In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **OSWALDO AMEZCUA AND JOSEPH C. FLORES,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S133660

Los Angeles County Superior Court Case No. KA050813, BA240363
The Honorable Robert J. Perry, Judge Presiding

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General
VIET H. NGUYEN
Deputy Attorney General
State Bar No. 233925
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-0207
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

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STATEMENT OF THE CASE

On January 22, 2003, the Los Angeles County District Attorney filed an amended 47-count information charging appellants Amezcua and Flores with crimes committed on multiple dates. In counts 1 to 3, it was charged that, on June 7, 2000, appellants Amezcua and Flores murdered Paul Ponce (Pen. Code,[1] § 187, subd. (a)) by means of lying in wait (§ 190.2, subd. (a)(15)) and involving the infliction of torture (§ 190.2, subd. (a)(18); count 1); that appellant Amezcua was a felon in possession of a firearm (§ 12021, subd. (a)(1); count 2); and that appellant Flores was a felon in possession of a firearm (§ 12021, subd. (a)(1); count 3). (7RT 1758-1759, 1763-1764.) On count 1, it was alleged that appellants Amezcua and Flores committed the offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist criminal conduct by gang members (§ 186.22, subd. (b)(1); 7CT 1779) and that appellant Flores personally and intentionally used and discharged a firearm, which proximately caused great bodily injury or death to the victim (§12022.53, subds. (b)-(d); 7CT 1760).

In counts 4 to 13, it was charged that, on June 19, 2000, appellants Amezcua and Flores murdered George Orlando Flores (§ 187, subd. (a)) by means of discharging a firearm from a motor vehicle (§ 190.2, subd. (a)(21); count 4); committed the attempted willful, deliberate, premeditated murders (§§ 664/187, subd. (a)) of Joe John Mayorquin (count 5), Robert Perez, Jr. (count 6), and Art Martinez (count 7); committed a shooting of an inhabited dwelling (§ 246; count 8); that appellant Amezcua was a felon in possession of a firearm (§ 12021, subd. (a)(1); count 9); and that appellant Flores was a felon in possession of a firearm (§ 12021, subd. (a)(1); count

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

10). It was further charged that appellants Amezcua and Flores murdered Luis George Reyes (§ 187, subd. (a)) during the commission of a robbery (§ 190.2, subd. (a)(17) while inflicting torture (§ 190.2, subd. (a)(18) because Reyes was a witness to a crime (§ 190.2, subd. (a)(10); count 11); committed a second degree robbery of Reyes (§ 211; count 12); and that appellant Amezcua was a felon in possession of a firearm (§ 12021, subd. (a)(1); count 13.) As to counts 11 and 12, it was further alleged that a principal was armed with a firearm (§12022 (a)(1) and personally and intentionally discharged that firearm (§12022.53 (b), (c), & (e)(1). (7CT 1759-1765.) As to counts 4 to 8, 11 and 12, it was alleged that appellants Amezcua and Flores committed the offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist criminal conduct by gang members (§ 186.22, subd. (b)(1); 7CT 1779) and that appellant Flores personally and intentionally used and discharged a firearm (§12022.53, subds. (b) & (c); 7CT 1767).

In counts 14 to 16, it was charged that, on June 24, 2000, appellants Amezcua and Flores attempted to murder a peace officer, Andrew Putney, in the performance of his duties (§§ 664/187, subd. (a); count 14); assaulted Putney (§ 245, subd. (d)(2); count 15); and that appellant Flores was a felon in possession of a firearm (§ 12021, subd. (a)(1); count 16). As to counts 14 and 15, it was alleged that appellants Amezcua and Flores committed the offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist criminal conduct by gang members (§ 186.22, subd. (b)(1); 7CT 1780) and that appellant Flores personally and intentionally used and discharged a firearm (§12022.53, subds. (b) & (c); 7CT 1766-1768).

In count 17, it was charged that, on June 25, 2000, appellants Amezcua and Flores committed arson to the property of Luis George Reyes

(§ 451, subd. (d); 7CT 1768.) It was alleged that appellants Amezcua and Flores committed the offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist criminal conduct by gang members. (§ 186.22, subd. (b)(1); 7CT 1779).

In counts 18 to 35, it was charged that, on July 4, 2000, appellant Amezcua committed the attempted willful, deliberate, premeditated murders of peace officers (§§ 664/187, subd. (a)) Cristina Coria (count 18), James Hirt (count 19), Steven Wong (count 20), Michael Von Achen (count 21) Michael Braaten (count 22), Robert Martinez (count 23), and Renaldi Thruston (count 24); the kidnapping of Cathy Yang (§ 207, subd. (a); count 25); an assault with a semiautomatic firearm upon Yang (§ 245, subd. (b); count 26); an assault with a firearm upon Jing Huali (§ 245, subd. (a)(2); count 27); the false imprisonment of the following hostages (§ 210.5) Bonnie Stone (count 28), Mike Lopez (count 29), Lorna Cass (count 30), Paul Hoffman (count 31), Jose Lopez Melchor (count 32), and Sabino Cardova (count 33); and that appellant Amezcua was a felon in possession of a firearm (§ 12021, subd. (a)(1); count 34.) In counts 18 to 33, it was alleged that appellant Amezcua committed the offenses for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist criminal conduct by gang members (§ 186.22, subd. (b)(1); 7CT 1779) and personally used a firearm. (§12022.53, subds. (b)). In counts 18 to 27, it was alleged that appellant Amezcua personally and intentionally discharged a firearm. (§12022.53, subds. (c).) In counts 18 to 20, 26, and 27, it was alleged that appellant Amezcua personally and intentionally discharged a firearm, which proximately caused great bodily injury or death. (§12022.53, subds. (d).) In counts 19 and 20, it was alleged that appellant Amezcua personally inflicted great bodily injury. (§ 12022.7, subd. (a).) In count 35, appellant

Flores was charged with being a felon in possession of a firearm (§ 12021, subd. (a)(1); count 35.) (7RT 1768-1778.)

In count 36, it was charged that, on April 30, 2001, appellant Flores possessed a weapon while confined in a penal institution. (§ 4502, subd. (a); 7RT 1778.)

In count 37, it was charged that, on January 29, 2001, appellant Amezcua possessed a weapon while confined in a penal institution. (§ 4502, subd. (a); 7RT 1779.)

In counts 38 to 40, it was charged that, on November 2, 2001, appellants Amezcua and Flores committed an attempted, willful, deliberate, premeditated murder of Steve Mattson (§§ 664/187, subd. (a); count 38); that appellant Amezcua possessed a weapon while confined in a penal institution (§ 4502, subd. (a); count 39); and that appellant Flores possessed a weapon while confined in a penal institution (§ 4502, subd. (a); count 40). On count 38, it was further alleged that that appellants Amezcua and Flores committed the offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist criminal conduct by gang members (§ 186.22, subd. (b)(1)), while using a shank (§ 12022, subd. (b)(1)) and personally inflicting great bodily injury upon Mattson (§ 12022,.7 subd. (a)). (7RT 1779-1781.)

In count 41, it was charged that, on February 21, 2001, appellant Amezcua possessed a weapon while confined in a penal institution. (§ 4502, subd. (a); 7RT 1781.)

In counts 42 to 44, it was charged that, on April 11, 2000, appellant Flores murdered John Lewis Diaz (§ 187, subd. (a)) by means of discharging a firearm from a motor vehicle (§ 190.2, subd. (a)(21); count 42); committed the attempted willful, deliberate, premeditated murder of Paul Anthony Gonzales (§§ 664/187, subd. (a); count 43); and was a felon

in possession of a firearm (§ 12021, subd. (a)(1); count 44). On count 41 and 42, it was alleged that a principal was armed with a firearm (§ 12022, subd. (a)(1)), that appellant Flores committed the offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist criminal conduct by gang members (§ 186.22, subd. (b)(1)), and that appellant Flores personally and intentionally used and discharged a firearm, which proximately caused great bodily injury or death (§12022.53, subds. (b)-(d)). (7CT 1782-1785.)

In counts 45 to 47, it was charged that, on May 25, 2000, appellant Flores murdered Arturo Madrigal (§ 187, subd. (a)) by means of discharging a firearm from a motor vehicle (§ 190.2, subd. (a)(21); count 45); committed the attempted willful, deliberate, premeditated murder of Fernando Gutierrez (§§ 664/187, subd. (a); count 46); and was a felon in possession of a firearm (§ 12021, subd. (a)(1); count 47). On counts 45 and 46, it was alleged that appellant Flores committed the offenses for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist criminal conduct by gang members (§ 186.22, subd. (b)(1)) and personally and intentionally used and discharged a firearm, which proximately caused great bodily injury or death (§12022.53, subds. (b)&(c)). On count 45, it was alleged that appellant Flores personally and intentionally used and discharged a firearm, which proximately caused great bodily injury or death. (§12022.53, subd. (d)). On count 46, it was alleged that a principal was armed with a firearm. (§ 12022, subd. (a)(1).) It was further alleged that appellants committed multiple murders. (§ 190.2, subd. (a)(3).) (7CT 1782-1788.)

It was alleged that both appellants Amezcua and Flores had suffered one prior serious or violent felony conviction within the meaning of the

"Three Strikes Law" (§§ 1170, subds. (a)-(d)), 667, subds. (b)-(i)), and served a prior prison term (§ 667.5). (7RT 1789-1791.)

On May 21, 2003, the prosecution notified the parties of its intention to seek the death penalty. (7CT 1817.) The case was called for jury trial. (11CT 2810.) At the close of the prosecution's case, the trial court dismissed the following charges and allegations: the witness killing (§ 190.2, subd. (a)(10) and torture (§ 190.2, subd. (a)(18) special allegations in count 11; the gang allegation in counts 18 to 33 (§ 186.22, subd. (b)(1)); the kidnapping charge in count 25 (§ 207, subd. (a)); the great bodily injury allegation in count 26 (§12022.53, subds. (d)); the false imprisonment of a hostage charge in count 32 (§ 210.5); and the custodial possession of a shank charge in count 41 (§ 4502, subd. (a)). The trial court also ordered the information to be amended to conform to proof to charge appellant Amezcua with the false imprisonment of Cathy Yang (count 48) and name appellant Amezcua as a defendant on counts 42, 43, 45, and 46. (12RT 2766-2770, 2779, 2782, 2785; 17CT 4465.)

On count 1, the jury found appellants Amezcua and Flores not guilty of the murder of Ponce. On count 2, appellant Amezcua was found not guilty being a felon in possession of a firearm. On count 3, appellant Flores was found not guilty being a felon in possession of a firearm. (17CT 4541-4542, 4575-4576.) In addition, the jury was unable to reach a verdict on count 38 (the attempted murder of Mattson), count 39 (possession of a weapon while confined in a penal institution by appellant Amezcua), and count 40 (possession of a weapon while confined in a penal institution by appellant Flores). A mistrial was declared on those counts. The jury was also unable to reach a verdict on count 43 (the attempted murder of Gonzales). A mistrial was declared on that count as well. (17CT 4686, 4703; 14RT 3082-3083.) Appellants Amezcua and Flores were found guilty as charged on the remaining counts. (17CT 4543-4547, 4577-4597.)

The jury returned verdicts of death against appellants Amezcua and Flores. (18RT 4747-4748.) On the capital counts in counts 4, 11, 42, and 45, appellant Amezcua was sentenced to death. Upon appellant Amezcua's death, he was ordered to serve two additional consecutive indeterminate sentences of 25 years to life and two additional determinate sentences of 10 years. Two additional determinate sentences of 10 years were imposed and stayed. Appellant Amezcua was ordered to pay a $200 restitution fine. (18CT 4845-4848; 14RT 3266.)

On the capital counts in counts 4, 11, 42, and 45, appellant Flores was sentenced to death. Upon appellant Flores's death, he was ordered to serve three additional consecutive indeterminate sentences of 25 years to life and two additional determinate sentences of 10 years. Two additional determinate sentences of 10 years were imposed and stayed. Appellant Flores was ordered to pay a $200 restitution fine. (18CT 4827-4860-48; 14RT 3274.)

On the remaining non-capital offenses, the trial court imposed the following consecutive sentences for appellant Amezcua: an indeterminate term of life in prison with a minimum parole wait of 30 years, plus 25 years to life (count 5); 7 indeterminate terms of life in prison with a minimum parole wait of 30 years, plus 20 years to life (counts 6, 7, 20, 21, 22, 23, 24); 2 indeterminate terms of life in prison with a minimum parole wait of 30 years, plus 25 years to life (counts 18, 19); an indeterminate term of life in prison with a minimum parole wait of 30 years (count 46); a determinate term of 44 years (count 8); 5 determinate terms of 3 years, four months (counts 28, 29, 30, 31, 33); a determinate term of 3 years (count 27), two determinate terms of 2 years (counts 26, 37); and a determinate term of 1 year, 4 months (count 17). The trial court imposed and stayed the terms in counts 9, 12, 13, and 48. (18CT 4792-4822, 4849-4855.)

On the remaining non-capital offenses, the trial court imposed the following consecutive sentences for appellant Flores: an indeterminate term of life in prison with a minimum parole wait of 45 years, plus 25 years to life (count 5); four indeterminate terms of life in prison with a minimum parole wait of 45 years, plus 20 years to life (counts 6, 7, 14, 46); an indeterminate term of 25 years to life, plus 30 years (count 8); and three indeterminate terms of 25 years to life (counts 17, 35, 36). The trial court imposed and stayed the terms in counts 12, 15, 16, 44, and 47. (18CT 4823-4841, 4863-4869.)

STATEMENT OF FACTS[2]

A. Prosecution's Guilt Phase Evidence

1. The April 11, 2000, Drive-By Shooting: the Murder of John Diaz (Count 42); the Attempted Murder of Paul Gonzales (Count 43)[3]; and Being a Felon in Possession of a Firearm by Appellant Flores (Count 44)

Appellants Amezcua and Flores were admitted members of Eastside Bolen Park ("ESBP"), a Hispanic gang located in Baldwin Park. (11RT 2542-2546, 2549-2550, 2557-2558.) ESBP had approximately 200 to 300 members. It was the prominent gang in the Baldwin Park area. (11RT 2545-2546.) It was estimated that ESBP committed two to three murders in Baldwin Park every year. (11RT 2549.) Appellant Amezcua's moniker was "Wizard." He had various gang-related tattoos on his body, including

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[2] Because appellants Amezcua and Flores were found not guilty of the charges relating to the murder of Ponce on June 7, 2000 (counts 1 to 3), respondent has not included the facts relevant to those counts. Likewise, because the trial court declared a mistrial on the charges relating to the attempted murder of Mattson on November 2, 2001 (counts 38 to 40), the facts relating to those counts are omitted as well.

[3] The jury was unable to reach a verdict on count 43. The trial court declared a mistrial on this count.

"ESBP," "ES," and "BP." He also had "Eastside Bolen Parque" tattooed on his forehead, above his eyebrows. (11RT 2256-2558, 2566.) Appellant Flores's moniker was "Jo-Jo." He also had various gang-related tattoos on his body, including "Laro Este Bolen Park" and "ESBP." (11RT 2549-2552, 2588.)

John Diaz and Paul Gonzales were half-brothers. They lived on Merced Street in the city of Baldwin Park. Diaz was a member of the Monrovia gang. (6RT 1637-1639.) Diaz had multiple tattoos on his body, including the word "Monrovia" tattooed above his right knee. (6RT 612, 1647.) Gonzales was not a gang member. (6RT 1613, 1636, 1646-1647.)

On April 11, 2000, at approximately 12:00 a.m., Diaz and Gonzales stopped at a Circle K Market, located nearby their home. Baldwin Park Police Detective Ernie Collaso was parked in the parking lot. Detective Callaso saw Diaz and Gonzales. (6RT 1624-1626.)

Afterwards, Diaz and Gonzales rode a bicycle down Merced Street towards their home. Gonzales was pedaling the bicycle. Diaz was riding on the handlebars. (6RT 1637-1639.) As they crossed an intersection, the brothers rode past a black sport utility vehicle ("SUV"). (6RT 1634-1638.)

The SUV drove past the brothers, made a U-turn, and drove back towards the brothers, on the opposite side of the street. The SUV again drove past the brothers, made a U-turn, and drove along-side them. (6RT 1638, 1640.) As the SUV approached, Gonzales was able to see that two individuals were inside. The passenger shouted out, "Where you from?" Then, gunfire erupted from the SUV. (6RT 1641-1642.) Gonzales jumped off the bicycle and took cover behind a parked car. The SUV drove off. Diaz told Gonzales, "Call an ambulance, fool." (6RT 1643.) Diaz then collapsed. Gonzales placed a sweatshirt underneath Diaz's head and called out for help. (6RT 1646.)

Upon hearing the gunshots, Detective Callaso drove in the direction that Diaz and Gonzales were travelling. However, he was unable to find any evidence of wrongdoing. Shortly thereafter, Detective Callaso received a report that a gunshot victim was located on Merced Street. When Detective Callaso arrived, Diaz was lying face down on the ground. Diaz was still breathing. Detective Callaso called for paramedics. (6RT 1626-1630.) Diaz was later pronounced dead at the hospital. (6RT 1628.)

Shortly after the shootings, Gonzales described the shooter as having a light-complexion, being between the ages of 18 and 22, and having a short haircut or a shaved head. (6RT 1662, 1667-1669.)

At approximately 2:35 a.m., Los Angeles County Sheriff's Department Homicide Investigator Kenneth Clark arrived at the scene of the shooting. (7RT 1688-1689.) Investigator Clark found five expended nine-millimeter bullet shell casings. There was also a bullet hole on the residence at 4536 Merced Street. (7RT 1691-1696.)

On April 13, 2000, Dr. Vladimir Levicky, a medical examiner with the Los Angeles County Coroner's Department, performed an autopsy of Diaz. (6RT 1597, 1599.) Diaz suffered three gunshot wounds: a fatal wound to his left side where the bullet perforated his liver and interior vena cava; a fatal wound to his back where the bullet perforated his liver, stomach, and aorta; and a "life-threatening" gunshot wound to the buttocks where the bullet perforated his bladder. (6RT 1600-1602.) The bullet that struck Diaz's back was recovered. (6RT 1602-1603.) Investigator Clark attended Diaz's autopsy, retrieved the bullet, and booked the bullet into evidence. (7RT 1700-1701.)

In a recorded conversation on February 21, 2002, appellants Amezcua and Flores admitted to committing the drive-by shooting to the trial prosecutor, Los Angeles County Deputy District Attorney Darren Levine ("DDA Levine"). Appellant Flores stated, "It's D[iaz], he's dead right?

There should be five [nine-millimeter] casings around here. I'll give you one more hint. He was on a bicycle. He was, uh, on the [handlebars] of the bicycle and it was his friend or his brother who was riding on the bike, right? [¶] And. Uh, he was never shot but the other one's dead." (Supp. III 1CT 49.) Appellant Flores further stated, ". . . the first one died. The other one watched it, witnessed the whole thing." (Supp. III 1CT 50.)

On March 28, 2002, appellants Amezcua and Flores again admitted to committing the drive-by shooting. Appellant Amezcua was driving a "four-runner type" truck. Appellant Flores saw a member of "Monrovia" whose gang name was "Vago." Vago was riding on the handlebars of a bicycle, coming away from a Circle K Market. Using a nine-millimeter pistol, appellant Flores shot Vago five times. After the shooting, the person pedaling the bicycle "laid there, didn't run." Appellant Flores found out the person may have been the victim's brother. Appellant Flores did not kill the victim's brother because he was not a gang member. (Supp. III 1CT 106-110; Supp. III 1CT 134-135.) The victim's brother saw appellant Flores's face and could identify him. (Supp. III 1CT 123; Supp. III 1CT 136.)

In June of 2002, Gonzales identified appellant Flores's photograph as a person who "resembled" the shooter. (6RT 1662, 1666-1667, 1673, 1680-1681.)

At trial, Gonzales identified appellant Flores as the gunman. He stated that he was "90 percent sure" in his identification. (6RT 1648-1650.) Gonzales did not recognize appellant Amezcua. (6RT 1650.)

At trial, Baldwin Park Police Detective David Reynoso testified as a gang expert. Detective Reynoso opined that the shooting was committed for the benefit of ESBP because Diaz was a member of a rival gang. Based on appellants's recorded statements to DDA Levine, Detective Reynoso opined that appellants Amezcua and Flores perceived Diaz to be a rival

gang member in territory claimed by ESBP. Detective Reynoso further opined that the shooting was committed to promote ESBP's reputation. (11RT 2259-2563.)

2. The May 25, 2000, Drive-By Shooting: the Murder of Arturo Madrigal (Count 45) and the Attempted Murder of Fernando Gutierrez (Count 46)

On May 25, 2000, Arturo Madrigal and Fernando Gutierrez were seated in Madrigal's Chevrolet Blazer. Madrigal was attempting to park the Blazer near the corner of Rexwood Avenue and Maine Avenue in Baldwin Park. This area was claimed by ESBP. (7RT 1702-1703.) Another car pulled alongside the driver's side of the Blazer. (8RT 2028-2029.) Someone inside the car asked, "Where you from?" Gutierrez replied, "We're from nowhere." (8RT 2030, 2034.)

The passenger of the other car pulled out a gun. Gutierrez saw a flash of light and quickly ducked for cover under the dashboard. (8RT 2030-2031, 2035.) When the shooting stopped, Gutierrez could hear blood dripping from Madrigal. Gutierrez then got out of the car and ran for help. (8RT 2032-2033.) Gutierrez told the police that the vehicle involved in the shooting contained four Hispanic men between the ages of 20 and 25 years of age. The passenger committed the shooting. Gutierrez saw the men briefly and was unable to identify anyone involved. (8RT 2035-2036.)

Baldwin Park Police Detective Mike Hemenway responded to the scene of the shooting. The Blazer was parked with its engine running. Madrigal was in the driver's seat. His head was slumped back against the seat and blood was coming out of his ears and head. (7RT 1703, 1705, 1708.)

Four expended nine-millimeter Luger bullet casings and two expended bullets were recovered nearby the Blazer. Another expended

bullet was recovered from inside the driver's side door. (7RT 1714-1717, 1728.)

In a recorded conversation on March 28, 2002, appellant Amezcua and Flores provided the details of the shooting to DDA Levine and Detective Thomas Kerfoot. Appellants Amezcua and Flores were "driving around [their] neighborhood looking for people to kill." Appellants saw "a gang member that was in the wrong area." The rival gang member was driving an "older model Blazer." When the gang member stopped at the corner to make a left turn, appellant Flores fired "two to three shots" that hit the driver in the face and neck. Appellant Flores used a nine-millimeter gun. Appellant Amezcua was driving the vehicle. The passenger ran and called 911. Appellants Amezcua and Flores committed the murder because the victim "was a gang member that was in the wrong area. Territorial." (Supp. III 1CT 110-116; see Supp. III 1CT 134-137.)

Detective Kerfoot later asked appellant Flores "What . . . motivates you to go out and just start capping [?]" (Supp. III 1CT 139.) Appellants Amezcua and Flores explained that it was their "job." Appellant Flores stated, "That's it. That's my neighborhood, man. And it's territorial. Uh, Wolf pees on every spot that's his . . . ." Appellant Flores then stated, "Well, see, . . . we were trying to better the gang and [instill] fear to the rest of the gangs." (Supp. III 1CT 139-140.) Appellant Flores stated that the victim was "told not to drive in our hood, you know?" Appellant Flores explained that the victim could have driven "the long way" and they had caught him taking "the short way." (Supp. III 1CT 140-141.) Appellant Flores further stated that he used a nine-millimeter Smith and Wesson firearm during the shooting. (Supp. III 1CT 116.)

Firearm analysis showed that the four expended bullet casings were fired from a single firearm, a nine-millimeter Smith and Wesson semiautomatic pistol. (12RT 2721.) Trajectory rods inserted into the three

bullet holes on the driver's side of the Blazer showed that the shots came from outside the Blazer. (7RT 1726.)

An autopsy was performed. The cause of Madrigal's death was a bullet that severed his brain stem. The bullet was recovered from Madrigal's skull. (7RT 1739-1740.) Madrigal also suffered a grazing, non-fatal bullet wound to his knee. (7RT 1743.)

Detective Reynoso opined that the shooting was committed for the benefit of the ESBP and contributed to their notoriety. Madrigal appeared to be a gang member because he had a shaved head.[4] The presence of a rival gang in ESBP territory would be perceived as disrespectful. (11RT 2563-2565.)

3. The June 19, 2000, Drive-By Shooting: the Murder of George Flores (count 4); the Attempted Murders of Joe John Mayorquin (count 5), Robert Perez, Jr. (count 6), and Art Martinez (count 7); Shooting of an Inhabited Dwelling (count 8); Being a Felon in Possession of a Firearm by Appellant Amezcua (counts 9); and Being a Felon in Possession of a Firearm by Appellant Flores (counts 10)

On June 18, 2000, Katrina Barber was sitting in front of her mother's house in a stolen Toyota Corolla. Appellants Amecua and Flores, who were acquainted with Barber, approached Barber and asked her for a ride. They purchased gasoline and then drove to Alhambra. (8RT 2043.) When they arrived in Alhambra, the Corolla had mechanical difficulties, so they were unable to continue driving it. Barber suggested that she could steal another car. Barber then stole a white Toyota Cressida. (8RT 2044.)

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[4] Gutierrez testified that he and Madrigal were not gang members. (8RT 2034.) However, Madrigal had several tattoos, including "My Jefito" on his left shoulder, "vero" on the back of his left hand, and the letter "M" on his upper right arm. (7RT 1746-1747.)

Afterwards, Barber drove appellants Amezcua and Flores to appellant Flores's mother's home in Hemet. They arrived at the house at approximately 3 a.m. and stayed for the night. (8RT 2045-2046.) When they left the next morning, appellants Amezcua and Flores were carrying two black duffle bags that were approximately three feet long. One of the bags contained appellant Flores's clothes. The other bag contained approximately 10 firearms. (8RT 2046-2048.)

Barber drove appellants Amezcua and Flores to Luis Reyes's home in Le Puente. Reyes was a mutual friend and had gone to school with Barber. (8RT 2049.) Reyes was a member of ESBP. (8RT 2072.) Reyes, Barber, and appellants Amezcua and Flores watched television and used crystal methamphetamine at Reyes's home. (8RT 2048-2049.) The group then left in separate vehicles. Appellant Flores was the passenger inside the Cressida, and Barber was the driver. Appellant Amezcua was the passenger inside of Reyes's Monte Carlo. (8RT 2050.)

The two vehicles went to a hotel parking lot. The cars were parked two spaces away from each other. Barber then saw Reyes talking to individuals that were inside another car. She thought that Reyes had given the individuals something. (8RT 2052.) Barber also thought the other car resembled an "undercover cop car." Appellant Flores thought the car resembled an F.B.I. vehicle. (8RT 2052-2053.) When the group left the hotel parking lot, Barber drove on the freeway to go to her mother's home in La Puente. Along the way, Reyes and appellant Amezcua were unable to follow behind Barber. (8RT 2052-2053.)

Barber and appellant Flores drove past four young men sitting on a wall in front of a home located on Ledford Street. The four men included: Robert Perez, George Flores, Art Martinez, and Joe Mayorquin. (8RT 1895-1896.) Perez lived at the house. He was not a gang member. However, two of the other men were inactive members of the 22nd Street

gang. (8RT 1916-1917.) The men had visited a firing range that morning. There was a bag nearby that contained the guns used at the range, but the men were unarmed. (8RT 1897.)

This area of Ledford Street was located in territory claimed by ESBP. Appellant Flores asked Barber whether she knew the men. Barber answered in the negative. Appellant Flores replied, "Well, flip a bitch to turn back around." (8RT 2052-2056.) Barber made a U-turn and drove back towards the men. Reyes and appellant Amezcua drove up in the Monte Carlo. (8RT 2053-2055.)

Perez saw the Monte Carlo pull up in front of the house. (8RT 1897-1898.) The car drove past the men, turned around, and returned. Perez told Flores, Martinez, and Mayorquin to go to the back of the house. Flores and Mayorquin did not want to leave because they wanted to see what was about to transpire. (8RT 1898-1899.)

The Cressida and Monte Carlo approached the house. (8RT 1898-1990.) Perez identified appellant Amezcua as the passenger in the Monte Carlo. (8RT 1902-1904.) Perez identified appellant Flores as the passenger in the Cressida. (8RT 1904-1905.) Perez had "no doubt" about his identifications. (8RT 1904-1905.)

When Barber and appellant Flores reached the wall, appellant Flores stated, "Well, well, what do we have here?" (8RT 1908-1909.) Appellant Flores stated that no one was disrespecting their neighborhood or them. Appellant Amezcua exited the Monte Carlo and began firing a pistol at the men. (8RT 1903-1904.) Perez jumped for cover behind a nearby parked car. (8RT 1904.) The other men fled. Appellant Flores began firing an AK-47 at the fleeing men. (8RT 1907, 2059.) Perez had no doubt that appellants Amezcua and Flores were targeting all four men. (8RT 1910-1911.)

After an initial burst of gunfire by appellant Flores, he handed a .22 caliber semiautomatic pistol to Barber. Barber fired three to four shots in the direction of the men, but was not trying to hit them. (8RT 2059-2061.) Barber saw one of the men, who was trying to enter the house, being struck by gunfire. After he was shot, the man fell on the porch. (8RT 2062.)

Flores was on the ground. He was not moving or breathing. (8RT 1912-1913.) Flores had sustained two fatal gunshot wounds. The first bullet entered the middle of Flores's back and passed through his spinal column, left lung, carotid artery, and jugular vein before exiting out of his neck. The second bullet entered the left side of Flores's back and passed though his scapula and shoulder joint before exiting his left shoulder. (8RT 1864-1866.) Mayorquin suffered two gunshot wounds: one to his right arm and the other to his left thigh. (8RT 1885.) A bullet was recovered from Mayorquin's body. (8RT 1913-1914.)

There were bullet holes in the front of the house. (8RT 1881, 1883, 1886.) Fourteen cartridge casings were recovered from the area near the driveway. The casings were subsequently matched to a nine-millimeter Ruger recovered at the scene of Santa Monica Pier shooting that was linked to appellant Amezcua. (12RT 2722.) In addition, sixteen cartridge casings of bullets typically used by AK-47 assault rifles were recovered. (8RT 1961-1962, 1964.) There was no indication that a gun was fired from the house towards the street. (8RT 1982.)

Perez identified appellant Flores in court. (9RT 1924.) He had previously identified Amezcua from a lineup. (8RT 1932.)

Sergeant Reynoso opined that the Ledford Drive shootings were committed for the benefit of the ESBP because it was disrespectful for a member of another gang to be "outside carefree" in their territory. (11RT 2569-2571.)

4. The June 19, 2000, Shooting: the Murder of George Luis Reyes (count 11); the Second Degree Robbery of Reyes (count 12); and Possession of a Firearm (count 13)

Following the Ledford Street shooting, Barber told appellant Flores that she wanted to go home. Appellant Flores stated that Barber could not go home yet; Reyes would drop her off at her home later. (8RT 2063-2064.) When they reached Ontario, the Cressida began having mechanical problems. Barber pulled over off the Vineyard exit. Reyes and appellant Amezcua followed in the Monte Carlo. (8RT 2064.) The cars were parked in an unpaved area on the side of Guasti Road. (8RT 2063-2064; 9RT 2167.)

As Barber was gathering her belongings from the Cressida, she looked over and saw appellant Amezcua shooting Reyes. (8RT 2068.) Appellant Flores asked Appellant Amezcua, "What are you doing that here for? Appellants Amezcua and Flores pulled Reyes out of the driver's seat. Reyes was bleeding badly. Barber could hear Reyes choking and gagging. (8RT 2069.)

Appellants Amezcua, appellant Flores, and Barber entered the Monte Carlo. Appellant Flores told Barber to drive away. However, Reyes's right leg was caught in the door of the Monte Carlo. Appellant Flores told Barber to "just run him over." (8RT 2072.) They then stopped at appellant Amezcua's cousin's home. (8RT 2073.) Afterwards, they went to appellant Flores's mother's home. Appellants Amezcua and Flores had the black duffle bag containing the guns. Appellant Flores took the black duffle bag into his mother's home. Barber stated that she wanted to leave. Appellant Flores told her that she could not leave. They stayed at appellant Flores's mother's home for approximately three to four days. (8RT 2075-2076.)

Andrew Quirez spotted Reyes's body on Guasti Road. Reyes was lying face down on the road. There were bloodstains on his shirt. (9RT 2160-2161.) Reyes was still alive. Quirez called for help. (9RT 2159-2163.) Emergency personnel arrived approximately ten minutes later. (9RT 2164.)

Ontario Police Sergeant Dean Brown responded to the scene. Reyes's body was lying on the side of the road. (9RT 2166, 2169.) Fresh tire tracks were near his body. (9RT 2176.) An expended bullet and casing were by Reyes. (9RT 2173-2174, 2181.)

The Cressida was on the side of the road. (9RT 2169, 2171.) Five shell casings were found inside. (9RT 2182-2184.) A latent fingerprint lifted from the rearview mirror matched appellant Amezcua's left thumb. (8RT 1944-1949.) It was determined that the Cressida had been stolen in Alhambra. (9RT 2182-2184.)

Reyes died as a result of multiple gunshot wounds. He suffered 19 gunshot wounds. (11RT 2637-2640, 2642) Some of Reyes's wounds were defensive. (11RT 2642-2661.) Bullets passed through Reyes's aorta, heart, and left lung. (11RT 2669-2670.) Soot and stippling indicated that Reyes was shot from a distance of two feet or less. (11RT 2673.) Tests conducted on the bullets recovered from Reyes's body were consistent with the nine-millimeter Ruger recovered from the Santa Monica Pier linked to appellant Amezcua. (12RT 2756-2759.)

Reyes was in possession of a car payment receipt for the Monte Carlo. (9RT 2179.) Ontario police issued a stop order for the Monte Carlo, indicating that it was involved in a murder and that its occupants were armed and dangerous. (9RT 2188.)

5. The June 24 and 25, 2000, Crimes: the Attempted Murder of Peace Officer Andrew Putney (count 14); the Assault of Officer Putney (count 15); Being a Felon in Possession of a Firearm by Appellant Flores (count 16); and the Arson of Reyes's Monte Carlo (count 17)

On June 24, 2000, appellants Amezcua and Flores met with appellant Flores's girlfriend, Carina Renteria. Renteria was driving her Honda Civic. Appellant Amezcua was driving the Monte Carlo. Appellant Flores exited the Monte Carlo and entered the Civic, carrying a large, black duffle bag. (9RT 2193-2195.)

Appellant Amezcua, appellant Flores, and Renteria went to a 7-Eleven store in Bloomington to purchase beverages. San Bernardino Sherriff's Deputy Andrew Putney was inside a parked, marked police vehicle in the 7-Eleven's parking lot. (9RT 2194-2196.) Deputy Putney was driving a white Chevrolet Tahoe. The Tahoe bore San Bernardino County Sherriff decals and had roof lights. (9RT 2224-2225.)

When appellant Amezcua drove the Monte Carlo out of the parking lot, Deputy Putney followed behind him in the Tahoe. Renteria and appellant Flores followed appellant Amezcua and Deputy Putney in the Civic. (9RT 2193-2195.) Appellant Amezcua drove onto Interstate 10, heading westbound. The Tahoe and Civic followed. (9RT 2198, 2203.)

Appellant Amezcua accelerated and began weaving through traffic. (9RT 2203, 2229-2230.) Deputy Putney continued to follow directly behind appellant Amezcua. Deputy Putney ran a check of the Monte Carlo's license plate and discovered that it was stolen and that the occupants may be armed and dangerous. (9RT 2226-2229.) Suddenly, appellant Amezcua swerved in front of a commercial truck and exited the freeway. Deputy Putney was unable to exit and lost track of the Monte Carlo. (9RT 2204-2206, 2230-2231.)

Appellant Flores told Renteria to catch up to Deputy Putney's Tahoe. When Renteria approached the Tahoe, appellant Flores rolled down the window. Appellant Flores then leaned his body outside of the Civic and began firing a gun at the Tahoe. (9RT 2206-2208.) When Renteria drove the Civic past the Tahoe, Deputy Putney saw a Hispanic male hanging outside the window of the Civic, firing a gun. Deputy Putney estimated that 15 shots were fired. The Tahoe was hit by eight bullets. (9RT 2207-2208, 2232-2233, 2242, 2265.) A tire was shot out. (9RT 2231-2232.) Deputy Putney attempted to follow the Civic, but eventually had to pull over. (9RT 2233-2234.)

Renteria did not know that appellant Flores was going to shoot at the Tahoe. (9RT 2208-2209.) Appellant Flores told her to exit the freeway. (9RT 2209.) They went to appellant Flores's mother's house in Hemet. (9RT 2210.) Appellant Amezcua met appellant Flores and Renteria at the home. Appellant Amezcua stated that the Monte Carlo was "too hot." Appellants Amezcua and Flores planned to burn the car. (9RT 2211-2213.)

Renteria and appellant Flores's mother went to purchase gasoline. They filled a red plastic gasoline container that was in the trunk of the Civic. When they returned, appellant Flores put the container in Monte Carlo. (9RT 2213-2215.)

Appellants Amezcua and Flores drove the Monte Carlo to an isolated area of Hemet. Renteria and appellant Flores's mother followed in the Civic. Renteria parked the Civic a short distance away and waited for appellants to return. When appellants returned to the Civic, Renteria drove back to appellant Flores's mother's home. The next morning, Renteria left and returned to her sister's home. (9RT 2214-2218.)

On June 25, 2000, at approximately 3 a.m., firefighters put out a vehicle fire involving a Monte Carlo in San Jacinto, a city adjacent to Hemet. There was no one in the vicinity. The police were called. (10RT

2302-2306.) San Jacinto Police ran a check of the Monte Carlo's license plate and contacted the Ontario police. (10RT 2307-2310.) It was determined that the Monte Carlo was intentionally set on fire. (10RT 2312-2319.) Several bullet shells, bullets, and bullet casings were found inside the Monte Carlo. (10RT 2320.)

During a recorded conversation on February 21, 2002, DDA Levine told appellants, "You guys are – you're a good shot." DDA Levine then mentioned the shooting of the Tahoe. Appellant Flores stated, "Yeah, it's hard to shoot when you're in a vehicle and both vehicles are moving and one's turning." DDA Levine stated, "You hit that car a lot of times." Appellant Flores replied, "Yeah. . . . I should've had the other gun." (Supp. III 1CT 69-70.)

In a recorded conversation on March 28, 2002, appellant Flores stated that they had "done quite a bit of travelling, okay?" Appellant Amezcua interjected, "With our duffle bags." Appellant Flores stated, "Black . . . duffle bags." (Supp. III 1CT 133.) Later, Detective Kerfoot asked appellants, "What'd you guys do with your duffle bags?" Appellant Flores replied that he could not tell Detective Kerfoot because, if they ever get out of custody, they needed to get the bags to complete their "mission." When asked about their "mission," appellants Flores replied, "To kill as many people as [we] could." Appellant Amezcua stated, "Cops included." Appellant Flores also stated that appellant Amezcua had a "Chinese AK." Appellant Amezcua then stated that he was not afraid to shoot a police officer and mentioned the incident by "the 7-Eleven store." (Supp. III 1CT 151-152.)

Renteria later detailed the events to her co-worker, Andre Acevedo. She was contacted by the sheriff's department and interviewed. During one of the interviews, Renteria provided deputies with appellant Flores's pager number. (9RT 2218-2219.) Renteria was charged and pleaded guilty to

being an accessory to arson. She testified at trial and was not given any consideration for her testimony. (9RT 2221-2222.)

Sergeant Reynoso testified that Reyes was considered to be a "rat" because he had previously cooperated with the police. Reynoso opined that Reyes was killed because of this cooperation was disrespectful to ESBP and Reyes's killing promoted the reputation of ESBP. (11RT 2572, 2607.)

6. The July 4, 2000, Crimes: the Attempted Murders of Peace Officers Cristina Coria (count 18), James Hirt (count 19), Steven Wong (count 20), Michael Von Achen (count 21) Michael Braaten (count 22), Robert Martinez (count 23), and Renaldi Thruston (count 24); the Assault with a Semiautomatic Firearm upon Cathy Yang (count 26); the Assault with a Firearm upon Jing Huali (count 27); the False Imprisonment of Bonnie Stone (count 28), Mike Lopez (count 29), Lorna Cass (count 30), Paul Hoffman (count 31), Sabino Cardova (count 33), and Yang (count 48); Being a Felon in Possession of a Firearm by Appellant Amezcua (count 34); Being a Felon in Possession of a Firearm by Appellant Flores (count 35);

Shortly before midnight, police called appellant Flores's pager number, which they had obtained from Renteria. (9RT 2219.) A dispatch call was broadcast stating that a triple homicide suspect had made a telephone call using a public telephone on the Santa Monica Pier. The suspect was described as a Hispanic male with a thin build and a tattoo on the side of his neck. (10RT 2366-2369, 2386.) Santa Monica Police Officer Robert Martinez was on the pier and went to where the public telephones were located. (10RT 2366-2367.)

Minutes later, three additional officers arrived. The four officers began walking to the end of the pier when Officer Martinez spotted appellants by the Playland Arcade. Appellant Flores matched the description of the suspect. Appellant Flores continued walking towards the

officers. Appellant Amezcua entered the Playland Arcade. (10RT 2371-2372.)

Officer Leyva approached and spoke with appellant Flores. Officer Martinez walked behind appellant Flores and saw a tattoo on his neck. Officer Martinez then began a pat down search of appellant Flores. Appellant Flores turned away. Officer Martinez then wrapped his arms around appellant Flores. The two men fell to the deck of the pier. Appellant Flores resisted. Officer Michael Von Achen had his dog bite appellant Flores's leg. Appellant Flores was then cuffed and searched. A nine-millimeter, semiautomatic AP9 handgun was recovered from behind appellant Flores's back. (10RT 2372-2376, 2479-2483; 12RT 2711-2714.) As appellant Flores was being transported to the hospital, Santa Monica Police Officer Michael Cabrera saw appellant Flores reaching into his pocket. Officer Cabrera stopped appellant Flores, patted appellant Flores's pocket, and recovered a .25 caliber semiautomatic pistol. (11RT 2532-2536.)

On the pier, Officer Martinez notified other officers that appellant Flores was with another man, who had entered the arcade. In preparation for closing, the arcade's workers had closed the front, northeast doors. The rear, southern doors were the only other exit to the arcade. Officers Martinez, Von Achen, and Michael Braaten went to the rear doors. (10RT 2334-2335, 2377-2378.) Officers Martinez, Von Achen, and Braaten positioned themselves to view the exit. (10RT 2338.) Officers Cristina Coria, Steven Wong, and Renaldi Thruston were also positioned nearby. (10RT 2500, 2502-2503, 2524-2548, 2472, 2475.) Officer James Hirt was positioned nearby, armed with a shotgun. (10RT 2412.)

As patrons were leaving the arcade through the rear doors, Officer Martinez saw appellant Amezcua. Officer Martinez yelled out to watch the "bald guy." Appellant Amezcua suddenly grabbed Cathy Yang around the

neck and held her in front of him. Appellant Amezcua had a gun in his hand, pointed at Officer Martinez. (10RT 2377-2380, 2341.)

Appellant Amezcua began firing multiple rounds at the officers. (10RT 2338-2345, 2499-2501.) Officer Coria was hit by the gunfire and fell to the ground. Officer Martinez grabbed her and carried her out of the line of fire. (10RT 2381-2384.) The bullet broke Coria's arm. (10RT 2472-2475.) Officer Hirt was struck by a bullet in the left knee. (10RT 2411-2423, 2426.)

Jing Huali was inside the arcade when she heard gunfire. Huali saw appellant Amezcua holding Yang, with a gun in his hand. Huali took cover behind a fan. She was shot in her left leg. (11RT 2518-2521.)

Lorna Cass and Paul Hoffman were inside the arcade with Hoffman's two children. As they were leaving, gunfire erupted. Cass ducked for cover. She saw appellant Amezcua with a gun, holding Yang in front of him. The man ordered Cass and Hoffman to move the arcade machines together to form a barricade. He then ordered the occupants of the arcade to sit in the barricaded area. Cass and Hoffman were not allowed to leave. (10RT 2427-2431.)

Bonnie Stone and Michael Lopez were in the arcade when the shooting occurred. Appellant Amezcua was holding Yang hostage. Appellant Amezcua ordered the men to form a barricade. He told the occupants of the arcade to sit in the barricaded area. Appellant Amezcua handed Lopez two magazines and told Lopez to load them with bullets. Stone wanted to leave, but felt that she could not do so. However, appellant Amezcua did not state that Stone and Lopez could not leave. (10RT 2432-2436, 2436-2442.)

Sabino Cardova was a ticket seller at the arcade. He heard gunfire and saw appellant Amezcua holding Yang hostage. Appellant Amezcua

pointed a gun at Cardova and order Cardova to sit next to him. Cardova complied. (10RT 2455-2459.)

Appellant Amezcua held the hostages for approximately five hours. (10RT 2429-2440, 2446.) During that time, appellant Amezcua allowed Cordova to go to the bathroom. On the way back from the bathroom, Cardova gestured to the police and escaped out a window. (10RT 2455-2456.) Before appellant Amezcua released the rest of the hostages, he stated, "I don't feel right holding you guys here. You can leave if you want." (10RT 2442.) Appellant Amezcua then began releasing the hostages. After all the hostages were released, appellant Amezcua gave himself up. (10RT 2443.)

Twelve expended cartridge casings and three bullet fragments were recovered from the arcade. These casings and bullet fragments matched a nine-millimeter Ruger semiautomatic pistol found nearby the barricade. (12RT 2697-2699, 2707-2709.) Moreover, the bullets recovered from the scene of the Ledford Street drive-by shooting (12RT 2721-2722), the bullets recovered from Reyes's body (12RT 2755-2759), and the bullets recovered from the shooting of the Tahoe also matched the Ruger. (12RT 2751-2755.)

During a recorded conversation on March 28, 2002, appellant Amezcua stated that the police officers at the Santa Monica pier were "very lucky" and that he "had a fully automatic AK47" with a "20-round clip drum" and four, "30-round clips." Some of the bullets were "hollow point." (Supp. III 1CT 123-124.)

7. Appellant Amezcua's Custodial Possession of Weapon on January 29, 2001 (count 37)

On January 29, 2001, Los Angeles County Sherriff's Deputy Armando Meneses searched appellant Amezcua's cell and found a shank under the rim of the toilet. Appellant Amezcua was the only occupant of

the cell. The cell had been searched before appellant Amezcua was placed in it. (9RT 2149-2150.)

8. Appellant Flores's Custodial Possession of Weapon on April 30, 2001 (count 36)

On April 30, 2001, Los Angeles County Sherriff's Deputy Carlos Tello searched appellant Flores's cell and found two oblong pieces of metal that were capable of being used as a shank. Appellant Flores was the only occupant in the cell. (12RT 2683-2687.)

B. Defense's Guilt Phase Evidence

The parties stipulated that Acevedo would have testified that Renteria had told Acevedo that she was driving a car with three passengers. Renteria was following another car that was "loaded with firearms" when a police car drove in between them. There was an unknown person in her front passenger seat and two men in the back seat. The men in the back seat told her to speed up and pull alongside the police officer. When she did so, they rolled down the window and began shooting. (13RT 2852-2853.)

C. Prosecution's Penalty Phase Evidence

On March 29, 1995, appellant Flores robbed David Wachtel, Buddy Jacob, and a woman named Karen at gunpoint. Appellant Flores took Wachtel's pager and wallet, Jacob's necklace, and $20 from Karen. Wachtel testified at a preliminary hearing and identified appellant Flores in court. (14RT 3108-3111.)

On June 13, 2000, Richard Robles asked Timothy Obregon to give his "homeboys" a ride home. Robes was a member of ESBP. Obregon was not a gang member. At first, Obregon refused. Robles pleaded with him, and Obregon eventually relented. Robles brought appellants Amezcua and Flores to Obregon's home and gave Obregon $40. (14RT 3148-3151.)

Obregon's girlfriend, Alicia Garcia, decided to go along for the ride. Appellant Flores placed a large, black duffle bag in the trunk of Obregon's mother's car. The group then entered the car. Obregon was in the driver's seat. Appellant Flores was seated in the back seat behind Obregon. Garcia was seated in the front passenger seat. Appellant Flores was seated in the back seat behind Garcia. (14RT 3152-3157.)

The drive was uncomfortably quiet. (14RT 3158.) Garcia asked how much longer it would take to get to their destination. No one answered. Suddenly, Obregon heard a "popping" sound and saw bullet holes in his windshield. Garcia was squirming and stated, "Stop shooting me." Obregon looked back and saw appellant Amezcua with a gun. Appellant Amezcua put a new magazine in the gun and pointed the gun at Garcia's head. Appellant Flores grabbed the gun and told appellant Amezcua, "No, don't do that." (14RT 3158-3160.)

Garcia turned to Obregon and began crying. She stated, "He shot me, and I'm dying." Blood was gushing from a hole in her chin. Obregon felt something in the back of his neck. Appellant Amezcua stated, "Better drive straight, motherfucker, or I will shoot you with this nine." (14RT 3161.)

Appellant Flores directed Obregon to a cornfield located in a rural area. Obregon feared that he and Garcia were going to be murdered. Appellant Flores repeatedly asked, "Do you know me?" Obregon told appellant Flores that he would state that he had been carjacked and would not "say anything." (14RT 3166-3167.) Appellant Flores stated that he would release Obregon and Garcia where they could get help. Appellant Flores told Obregon to pull over in a residential neighborhood near a Circle K market. Appellant Flores asked Obregon for some money. Obregon gave appellant Flores $20. (14RT 3163-3165.)

Garcia was covered in blood. Obregon lifted her out of the car. She had multiple gunshot wounds to the chest. Obregon laid Garcia on the

sidewalk. Appellant Flores again asked, "Do you know me?" Obregon replied that he would state that they had been carjacked. (14RT 3165-3166, 3170.) Appellants Amezcua and Flores drove off. Obregon ran to the Circle K market and called 911. When questioned by the police, Obregon stated that they had been carjacked. (14RT 3168-3170.) Obregon's car was later found engulfed in flames. (14RT 3182, 3184.) Garcia survived the shooting. However, she was never the same. Her personality had changed. She lived in a constant state of fear. (14RT 3173.)

On May 10, 2001, Anaheim Police Officer Dustin Cikel performed a search of appellant Flores's cell at Los Angeles County Jail. As he was confiscating contraband, appellant Flores stated, "You will see Cickel. Maybe not today, but you will see when you are not expecting it." Officer Cickel understood this to be a threat. (14RT 3119-3120.)

On November 19, 2004, Los Angeles County Sherriff's Deputy Juan Rivera searched appellant Amezcua's cell and found a shank. (14RT 3113-3117.)

George Flores's mother, Maria De Los Calvo, testified that Flores was the youngest of her four children. Flores was a very good and loving son. Flores's funeral was the saddest day of her life. She threw herself on his coffin because she wanted go with him. Flores's son often cries and asks why his father was taken from him. (14RT 3123-3127.)

Michelle Gerena was a friend of Flores. Flores was going to be Gerena's daughter's godfather. Flores loved his son. More than 200 people attended Flores's funeral. (14RT 3134-3137.)

John Diaz's mother, Vivian Gonzales, testified that Diaz was a caring and loving son. Gonzales missed Diaz very much. When Diaz was killed, Gonzales heard the gunshots. She knew that Diaz had been shot. Gonzales could not approach Diaz because she could not bear to see him die.

Gonzales is unable to go to Diaz's grave. She is always angry. Diaz's daughter often asks for her father. (14RT 3138-3143.)

D. Defense's Penalty Phase Evidence

Appellants Amezcua and Flores presented no evidence.

JURY SELECTION ISSUES

I. THE TRIAL COURT PROPERLY CONDUCTED VOIR DIRE

During voir dire, potential jurors were asked to complete a juror questionnaire. Appellants Amezcua and Flores requested that the following question (hereinafter "requested question") be included in the juror questionnaire:

> 1. If you find the defendant guilty of five different murders with special circumstances would you always vote for the death penalty? Yes ___ No ___ Please Explain.

(11CT 2724.)[5] The prosecutor opposed the inclusion of the requested question and stated that rewording it "would be appropriate." (4RT 1166.) The trial court agreed, stating "I think [the requested question is] covered by the questionnaire but perhaps not as specifically. Of course, I am going to be giving some time for counsel to address these issues with the jury in open court." (4RT 1166.) The trial court expressed concern that the requested question would cause prospective jurors to prejudge the evidence. (4RT 1167.) The trial court detailed a prior trial where a prospective juror stated that, if the defendant had been convicted of multiple murders, he would vote for death. The trial court stated that it did not want "to have jurors to commit to certain positions based on what you expect the evidence to show." (4RT 1167-1168.) The trial court then stated,

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[5] Counsel for appellants requested that two questions be included in the jury questionnaire. The prosecution only objected to this question. (11CT 2724-2725; 4RT 1166.)

> I don't think murder with special circumstance means much to anybody. Special circumstances means a lot to lay jurors. I will try to fashion a question about the number of murders, perhaps. I will give some thought to it.

(4RT 1168.) At the next hearing, the trial court proposed the requested question be modified (hereinafter "modified question"), as follows: "If you find a defendant guilty of five murders, would you always vote for death and refuse to consider mitigating circumstances (his background, etc.)?" (4RT 1174.) The prosecutor and appellant Flores agreed to the form of the modified question. Appellant Amezcua did not object to the modified question. The trial court included the modified question in the juror questionnaire. (4RT 1175; see 11CT 2837.)

Appellant Amezcua now contends that the trial court erred when it denied his request to include the requested question in the juror questionnaire. (Amezcua AOB 64-73.) Specifically, appellant Amezcua states that the requested question sought to identify prospective jurors "who would automatically vote for death in the event appellant [Amezcua] was convicted of five murders." (Amezcua AOB 66.) Appellant Amezcua then argues that, when "the trial court modified the defense-proffered question by tacking on, in the conjunctive, consideration of mitigating circumstances, the court blurred the call of the original question in a way that suggested that only mitigating circumstances would suffice to prevent a death verdict." (Amezcua AOB 66-67.)

Respondent disagrees and submits that appellant Amezcua has forfeited this claim because he failed to object to the trial court's modification of the requested question. In any event, appellant Amezcua cannot show that the trial court erred when it did not include the requested question in the juror questionnaire. Although the requested question was not included in the juror questionnaire, the trial court expressly provided appellant Amezuca the opportunity to ascertain potential jurors' views

about a defendant convicted of multiple murders. Thus, the trial court's conduct of voir dire was proper.[6]

A. Appellant Amezcua Has Forfeited His Claim for Failing to Object to the Trial Court's Modification of the Requested Question

Appellant Amezcua has forfeited any claim that the trial court erred when it failed to include the requested question in the juror questionnaire. Appellant Amezcua notes that appellant Flores agreed to the inclusion of the modified question, but the record does not reveal that appellant Amezcua made a specific concurrence. (Amezcua AOB 66; 4RT 1175.) However, a lack of concurrence by appellant Amezcua does not preserve his claim on appeal. Rather, appellant Amezcua's failure to object to the inclusion of the modified question forfeits such a claim. (See, e.g., *People v. Clark* (1992) 3 Cal.4th 41, 125-126 ["In the absence of a timely and specific *objection* on the ground sought to be urged on appeal, the trial court's rulings on admissibility of evidence will not be reviewed"], emphasis added.)

The record indicates appellant Amezcua's trial counsel accepted, without apparent objection, the final form of the modified question that was included in the juror questionnaire. (4RT 1174-1175.) Thus, appellant Amezcua has forfeited this claim. (See, e.g., *People v. Thompson* (2010) 49 Cal.4th 79, 97 [finding that the defendant forfeited his claims that the form of the questions included in the juror questionnaire were deficient because defense counsel initially drafted the question, agreed to the various revisions, and accepted, without objection the final form of the questionnaire]; *People v. Rogers* (2009) 46 Cal.4th 1136, 1149 [the defendant's failure to object to, or suggest modifications to, the

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[6] To the extent that appellant Flores joins in this claim, the claim should be denied for the same reasons.

questionnaire forfeited any challenge to any aspect of the questionnaire]; *People v. Robinson* (2005) 37 Cal.4th 592, 617 [same].) In any case, as discussed below, appellant Amezcua's claim lacks merit and does not warrant reversal.

B. Because Appellant Amezcua Had the Opportunity to Ascertain Potential Jurors' Views on a Defendant Convicted of Multiple Murders, the Trial Court's Modification of the Requested Question Did Not Render Voir Dire Improper

"Section 223 of the Code of Civil Procedure provides, among other things, that, '[i]n a criminal case,' the trial court has 'discretion in the manner in which' it conducts the voir dire of prospective jurors." (*People v. Waidla* (2000) 22 Cal.4th 690, 713; Code Civ. Proc., § 223.) As this Court has recognized, a trial court managing death-qualification voir dire faces the precarious challenge of avoiding the "two extremes" of, on the one hand, restricting voir dire to the point that it is "so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried," and, on the other hand, allowing an inquiry that is "so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." (*People v. Cash* (2002) 28 Cal.4th 703, 721-722 ("*Cash*"); accord, *People v. Valdez* (2012) 55 Cal.4th 82,164-165.)

Because the trial court is in the best position to assess the amount of voir dire that is necessary to ferret out latent prejudice, it has great latitude in deciding what questions to ask prospective jurors. (*People v. Rogers*, *supra*, 46 Cal.4th 1136, 1149-1150; *People v. Butler* (2009) 46 Cal.4th 847, 859.) Moreover, "[i]n the process of determining prospective jurors' capital case qualifications, the trial court has considerable discretion to place reasonable limits on voir dire and to determine the number and nature

of voir dire questions." (*People v. Tate* (2010) 49 Cal.4th 635, 657, citations omitted; accord *People v. Stitely* (2005) 35 Cal.4th 514, 540.)

However, "the trial court cannot bar questioning on any fact present in the case 'that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances.'" (*Cash, supra*, 28 Cal.4th 703, 721.) But, a court's refusal to allow inquiry into such a fact would be improper "only if it is '*categorical*' and denies *all* 'opportunity' to ascertain juror views about these facts." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1286, citations omitted and emphasis in original, quoting *People v. Vieira* (2005) 35 Cal.4th 264, 286-287; *People v. Tate, supra*, 49 Cal.4th at p. 657 ["the defense cannot be categorically denied the opportunity to inform jurors of case-specific factors that could invariably cause an otherwise reasonable and death-qualified juror to vote for death regardless of the strength of the mitigating evidence."], citations omitted.) Whether a defendant has been convicted of multiple murders is a fact that could cause a potential juror to invariably vote for death. (*People v. Vieira, supra*, 35 Cal.4th at p. 286.)

Here, the trial court did not deny appellant Amezuca the opportunity to ascertain potential jurors' views about a defendant convicted of multiple murders. Rather, it merely modified a defense-proffered question, without any objection by either appellant. The requested question asked prospective jurors if they found "the defendant guilty of five different murders with special circumstances would [they] always vote for the death penalty?" (11CT 2724.) The trial court was concerned that the question would cause potential jurors to prejudge the evidence by committing to a certain position. The trial court was further concerned with the term "murder with special circumstances." (4RT 1167-1168.) The trial court merely reworded the requested question to omit the phrase "murder with special circumstances," while still inquiring about potential juror's views

on a defendant convicted of multiple murders. (4RT 1168.) When the trial court modified the question, it made clear that defense counsel could question potential jurors about their views of a defendant convicted of multiple murders in open court. (4RT 1166 ["Of course, I am going to be giving some time for counsel to address these issues with the jury in open court."].) Thus, the trial court conduct of voir dire was proper. (See, e.g., *People v. Valdez* (2012) 55 Cal.4th 82, 165-166 [the trial court's conduct of voir dire was proper when it did not categorically restrict the defendant from inquiring about prospective jurors about their views on multiple murder in open court and when it distributed a questionnaire asking them about their views about multiple murder]; *People v. Rogers*, *supra*, 46 Cal.4th at pp. 1150-1151 [finding that voir dire was proper because the prospective jurors had been fully apprised that multiple murders were at issue in the trial and the significance of this fact to their death penalty views could be ascertained through the questions during general voir dire]; *People v. Vieira*, *supra*, 35 Cal.4th at p. 287 [the trial court's refusal to include a written question regarding multiple-murder was not improper because the trial court never ruled or otherwise suggested that questions about multiple-murder could not be asked during general voir dire].)

Appellant Amezcua's reliance on *Cash* is misplaced as that case is clearly distinguishable. (Amezcua AOB 68-69, 72-73.) In *Cash*, the defense was categorically denied the opportunity to ask potential jurors about their view about a capital defendant that had committed one or more murders other than the charged murder. (*Cash*, *supra*, 28 Cal.4th at pp. 703, 721-722.) This Court found that the trial court erred because conviction of a prior murder was a general fact of circumstance present in the case and that circumstance could cause a juror to invariably vote for death, regardless of the strength of the mitigating evidence. (*Cash*, *supra*, 28 Cal.4th at p. 721.) In contrast, here, the trial court did not deny

appellant Amezcua the opportunity to conduct a meaningful voir dire inquiry into prospective jurors' views on a defendant convicted of multiple murders. (4RT 1166.) Because appellant Amezcua was not barred from asking prospective juror about their views on this circumstance, *Cash* does not support appellant Amezcua's claim. (See, e.g., *People v. Rogers*, *supra*, 46 Cal.4th at pp. 1150-1151; *People v. Vieira*, *supra*, 35 Cal.4th at p. 287 ["[r]efusal to include the question [in the written form] was not error so long as there was an opportunity to [orally] ask the question during voir dire"].)

Likewise, appellant Amezcua's reliance on *Morgan v. Illinois* (1992) 504 U.S. 719 [112 S.Ct. 2222, 119 L.Ed.2d 492] ("*Morgan*") is misplaced. (Amezcua AOB 67-68, 73.) In *Morgan*, the trial court, rather than the attorneys, conducted voir dire. (*Id.* at p. 722.) The trial court questioned each prospective juror on general fairness and whether any prospective juror "had moral or religious principles so strong that he or she could not impose the death penalty 'regardless of the facts.'" (*Id.* at pp. 722-723.) The trial court refused a defense request that the court inquire, "If you find [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?" (*Id.* at p. 723.) The United States Supreme Court found that the questions given by the trial court were insufficient to satisfy the defendant's right to make an inquiry into whether potential jurors was biased and reversed the death sentence. (*Id.* at 733-739.)

Here, in contrast, the trial court did not conduct voir dire without appellant Amezcua's participation. Rather, the attorneys were allowed to participate in voir dire, and not prohibited from questioning prospective jurors in open court about their views on a defendant convicted of multiple murders. (4RT 1166; see *People v. Thornton* (2007) 41 Cal.4th 391, 420 [the trial court "'possesse[s] discretion to conduct oral voir dire as

necessary and to allow attorney participation and questioning as appropriate'"].) Moreover, the trial court merely reworded the requested question, without objection from either appellants Amezcua or Flores. (4RT 1174-1175.) Thus, *Morgan* is clearly distinguishable and appellant Amezcua's claim should be rejected.

II. SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S FINDING THAT PROSPECTIVE JUROR NO. 74'S FEELINGS ABOUT THE DEATH PENALTY WOULD SUBSTANTIALLY IMPAIR HER PERFORMANCE AS A JUROR

Appellants Amezcua and Flores contend that the trial court erred when it excused Prospective Juror No. 74 for cause. Specifically, appellants argue that, although Prospective Juror No. 74 expressed ambiguity, confusion, and reservations towards the death penalty, she consistently represented that her feelings about the death penalty would not impair her ability to be a fair and impartial juror with the ability to weigh aggravating and mitigating evidence to reach a determination about the penalty imposed. (Amezcua AOB 74-88; Flores AOB 57-70.) Respondent disagrees. During voir dire, Prospective Juror No. 74 did not consistently represent that she could be a fair and impartial juror. Rather, before she was excused for cause, Prospective Juror No. 74 stated that she would not be able to impose death penalty. Thus, substantial evidence supported the trial court's finding that Prospective Juror No. 74 could not fairly consider the death penalty as a sentencing option.

A. Relevant Proceedings

Prospective Juror No. 74 completed a jury questionnaire. (16CT 4196-4205.) Among her responses, Prospective Juror No. 74 made several statements indicating that her feelings about the death penalty would impair her performance as a juror. Although Prospective Juror No. 74 stated that she had "no opinion one way or the other" about the death penalty, she

stated that "I just don't want to be the one to decide; I wouldn't choose to kill someone." (16CT 4201.)

Further, Prospective Juror No. 74 stated that she was strongly opposed to the death penalty and would always vote for life and never vote for death for a defendant convicted of first degree murder and a special circumstance. (16CT 4201.) She also stated that she would "probably" always vote for life in prison, regardless of the aggravating evidence presented at the penalty phase. (16RT 4202.)

Prospective Juror No. 74 made several responses that indicated that she might be able to impose the death penalty. She stated that she was "unsure" whether she would always vote against the imposition of the death penalty regardless of the mitigating and aggravating evidence presented. (16CT 4202.) She further stated that she could vote for the imposition of the death penalty if she thought it was appropriate, and her feelings about the death penalty would not impair her ability to be a fair and impartial juror in this case. (16RT 4202.)

Before voir dire examination, the trial court enumerated four separate categories that divided potential jurors by their feelings towards the death penalty. A "category number one person" included people who "could never ever vote to convict or put to death someone at the hands of the state." A "category number two person" included people who "strongly" favored the death penalty and did not care about the mitigating evidence. A "category number three person" included people who believed in the death penalty, but "could never vote to put someone to death." A "category number four person" included people who could vote for either life in prison or the death penalty, depending on the evidence. (5RT 1307-1311.)

The trial court questioned Prospective Juror No. 74 about her ability to impose the death penalty. When asked to select a descriptive category for herself, Prospective Juror No. 74 described herself as "pretty much a

three (a person who could never impose the death penalty)." (5RT 1356.) The trial court inquired further and asked Prospective Juror No. 74, "Pretty much a three. Are you a three?" Prospective Juror No. 74 stated, "I would have to say so. It would have to be for me to put someone to death. The aggravating evidence be a lot [sic] and there would be like no mitigating evidence. So it's a good chance that I am a three." (5RT 1356.) The trial court then asked, "Well but you are saying that you could put someone to death?" (5RT 1356.) Prospective Juror No. 74 replied, "It would have to be really harsh circumstances." (5RT 1356.) The trial court stated, "That is all right. It's up to the People to persuade you." (5RT 1356.) After further discussion, Prospective Juror No. 74 then stated that she "could be a four (a person who could vote for either life in prison or the death penalty)." The trial court agreed and stated, "Yeah, I think you are a four." (5RT 1357.)

When questioned by appellant Flores, Prospective Juror No. 74 stated that she could be a "neutral juror." She further indicated that, although it "would be hard," she could impose the death penalty. (5RT 1384-1385.)

Afterwards, the prosecutor detailed the seriousness and gravity of imposing the death penalty. (5RT 1385-1388.) The prosecutor then asked Prospective Juror No. 74 whether she could impose the death penalty. Prospective Juror No. 74 replied, "I don't think I could do it." (5RT 1388.)

The trial court later excused Prospective Juror No. 74 for cause, finding that she had "[vacillated] between being a three and a four, and I think Mr. Levine [the prosecutor] pushed her over or got her to commit to being a three." (5RT 1395-1396.) Appellants Amezcua and Flores objected to Prospective Juror No. 74 being excused for cause. (5RT 1396-1397.)

B. Applicable Law

The proper standard for exclusion, for cause, of a juror based on bias with regard to the death penalty is whether the juror's views would

"prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; see also *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting the *Witt* review standard in California].) A juror must be able to do more than simply "consider" imposing the death penalty. A juror must be able to consider imposing the death penalty as a reasonable possibility. (*People v. Schmeck* (2005) 37 Cal.4th 240, 262.)

This standard does not require that a juror's bias be proved with "unmistakable clarity." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) To the contrary, as this Court has recognized, "frequently voir dire examination does not result in an 'unmistakably clear' response from a prospective juror, but nonetheless 'there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" (*People v. Ghent*, *supra*, 43 Cal.3d at p. 767, citing *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426; accord *People v. Jones* (2012) 54 Cal.4th 1, 41 [when a juror supplies conflicting or equivocal responses to questions directed at their potential bias or incapacity to serve, "the trial court, through its observation of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach a conclusion regarding the juror's actual state of mind"].)

When a "prospective juror's answers on voir dire are conflicting or equivocal, the trial court's findings as to the prospective juror's state of mind are binding on appellate courts if supported by substantial evidence." (*People v. Duenas* (2012) 55 Cal.4th 1, 10; *People v. Wilson* (2008) 44 Cal.4th 758, 779; accord, *People v. Lewis* (2008) 43 Cal.4th 415, 483 [trial court's determination as to prospective juror's true state of mind is

binding]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1007 ["the reviewing court generally must defer to the judge who sees and hears the prospective juror, and who has the 'definite impression' that he is biased, despite a failure to express clear views"]; *People v. Stewart* (2004) 33 Cal.4th 425, 451 ["appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor) gleans valuable information that simply does not appear on the record"].)

C. Substantial Evidence Supported the Trial Court's Excusal of Prospective Juror No. 74

Prospective Juror No. 74's statements about her feelings towards the death penalty were conflicting. In the juror questionnaire, she expressed strong opposition to the death penalty and an inability to impose it. Prospective Juror No. 74 stated that she "wouldn't choose to kill someone." (16CT 4201.) She stated that she would always vote for life and never vote for death. (16CT 4201.) She also stated that she would "probably" always vote for life in prison, regardless of the aggravating evidence presented at the penalty phase. (16RT 4202.)

However, these answers conflicted with Prospective Juror No. 74's statements in the questionnaire that she was "unsure" whether she would always vote against the imposition of the death penalty regardless of the mitigating and aggravating evidence presented, that she could vote for the imposition of the death penalty if she thought it was appropriate, and that her feelings about the death penalty would not impair her ability to be a fair and impartial juror. (16RT 4202.)

Likewise, Prospective Juror No. 74 gave conflicting answers during voir dire. Prospective Juror No. 74 described herself as a person who could never impose the death penalty. (5RT 1356.) Yet, upon further

questioning by the trial court, she stated that she "could" vote for either life in prison or the death penalty based on the evidence. (5RT 1357.) When questioned by appellant Flores, Prospective Juror No. 74 stated that she could be a "neutral juror." (5RT 1384-1385.) Ultimately, however, when questioned by the prosecutor, Prospective Juror No. 74 stated that she did not think she could impose the death penalty. (5RT 1388.)

Faced with these conflicting and equivocal answers, the trial court excused Prospective Juror No. 74 for cause, finding that the prosecutor "pushed her over or got her to commit to being" a person who could never vote for the death penalty. (5RT 1396.) This finding is binding on this Court because it was supported by substantial evidence, i.e., Prospective Juror No. 74 own words that she could not impose the death penalty. (See, e.g., *People v. Hamilton* (2009) 45 Cal.4th 863, 891 [in "light of substantial evidence in support, we defer to the court's assessment of [the prospective juror's] attitudes and in the decision to excuse him for cause."]; *People v. Harrison* (2005) 35 Cal.4th 208, 227-228 [the trial court properly excused juror who said that "maybe" she could not impose the death penalty and later said it would be "very, very difficult" but that she could "probably do it"]; *People v. Ayala* (2000) 24 Cal.4th 243, 275 [because the potential juror's answers were "inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror"]; *People v. Bradford*, (1997) 15 Cal.4th 1229, 1320 and cases cited therein [for-cause excusal proper even though the juror could vote for death in "specified, particularly extreme cases"].)

Moreover, appellant Flores's reliance on *People v. Pearson* (2012) 53 Cal.4th 306 ("*Pearson*") is misplaced because that case is clearly distinguishable. (Flores AOB 67.) In *Pearson*, the prospective juror

("C.O.") was unsure about her feelings towards, and her position on, the death penalty. However, C.O. consistently expressed that she had the ability to vote for the death penalty in the appropriate case. (*Id.* at pp. 328-330.) The trial court granted the prosecutor's challenge of C.O for cause, finding that C.O. had given "conflicting" and "equivocal" responses about capital punishment. (*Id.* at p. 330.) This Court found that trial court erred when it granted the prosecutor's challenge because "C.O. made no conflicting or equivocal statements about her ability to vote for a death penalty in a factually appropriate case." Thus, the record did not support the trial court's findings. (*Ibid.*)

Here, in contrast, Prospective Juror No. 74 gave inconsistent and conflicting responses during voir dire regarding her ability to impose the death penalty. (See 5RT 1356, 1357, 1384-1385, 1388.) Thus, the record supported finding the trial court's finding. (*Pearson, supra*, at p. 331 [a potential juror's vague, indefinite or unformed does not disqualify her from service, so long as she could follow her oath to conscientiously consider the death penalty].) Thus, appellants Amezcua and Flores claim that the trial court erred when it excused Prospective Juror No. 74 for cause must be denied.[7]

D. Any Error Was Harmless

Assuming this Court were to find that Prospective Juror No. 74 was erroneously excluded, the error was harmless. As the Chief Justice recently observed in *Gray v. Mississippi* (1987) 481 U.S. 648, 666 [107 S.Ct.2045,

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[7] To the extent appellants raises any state or federal constitutional or statutory issue not squarely grounded in *Wainwright*, those issues have been waived and are subject to procedural default since appellant failed to raise them in the trial court. (See *People v. Hines* (1997) 15 Cal.4th 997, 1035; *People v. Holt* (1997) 15 Cal.4th 619, 666-667; *People v. Alvarez* (1996) 14 Cal.4th 155, 186.)

95 L.Ed.2d 622], the United States Supreme Court examined two theories upon which harmless error analysis might be applied to a violation of the review standard created under *Witherspoon-Witt*. (*People v. Riccardi* (2012) 54 Cal.4th 758, 840-846 (conc. opn. of Cantil-Sakauye, C.J.).) The majority in *Gray* rejected only one of those theories, however; that is, it rejected the contention that an erroneous *Witherspoon-Witt* exclusion had no effect on the composition of the jury. *Gray* found that the exclusion necessarily had an effect on the jury composition, even if one assumed that the prosecutor in any circumstance would have exercised a peremptory challenge against the death-scrupled prospective juror. Thus, as the Chief Justice concluded in *Riccardi*, "*Gray* stands for the proposition that *Witherspoon-Witt* error is reversible per se because the error affects the composition of the panel '"as a whole"' [citations] by inscrutably altering how the peremptory challenges were exercised [citations]." (*People v. Riccardi*, *supra*, 54 Cal.4th. at p. 842 (conc. opn. of Cantil-Sakauye, C.J.).) But as the Chief Justice also noted in *Riccardi*, one year after *Gray*, the high court in *Ross v. Oklahoma* (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80], rejected the *Witherspoon-Witt* remedy as well as the rationale developed for it in *Gray*, as applied to a wrongly included pro-death juror, explaining that the Sixth Amendment is not implicated simply by the change in the mix of viewpoints held by jurors (be they death penalty supporters or skeptics) who are ultimately selected. (*People v. Riccardi*, *supra*, 54 Cal.4th. at pp. 842-844 (conc. opn. of Cantil-Sakauye, C.J.).)

Notwithstanding the Chief Justice's observations in *Riccardi*, this Court felt "compelled to follow that precedent that is most analogous to the circumstances presented here[,]" which was *Gray*, as opposed to *Ross*. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 845 (conc. opn. of Cantil-Sakauye, C.J.).) Respondent respectfully requests this Court revisit this conclusion in light of the observation that in *Gray*, the State (as well as the

dissent) had argued the error had *no effect* on the case. Here lies "a reasoned basis" (*id.* at p. 844 fn. 2), for the different results in these cases. The "no-effect" rationale for adopting a harmless error rule only goes so far, and allowed the *Gray* Court to reject it so long as there was some effect on the jury composition. The state's proffered rationale therefore never required the Court to account for the nature of a *Witherspoon-Witt* violation. Here, however, the People now ask the Court to do so. The appropriateness of harmless error analysis, we submit, should take into account the "differing values" particular constitutional rights "represent and protect[.]" (*Chapman v. California* (1967) 386 U.S. 18, 44 [87 S.Ct. 824, 17 L.Ed.2d 705] (conc. opn. of Stewart, J.).)

Witherspoon protects capital defendants against the State's unilateral and unlimited authority to exclude prospective jurors based on their views on the death penalty. Accordingly, "'*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude . . . .' [Citation.]" (*Wainwright v. Witt, supra,* 469 U.S. at p. 423.) Beyond this protection is the simple misapplication of the *Witherspoon-Witt* standard because it does not grant the prosecution the unilateral and unlimited power to exclude death-scrupled jurors, and as this Court has recognized, no cognizable prejudice results simply from the absence of any viewpoint or the existence of any particular balance of viewpoints among the jurors. (*People v. Riccardi, supra,* 54 Cal.4th at pp. 843-844 (conc. opn. of Cantil-Sakauye, C.J.); *Lockhart v. McCree* (1986) 476 U.S. 162, 177-178 [106 S.Ct. 1758, 90 L.Ed.2d 137].) Thus, exclusion of a juror through misapplication of the *Witherspoon-Witt* standard results in mere "technical error that should be considered harmless[.]" (*Gray v. Mississippi, supra,* 481 U.S. at p. 666.)

GUILT PHASE ISSUES

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THE MANIFEST NEED FOR HEIGHTENED COURTROOM SECURITY

A. Relevant Proceedings

Before jury selection, the parties discussed various jail security issues. Multiple hearings were held on the subject. Los Angeles County Deputy Sheriff John Kepley testified at two such hearings. At the first hearing, the parties discussed whether appellants Amezcua and Flores should be provided pencils in jail. Deputy Kepley testified that both appellants were categorized as "K-10," or "high security and/or administrative segregated noteworthy" inmates. (2RT 37-38.) Deputy Kepley had been gathering intelligence on appellants Amezcua and Flores. He opined that they were "highly respected" members of the Mexican Mafia and willing to "accept work and assault other inmates on behalf of the Mexican Mafia." (2RT 39.)

Deputy Kepley then detailed several incidents where appellants Amezcua and Flores had been caught with deadly weapons or materials to make deadly weapons, i.e., "shanks," which are "jailhouse stabbing weapons." (See 1RT 10; 2RT 41.) On October 2, 2000, appellant Flores's cell was searched. A five-foot long wooden broom handle, a large piece of a jagged mirror, two altered razor blades, and excessive linens were recovered from his cell. (2RT 46-47.) On January 5, 2001, appellant Flores's cell was searched. Contraband was found in the cell, including loose razor blades. (2RT 45-46.) On January 29, 2001, appellant Amezcua's cell was searched. A shank that was fashioned from metal was recovered. (2RT 45.) On April 30, 2001, appellant Flores's cell was searched. A two-inch wide piece of steel that was 12-inches in length was

recovered. Deputy Kepley believed that appellant Flores was in the process of making a shank with the piece of metal. (2RT 44.)

Deputy Kepley then detailed several violent incidents involving appellants Amezcua and Flores. The first incident occurred on May 10, 2001. Appellant Flores became belligerent with deputy sheriffs assigned to his housing location. Appellant Flores threatened one of the deputies, "Deputy Ciscel," stating, "You'll see – maybe not today, but you'll see it when you're not expecting it." (2RT 43-44.) The next incident occurred on September 2, 2001. Appellant Amezcua had been allowed outside of his cell to clean up the "freeway tier." Appellant Amezcua then stabbed another inmate, Steve Harvey. (2RT 42-43.) The last incident occurred on November 2, 2001. Five inmates were to be transported to the visiting area. These inmates included appellants Flores and Amezcua, as well as other inmates that were housed on the same row. The inmates were all individually handcuffed, waist-chained, and shackled. A deputy opened the gates and let the five inmates out in front of their row. Prior to being escorted to the visiting area, appellants Amezcua and Flores removed their handcuffs and waist chains. Appellants then used shanks to stab another inmate, Steve Mattson. (2RT 40-41.) After this hearing, the trial court ruled that appellants Amezcua and Flores should not be provided pencils or any sharp objects in prison. (2RT 69.)

Appellant Amezcua subsequently made a motion to allow him to discuss the case with appellant Flores while in jail. (2RT 532-533.) The trial court denied the motion because appellants had previously possessed weapons and committed violent assaults in jail. (2RT 532-534.)

Appellants Amezcua and Flores later made motions to allow both of their attorneys to meet with them at the same time, as well as requesting thermal underwear, telephone access, and writing materials. (2RT 545-549.) A hearing was held wherein Deputy Kepley again testified and

detailed subsequent incidents involving appellants Amezcua and Flores. Appellant Amezcua was involved in an incident where he was found in possession of a pencil inside his cell on April 20, 2002. (2RT 553.) Appellant Flores was involved in six additional incidents, including: failing to comply with deputies orders, having a shank in his sock, being in possession of contraband, and attempting to "gas" a deputy with "liquids of unknown content." (2RT 554-557.) The trial court denied the various motions as follows:

> Frankly, I've heard enough. I don't care to hear argument.
>
> I'm going to rule that the security concerns in this case are great, and I am satisfied that the sheriffs are treating the defendants appropriately, and I'm not going to make a change in the security status, nor am I going to order that the defendants be allowed to meet their attorneys in the attorney room.
>
> I think that in the court's view, it's not that essential to the defense of this case that such a meeting take place, and I think there are overriding security concerns that persuade the court that it would not be appropriate to allow such a meeting.

(2RT 587.)

At a subsequent hearing, the prosecutor felt "compelled to put one other thing on the record." As the clerk called the prosecutor to the corner of the courtroom, the prosecutor passed by appellant Amezcua. As the prosecutor returned to his seat, appellant Amezcua stated that he wished "he had a gun." As the prosecutor sat down, appellant Amezcua made his hand into a shape of a gun, pointed his finger at the prosecutor, and made a "shooting noise." The trial court admonished appellant Amezcua that the described behavior was "not appropriate." (2RT 631.)

Appellant Amezcua later made a motion requesting that he be provided legal materials in jail, a copy of the penal code, and a law dictionary. The trial court reiterated its security concerns, stating that it

was "extremely concerned about the security concerns that have been expressed again . . . about [appellant] Amezcua. And there have been too many incidents involving [appellant] Amezcua and [appellant Flores] for this court to have a very heightened sense of concern about security issues." The trial court further stated, "I do perceive that [appellant] Amezcua is too much of a danger to allow him to have this material." (RT 995-996.)

At the start of jury selection, eight uniformed sheriff's deputies were present in the courtroom. Appellants Amezcua and Flores objected to the number of deputies "sitting here" in the courtroom as "onerous" because they had not "acted up in court" and each defendant was belted to his chair with one hand cuffed to the belt. (5RT 1201-1202.) The trial court overruled the objection and declined to make any changes to the security measures as follows:

> Well, I think that I normally leave security issues up to the bailiffs, to the experts. I feel that in this case, given that there have been a number of incidents at the jail, that there is understandably some concern above that present in most cases. I will watch the issue.
>
> I feel that I am going to allow the number of bailiffs to remain for today. I feel that this going to be very quick. The jurors are going to be in and out in a matter of minutes. I will give additional thought to the number of bailiffs that are necessary, given the fact that we have two defendants, we had a number of incidents in jail. I think it's important for us to have what the security people call a show of force.
>
> My thought is that once we get going with the trial, and I do expect that there will be no problems. I think that Mr. Amezcua and Mr. Flores have conducted themselves in a very appropriate manner at all times with this court, and I think that once we get going, that the sheriff will see that there is probably not the need to have such a number of bailiffs, but your objection is noted for the record.

(5RT 1202-1203.)

Appellants Amezcua and Flores were belted to their chairs, with their right hand cuffed to their belts. Because there was a "drape over the table" that covered the handcuff and the belt, the jury was not able to see the restraints. Appellants Amezcua and Flores objected to this procedure, arguing that the jury would infer that appellants were "probably" handcuffed because "they would see that only their left hand would be up." The trial court overruled the objection, stating, "Well, I don't think it's a big deal frankly. I think that precautions have to be taken in this case." (5RT 1203-1204.)

Shortly thereafter, the prospective jurors were called into the courtroom. The trial court made introductory remarks, ordered the prospective jurors to complete a written juror questionnaire, and ordered the prospective jurors to return at "8:30 next Monday." (5RT 1206-1218.) Appellants Amezcua and Flores made no further objections to the number of deputies present in court or to the physical restraints on any other date. It is unclear whether these security measures were altered during trial. (See Amezcua AOB 162; Flores AOB 86.)

B. The Trial Court Did Not Abuse Its Discretion When It Found a Manifest Need that Appellants Amezcua and Flores Be Physically Restrained and that the Presence of Additional Courtroom Security Was Necessary

Appellants Amezcua and Flores contend that the trial court abused its discretion by failing to engage in a fact-specific analysis on whether heightened security measures were needed. Specifically, appellants argue that the trial court abused its discretion by relying on the expertise of the deputies to determine whether appellants needed to be physically restrained and whether the presence of eight bailiffs inside the courtroom was necessary. (Amezcua AOB 159-177; Flores AOB 83-97.) Respondent disagrees.

"'A trial court has broad power to maintain courtroom security and orderly proceedings. [Citations.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1269 ("*Hayes*"); *People v. Stevens* (2009) 47 Cal.4th 625, 632 ("*Stevens*").) There are three varying degrees of courtroom security measures: routine security measures; security measures that are not routine and not inherently prejudicial; and extraordinary security measures that are inherently prejudicial. Each of these security measures requires a different justification before they are used in court.

The use of routine courtroom security measures does not impinge on a defendant's ability to present a defense or enjoy the presumption of innocence. (*People v. Hernandez* (2011) 51 Cal.4th 733, 741-742 ("*Hernandez*").) These measures "need not be justified by the court or the prosecutor." (*People v. Duran* (1976) 16 Cal.3d 282, 291, fn. 8; see *People v. Stevens* (2009) 47 Cal.4th 625, 643 ("*Stevens*").) Examples of routine security measures include the presence of armed security guards. (*Duran, supra*, 16 Cal.3d 282, 291, fn. 8.)

The use of security measures that are not routine and not inherently prejudicial is left to the sound discretion of the trial court. (*People v. Jenkins* (2000) 22 Cal.4th 900, 995-997 [finding that the use of metal detector at the entrance of the court room is not inherently prejudicial and concluding that the trial court did not abuse its discretion by employing the security measure] ("*Jenkins*").) However, the trial court cannot defer that discretion to law enforcement officers, but must "'exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis'" by "balancing the need for heightened security against the risk that additional precautions will prejudice the accused." (*Hernandez, supra*, 51 Cal.4th at p. 742, quoting *Holbrook v. Flynn* (1986) 475 U.S. 560, 570 [106 S.Ct. 1340, 89 L.Ed.2d 525] ("*Holbrook*").) Examples of security measures that are not routine and not inherently

prejudicial include the presence of additional armed security personnel (*People v. Jenkins* (2000) 22 Cal.4th 900, 997-998) and the stationing of a bailiff behind the witness stand while the defendant is testifying (*Stevens, supra*, 47 Cal.4th at pp. 638-639).

The use of extraordinary security measures that are inherently prejudicial and carry an inordinate risk of infringing on a defendant's right to a fair trial must be justified by a particular showing of manifest need. (*Stevens, supra*, 47 Cal.4th at pp. 633-634.) Examples of inherently prejudicial measures include the use of visible physical restraints (*Duran, supra*, 16 Cal.3d at p. 290), the use of physical restraints that are not visible to the jury (*People v. Mar* (2002) 28 Cal.4th 1201, 1217), and forcing the defendant to appear before the jury in prison clothing (*People v. Taylor* (1982) 31 Cal.3d 488, 494-495).

1. The Record as a Whole Reflects that the Trial Court Found a Manifest Need for Heightened Security Measures Based Upon Appellants's Dangerous and Violent Conduct in Jail

"[A] criminal defendant may be subjected to physical restraints in the jury's presence upon 'a showing of a manifest need for such restraints.' This requirement is satisfied by evidence that the defendant has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court." (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1032, citations omitted.) A trial court's decision regarding imposition of restraints will be reversed only when an appellant shows "a manifest abuse of discretion." (*Duran, supra,* 16 Cal.3d at p. 293, fn. 12.)

Here, the record as a whole reflects that the trial court acted within its discretion. The trial court found a manifest need for the heightened security measures based upon appellants Amezcua's and Flores's dangerous and violent conduct in jail. There was ample evidence presented that appellants

Amezcua and Flores threatened a jail deputy, possessed weapons in jail, assaulted other inmates, and threatened the prosecutor in court. As detailed above, Deputy Kepley testified that both appellant Amezcua and Flores had been caught, on numerous occasions, with shanks or materials to make shanks. (2RT 44-47.) Deputy Kepley also detailed three violent jail incidents involving appellants Amezcua and Flores. The first incident involved an incident where appellant Flores threatened a jail deputy. (2RT 43-44.) The next incident involved an incident where appellant Amezcua stabbed another inmate. (2RT 42-43.) The last, and most troubling incident, involved an incident where appellant Amezcua and Flores were able to remove their handcuffs and waist chains and stab another inmate. (2RT 40-41.)

When the trial court overruled appellants Amezcua's and Flores's objections to the heightened security measures, it specifically made reference to their violent and dangerous conduct in jail. (5RT 1202-1204.) Appellants Amezcua and Flores attempt to characterize the trial court's references to their violent and troubling incidents in jail as "generic." (Amezcua AOB 162; Flores AOB 86.) In doing so, however, appellants have simply ignored the proceedings that occurred prior to their objection to the heightened security measures. Again, as detailed above, multiple hearings were held discussing appellant Amezcua's and Flores's violent behavior in jail. During these hearings, the trial court found that the security issues were "great" (2RT 587) and stated that it was "extremely concerned about the security concerns" and had "a very heightened sense of concern about security issues" (RT 995-996). Thus, the trial court's reference to these incidents was not "generic," but rather specific references to the prior evidence presented on appellants's numerous violent and troubling conduct in prison. (See, e.g. *People v. Lomax* (2010) 49 Cal.4th 530, 561-562 [finding that evidence presented about an attack on a deputy

in a holding cell in connection with the defendant's *Pitchess* motion supported the trial court's use of an electronic security belt].)

Relying on *Duran, supra,* 16 Cal.3d at pp. 291-292, appellants Amezcua and Flores contend that "the trial court abused its discretion when it relied upon the defendants' conduct in the county jail to justify the heightened security measures." Specifically, appellants argue that, because the trial court noted that they had "'conducted themselves in a very appropriate manner at all times with" the trial court, there was no evidence of nonconforming conduct or planned nonconforming conduct within the courtroom. (Amezcua AOB 172; Flores AOB 94.) Appellants are mistaken. The trial court was aware that appellant Amezcua had *threatened* the prosecutor *inside* the courtroom. (2RT 631.) In any event, a trial court can reasonably determine that a manifest need for heighten courtroom security exists based upon nonconforming conduct outside of the courtroom.

In *Duran*, the defendant was accused of assault with a deadly weapon by a life-term prisoner (§ 4500) and possession of a dirk or dagger when confined in prison (§ 4502). (*Duran, supra,* 16 Cal.3d at p. 286.) The defendant made a motion to allow him and his inmate witnesses to appear before the jury in civilian clothing, which the court summarily denied. (*Duran, supra,* 16 Cal.3d at p. 288.) The court also enforced a procedure wherein the defendant's wrists and ankles were shackled when he testified. (*Ibid.*) This Court found that the trial court erred when it summarily denied the defendant's motion and held that a defendant cannot be subjected to physical restraints in the jury's presence, unless there is a manifest need for such restraints. (*Id.* at pp. 290-291.) This Court did not make "it clear" that a defendant's violent conduct cannot justify heightened security measures. (Amezcua AOB 170; Flores AOB 92.) Rather, this Court found the opposite, i.e. that physical restraints *are* justified on a showing that the

defendant is a violent person and on evidence of nonconforming conduct, stating:

> We do not mean to imply that *restraints* are justified *only* on a record showing that the accused is a *violent person*. An accused may be restrained, for instance, on a showing that he plans an escape from the courtroom or that he plans to disrupt proceedings by nonviolent means. *Evidence of any nonconforming conduct* or *planned nonconforming conduct* which disrupts or would disrupt the judicial process if unrestrained may warrant the imposition of reasonable restraints if, in the sound discretion of the court, such *restraints* are necessary.

(*Duran*, *supra*, 16 Cal.3d at p. 293, fn. 11, italics added.)

This Court also did not hold that heightened security measures could only be justified on nonconforming conduct that occurs within the courtroom or planned nonconforming conduct in the courtroom. (See, e.g. *People v. Lomax*, *supra*, 49 Cal.4th at pp. 559-562 [finding that the trial court did not abuse its discretion when it found a manifest need that the defendant wear an electronic security belt based, primarily, upon a violent outburst in a holding cell]; see *Stevens*, *supra*, 47 Cal.4th at pp. 633, 634 [in *Duran*, this Court "cautioned that imposing visible physical restraints without a record showing violence, a threat of violence, *or* other nonconforming conduct, 'will be deemed an abuse of discretion'"], emphasis added; see *People v. Mar*, *supra*, 28 Cal.4th at p. 1221 [when objectionable conduct has occurred outside of the courtroom, sufficient evidence must be present on the record so the trial court can make its own determination of the seriousness of the conduct]; *Duran*, *supra*, 16 Cal.3d at p. 293 [noting that there was "no showing that defendant threatened to escape or behaved violently before coming to court or while in court"].)

Given the violent behavior of both appellants in jail, in which they demonstrated the ability to remove handcuffs and shackles, procure weapons, and commit stabbings, the trial court did not abuse its discretion

when it concluded that heightened courtroom security measures were appropriate. (See *Hernandez, supra*, 51 Cal.4th at p. 742 [finding error when the trial court did not "base its decision to station a deputy at the witness stand during defendant's testimony was not based on a thoughtful, case-specific consideration of the need for heightened security, *or* of the potential prejudice that might result"], emphasis added.)

2. The Trial Court Conducted a Fact-Specific Analysis of the Need for Heightened Security

Appellants Amezcua and Flores contend that the trial court did not conduct a "fact-specific" analysis of the need for heightened security. (Amezcua AOB 166; Flores AOB 86-87.) However, the record clearly demonstrate that the trial court based its decision that heightened security measures were necessary after conducting a fact-specific analysis. The trial court based its ruling upon appellants's violent behavior in jail, stating,

> I feel that I am going to allow the number of bailiffs to remain for today. I feel that this going to be very quick. The jurors are going to be in and out in a matter of minutes. I will give additional thought to the number of bailiffs that are necessary, given the fact that we have two defendants, we had a number of incidents in jail. I think it's important for us to have what the security people call a show of force.

(5RT 1202-1203.) Thus, the record reflects that the trial court based its decision for the need for heightened security on the number of defendants in the case and appellants's behavior in jail.

3. The Trial Court Did Not Defer Decision-Making Authority on Whether Security Measures Were Appropriate to Security Enforcement Officers

Appellants Amezcua and Flores argue that the trial court abused its discretion "to the extent that it relied on the expertise of the courtroom deputies to determine the security measures, that reliance was improper because, in doing so, the court substituted the bailiffs exercise of discretion

for its own." (Amezcua AOB 171; see Flores AOB at 93.) Specifically, appellant's Amezcua and Flores contend that case law "makes it clear that the trial court must make its own determination whether the heightened courtroom security measures" were necessary, without any input from the bailiffs. (Amezcua AOB 173; see Flores AOB 86.) Appellants Amezcua and Flores are mistaken.

A trial court is not required to determine whether heightened security measures are appropriate in a vacuum, without any input from others. In fact, a trial court may rely on the expertise of security enforcement officers to determine what security measures should be used. (See, e.g., *Jenkins*, supra, 22 Cal.4th at pp. 997-999.) However, it "may not rely *solely* on the judgment of jail or court security personnel in *sanctioning* the use of such restraints." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1218, emphasis added.)

In *People v. Jenkins*, *supra*, 22 Cal.4th 900, the defendant objected to presence of three additional armed bailiffs during the testimony of witness Jeffery Bryant. (*Id.* at pp. 997-998.)

> The court conferred with one of the bailiffs, who explained that some silent communication between the witness and defendant's brother, who sat in the courtroom, caused him to order the additional security. The court noted that although it did not wish to provide excessive security, if the bailiff was of the opinion that additional security was necessary, the court would defer to the bailiff's decision. The court directed defense counsel to confer with the bailiff to resolve the difficulty.

(*Id.* at p. 998.) The next day, the defendant asked that the number of bailiffs be reduced because only a few of the defendant's friends and relatives were attending trial and had to pass through a metal detector. (*Ibid.*) The court observed that the number of bailiffs fluctuated between three and four, that three was the bare minimum at a joint trial of two defendants, that sometimes it was the presence of certain spectators rather than the identity of the witness that prompted additional security, that some

of the bailiffs were not visible to the jury, that the presence of an additional bailiff was "innocuous," and that there was a low-key atmosphere inside the court. (*Ibid.*) Under these circumstances, this Court found that "no abuse of discretion *or abrogation of judicial authority* over courtroom security appears." (*Ibid*, emphasis added.)

Likewise, in this case, the trial court also did not abrogate its judicial authority over courtroom security. Although the trial court stated that it "normally [left] security issues up to the bailiffs, to the experts," the court's remarks made it clear that it was exercising its own discretion when it found that heightened security measures appropriate, stating "*I* feel that *I* am going to allow the number of bailiffs to remain for today." (5RT 1202-1203, emphasis added.) The trial court's remarks reflect that it had engaged in a fact-specific analysis on whether heightened security measures were necessary. The trial court had previously stated that the security concerns were "great" (2RT 587), that the trial court was "extremely concerned about the security concerns," and had "a very heightened sense of concern about security issues" (RT 995-996). Moreover, when overruling appellants's objections to the heightened security measures the trial court stated that "precautions *have to be* taken in this case." (5RT 1203-1204, emphasis added.) Although the trial court considered input from the bailiffs on what security measures were appropriate, that reliance was not improper, and the record reflects that the trial court made its own decision that additional security measures were necessary. (See, e.g., *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 997-998; see *People v. Hill* (1998) 17 Cal.4th 800, 817 ["When defendant complained about the decision to place him in leg restraints, the court explained that 'I don't interfere in [the sheriff's department's] business.' Later, when defense counsel asked whether it was necessary defendant wear the chains, the court replied, 'I believe the [sheriff's] department has said so,' implying the

court had no say in the matter."], overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

Appellants Amezcua's and Flores's reliance on *People v. Mar*, *supra*, 28 Cal.4th 1201, is misplaced. (Amezcua AOB 172; Flores AOB 94.) Appellants contend that "the trial court failed to conduct a formal hearing and no other evidence was before the court supporting the need for heightened courtroom security measures," and argue that the trial court "simply deferred to the recommendation of the bailiffs." (Amezcua AOB 173; Flores AOB 95.) Appellants Amezcua and Flores are mistaken. As detailed above, the record reflects that the trial court exercised its own discretion when it ordered heightened security measures and there was ample evidence presented detailing appellants's violent and dangerous conduct in jail.

4. In Any Event, Appellants Cannot Show They Were Prejudiced by the Heightened Security Measures

In any event, appellants Amezcua and Flores have failed to show that they were actually prejudiced by the presence of eight bailiffs or the use of physical restraints that were not visible to the jury because it was not reasonably likely that these heightened security measures affected the result of their trial. (*Hernandez, supra,* 51 Cal.4th at p. 746 [applying the *Watson*[8] standard to erroneous use of courtroom security measures that are not inherently prejudicial]; *People v. Mar*, *supra*, 28 Cal.4th at p. 1225 [applying the *Watson* standard to erroneous orders for physical restraints on defendants not visible to a jury].)

Here, there is no indication that the additional bailiffs were stationed near appellants Amezcua and Flores or that the bailiffs followed them

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[8] *People v. Watson* (1956) 46 Cal.2d 818, 836.

around. The mere presence of security guards in the courtroom "is seen by jurors as ordinary and expected." (*People v. Stevens*, *supra*, 47 Cal.4th at p. 634, quoting *People v. Jenkins, supra,* 22 Cal.4th at p. 998), and there are a wide range of inferences that a juror might reasonably draw from the presence of additional courtroom security officers (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 996). Moreover, the presence of the bailiffs focused attention on the proceedings, a multiple-murder trial where the State was seeking the death penalty, and not on appellants Amezcua's and Flores's character. (See *People v. Ayala* (2000) 23 Cal.4th 225, 250 [the use of a metal detector focused attention on the nature of case, not to the defendant's character].) Thus, appellants Amezcua and Flores cannot show that it was reasonably likely that the result of the trial would had been different absent the presence of eight bailiffs. (*People v. Stevens*, *supra*, 47 Cal.4th at p. 635 ["Defendant has not cited, nor, after a nationwide search, have we found, a single conviction that has been reversed under *Holbrook* based on the presence of excessive security in the courtroom."]; see *People v. Ainsworth* (1988) 45 Cal.3d 984, 1003-1004 [finding that the trial court, in a single-defendant capital case, did not err when it implicitly found that the presence of four to six sheriffs deputies was not unreasonable given the nature of the charges].)

In addition, there is no indication in the record that the jurors saw that appellants Amezcua and Flores were physically restrained. Courts have consistently held that courtroom shackling, even if error, is harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense. (*See, e.g., People v. Cleveland* (2004) 32 Cal.4th 704, 740 [finding any error by the trial court in ordering leg braces and improperly abdicating its responsibility to the bailiff was harmless where there was no evidence that the jury saw the braces]; *People v. Anderson* (2001) 25

Cal.4th 543, 596 ["we have consistently held that courtroom shackling, even if error, was harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense"]; *People v. Coddington* (2000) 23 Cal.4th 529, 650-651, overruled on another ground in *Price v. Superior Court, supra*, 25 Cal.4th at p. 1069; *People v. Majors* (1998) 18 Cal.4th 385, 406; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 584.)

Moreover, overwhelming evidence supported the appellants's convictions. In recorded conversations with DDA Levine, appellants Amezcua and Flores admitted to murdering Diaz during a drive-by shooting. (Supp. III 1CT 68, 106-110, 134-135.) In fact, appellant Flores stated that Gonzales had witnessed the shooting, saw appellant Flores's face, and could identify appellant Flores. (Supp. III 1CT 123; Supp. III 1CT 136.) Gonzales identified appellant Flores's picture as a person that resembled the gunman (6RT 1666-1667, 1673, 1680-1681) and identified appellant Flores at trial (6RT 1649-1650). Appellant Amezcua and Flores also admitted to the murder of Madrigal and the attempted murder of Gutierrez during a drive-by shooting that occurred on May 25, 2000. (Supp. III 1CT 110-116.)

Barber, an accomplice to the Ledford Street shootings, testified at trial and stated that appellants had committed the shooting. (8RT 2057-2063.) Barber's testimony was corroborated by Perez's adamant identifications of appellants Amezcua and Flores. (8RT 1902-1905.) Barber also witnessed appellant Amezcua shooting Reyes. (8RT 2068.) The Cressida used in the Ledford Street was found on the side of the road next to Reyes. (9RT 2169, 2171.) Five shell casings and appellant Amezcua's thumbprint were found inside the Cressida. (8RT 1944-1949; 9RT 2182-2184.)

Renteria testified that appellant Flores fired at Deputy Putney's Tahoe (counts 14 to 17). (9RT 2206-2208.) During the recorded conversation

with DDA Levine, appellant Flores admitted to shooting the Tahoe. (Supp. III 1CT 69-70.)

Appellants Amezcua and Flores were apprehended at scene of the Santa Monica Pier shooting that occurred on July 3, 2000 (counts 18 to 25, 27 to 35, 48). Officer Martinez arrested appellant Flores and recovered a nine-millimeter semiautomatic handgun. (10RT 2373-2377.) Officer Martinez (10RT 2377-2378), Sergeant Braaten (10RT 2341), Officers Hirt (10RT 2425), Huali (11RT 2521), Stone (10RT 2433-2434), and Lopez (10RT 2439) all identified appellant Amezcua as the person involved in the shootout with police. Twelve expended cartridge casings and three bullet fragments were recovered from the arcade. These casings and bullet fragments matched a nine-millimeter Ruger semiautomatic pistol found near the barricade. (12RT 2697-2699, 2707-2709.) The bullets recovered from the scene of the Ledford Street drive-by shooting (12RT 2721-2722), bullets recovered from Reyes's body (12RT 2755-2759), and the bullets recovered from the shooting of the Tahoe, matched that Ruger. (12RT 2751-2755.) Thus, overwhelming evidence showed that appellants Amezcua and Flores were the perpetrators of these crimes. Therefore, any alleged error was harmless.

IV. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANTS'S RECORDED CONVERSATIONS WITH DDA LEVINE

On January 7, 2002, appellants Amezcua and Flores were granted pro per status. (3CT 773-777.) On February 8, 2002, at their request, DDA Levine met with appellants to provide discovery. Appellants made several statements regarding the charged offenses and to other uncharged murders. This meeting was not tape recorded. (3RT 840.) On February 21, 2002, and March 28, 2002, DDA Levine again met with appellants. During these meetings, appellants Amezcua and Flores requested that DDA Levine ask

the trial court for a restitution fine in the amount of $200 and provided information about the murders of Diaz and Madrigal. These meetings were tape-recorded. (Supp. III 1CT 40-85, 86-174.)

On November 5, 2003, appellants Amezcua and Flores moved to exclude evidence of the meetings on the ground that its admission would violate the advisement requirement in *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] ("*Miranda*"), that their confessions were induced by promises of leniency, and that the meetings violated their right to remain silent and to counsel pursuant to section 866.5. (3RT 869-871; 11RT 2675-2677; 8CT 1835-1842; 9CT 2201-2204.) The trial court denied the motion, finding that appellants Amezcua's and Flores's statements were voluntary and did not violate the advisement requirement in *Miranda*. (3RT 873-874.)

On November 26, 2002, a grand jury returned an indictment charging appellants with the murders of Diaz and Madrigal and the attempted murder of Gonzales and Gutierrez. (1CT 155-162.) These charges were added to the amended information. (7CT 1751-1792.)

Later, appellants renewed their motion to exclude the tape meetings, which was denied. (11RT 2635-2636.) The recordings were played for the jury. (11RT 2675-2677; Peo. Exs. 95, 96.) Appellants were convicted of the first degree murders of Gonzales and Madrigal and the attempted premeditated murder of Gutierrez. (17CT 4569, 4570-4571; 14RT 3056-3059.)

At sentencing, DDA Levine requested that the trial court impose "a less than maximum restitution fine," explaining that he was honoring his promise to appellants that he would do so. (14RT 3252-3253.) Later, the trial court granted the request and imposed a restitution fine in the amount of $200. (14RT 3266, 3274.)

On appeal, appellants Amezcua and Flores contend that the trial court should have excluded their recorded conversation with DDA Levine as statements made during the course of plea negotiations. Specifically, appellants argue that the statements were made while bargaining for a lower restitution fine. Thus, according to appellants, the statements made were prohibited by public policy and inadmissible pursuant to section 1192.4[9] and Evidence Code section 1153.[10] (Amezcua AOB 143-158; Flores AOB 98-112.) Respondent disagrees and submits that appellants have forfeited their claim by failing to object to the admission of the statements on the ground that its admission was prohibited by these statutes and public policy. In any event, appellants's claim is without merit. This was not a plea negotiation. Appellants Amezcua and Flores had no intention of pleading guilty. They were giving DDA Levine hints and information so that he could discover all the murders that they had committed. They were proud of these murders. They wanted to go to trial and take credit for them.

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[9] Section 1192.4 states:
If the defendant's plea of guilty pursuant to Section 1192.1 or 1192.2 is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available. The plea so withdrawn may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.

[10] Evidence Code section 1153 states:
Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.

DDA Levine repeatedly asked appellants why they were providing him with the information about the uncharged murders. Appellants Amezcua and Flores continually answered that they did not want anything in return. Appellants merely asked DDA Levine to ask the trial court for a lower restitution fine at sentencing. DDA Levine honored their agreement and requested a lower restitution fine. The trial court granted DDA Levine's request. Thus, appellants attempted to construe their conversations with DDA Levine as plea negotiations is not supported by the record and must be rejected.

A. Relevant proceedings

1. February 21, 2002, Recording

On February 21, 2002, appellants Amezcua and Flores had a meeting with the DDA Levine. Appellants had invoked their right to self-representation and were not represented by counsel. "Richard" was also present. (Supp. III 1CT 41.) Initially, DDA Levine and appellants discussed discovery matters. (Supp. III 1CT 41.) Appellants and DDA Levine discussed the witnesses for the upcoming preliminary hearing. Appellant Amezcua asked DDA Levine for a witness list. DDA Levine explained that appellants would receive the witness list for the preliminary hearing on the day of the hearing. Appellants and DDA Levine also discussed whether to stipulate to the cause of death of the victims. (Supp. III 1CT 43-45.)

Appellant Flores asked Richard, "What are you a [sic] investigator?" DDA Levine facetiously stated that the officer was a friend that worked in law enforcement, "but he's outside the job, and I just wanted him to meet my two favorite defendants." Appellant Amezcua responded, "Wow. Hell, yeah!" DDA Levine then stated that "as long as he's down here . . . [¶] . . . I have the Redlands case." (Supp. III 1CT 48.)

Appellant Flores then stated, "No, no, I mean, new ones, you know." DDA Levine responds, "New murders?" Appellant Flores replied, "Yeah. You still haven't found him, huh?" DDA Levine replied, "I'm not good at that." Appellants Amezcua and Flores then had a short discussion amongst themselves. Then, appellant Flores asked DDA Levine whether he had found evidence of the April 11, 2000, shooting. DDA Levine answered negatively. Appellant Flores then detailed the shooting. (Supp. III 1CT 50.)

DDA Levine then asked appellant Flores, "why would I be interested in something like that?" Appellant Flores replied, "Why not? It's Baldwin Park. That's the hint. You can't find that, you ain't [sic] never find it." After that comment, appellant Amezcua started laughing. (Supp. III 1CT 50.) DDA Levine then asked appellant Flores, "Why do you want me to make all these murders on you?" (Supp. III 1CT 50.) Appellant Flores responded, "Because I enjoy staying here . . . ." (Supp. III 1CT 50.)[11]

DDA Levine then asked appellants Amezcua and Flores, "You don't have a thing for me or anything?" Appellant Flores responded, "Nah, nah, we just – we think you're cool, you know. And then after the trial we'll give you another one." DDA Levine replied, "You can give me another murder that you did?" Appellant Flores stated, "Another one." DDA Levine asked, "Why?" Appellant Flores stated, "Why not?" (Supp. III 1CT 51.)

DDA Levine then stated, "When you came to me -- last time you said to me 'give me - - 50 years . . . [¶] . . . without the 'L.'" DDA Levine continued, "I don't think you want the death penalty. You said that." Appellant Flores explained, "If you give me 50 years without the 'L,' I can

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[11] The rest of appellant Flores's sentence was unintelligible. DDA Levine's response was also unintelligible. (Supp. III 1CT 50-51.)

get married and get a bone yard visit. [¶] But if you give me the 'L,' I have no sex." (Supp. III 1CT 51; see Supp. III 1CT 52.) DDA Levine responded that ". . . it's not a personal thing but if . . . there's a death penalty, this is a case that . . . warrants it." (Supp. III 1CT 51; see Supp. III 1CT 52.)

Appellant Flores then told DDA Levine about another murder that DDA Levine "can't have." (Supp. III 1CT 51-52.) To DDA Levine's surprise, appellants Amezcua and Flores stated that they committed another murder in Los Angeles County and the charges had already been filed with a different deputy district attorney. DDA Levine stated, "I get all your murders. I'm . . . your personal DA." Appellant Flores replied, "No, not this one and I can bet. You'll see." Appellants Amezcua and Flores then stated that DDA Levine was "gonna [sic] trip" when he found out about the murder. (Supp. III 1CT 51-53.)

Appellants Amezcua and Flores started talking about the murders and began laughing amongst themselves. DDA Levine asked appellants, "Why do you think it's so fuckin' [sic] funny?" Appellant Amezcua replied, "We don't value life?" Appellant Flores later stated, "We've done a lot of bad things, you know. But they're bad to you, but there're good to us?" Appellant Flores then explained who he kills and who he would let live. (Supp. III 1CT 54-56.)

After a discussion about jailhouse alcoholic beverages (Supp. III 1CT 56-59) and tattoos (Supp. III 1CT 59), appellant Amezcua asked, "Can we talk about restitution?" (Supp. III 1CT 60.) Appellant Flores explained that a lower restitution amount would make it easier for them to purchase a television in prison. DDA Levine stated, "You don't get TV's on death row." Appellants Amezcua and Flores stated that death row inmates were allowed to purchase TVs and radios. (Supp. III 1CT 61-62.) Appellant Flores further explained that they did not want to implicate other people,

stating, "I'll tell you everything I did and he'll tell you everything that he did. I won't say what he did and [he] won't say what I did." (Supp. III 1CT 62.)

DDA Levine then asked about the case that he was "gonna [sic] be shocked about?"[12] (Supp. III 1CT 63.) DDA Levine then asked appellants Amezcua and Flores about "Caterina Gonzales." Appellant Flores stated that he knew that Gonzales did not receive the death penalty and described some of the facts in the case. DDA Levine asked if appellants Amezcua and Flores knew that he was the prosecutor in the case. Appellant Flores replied, "Yes," but stated that he never talked to Gonzales. (Supp. III 1CT 64.) Appellant Flores then stated that he would not wear a suit in court and stated, "[E]verything we've done, we've done it because we wanted to. It was the right thing to do. We did the right choices. Uhm, and we don't feel bad about nothin' [sic]. We have no remorse, you know. We even gave . . . a couple of people back their lives." (Supp. III 1CT 65.) DDA Levine stated that he mentioned Gonzales because "when [DDA Levine] get[s] assigned a case, it's usually a pretty big case." (Supp. III 1CT 66.)

The conversation then returned to the April 11, 2000, shootings. Appellant Flores stated, "Well, this one's a man, you know." DDA Levine interjected, "Riding on the handle bars of a bike." Appellant Flores continued, "A bike. I'll . . . give you a little bit more. He was wearing . . . either [] light gray or [] light blue, and had his legs sticking out because he didn't [want] to wrinkle his pants." Appellant Flores stated that appellant Amezcua was the driver during the shooting. (Supp. III 1CT 68.)

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[12] It appears that DDA Levine states that he was "gonna be shocked about" is a reference to the murder assigned to another DDA that appellants Amezcua and Flores stated that DDA Levine was "gonna trip" about. (Supp. III 1CT 53.)

Appellant Flores began talking about the Ledford Drive shootings, stating "[O]n the Ledford thing, there's nothing about that second guy. The one I believe he's in a wheelchair or fucked up, got shot in the legs, butt area." DDA Levine told appellant Flores that Mayorquin had survived the shooting. (Supp. III 1CT 68-69; see 8RT 1912-1914; 10RT 2300-2301.)

After a discussion about a shooting of the Tahoe (Supp. III 1CT 69), the following exchange occurred:

> [DDA Levine]: Why do you wanna [sic] give all this stuff [information]?
>
> [Appellant] Amezcua: We don't - - care.
>
> [Appellant] Flores: It doesn't matter.
>
> [Appellant] Amezcua: Your job is to convict us.
>
> [Appellant] Flores: . . . yeah, convict us. You'll get the stripes, we just smile and look good.

(Supp. III 1CT 70). Appellants Amezcua and Flores then explained that they were going to humiliate the prosecution's witnesses at trial, particularly Katrina Barber. (Supp. III 1CT 71-74.)

Appellant Flores then stated, "But see, you gotta [sic] make sure we don't get . . . [the] customary $200 fine for restitution." Appellant then asked DDA Levine to ask the court to have restitution reduced to $200. DDA Levine replied, "Alright, we'll see." (Supp. III 1CT 74-75.) DDA Levine then asked "How many . . . of these deals are you gonna . . . [¶] . . . try to make with me?" (Supp. III 1CT 75.) Appellant Flores stated that they had three deals and that he was willing to give DDA Levine information on two additional murders. (Supp. III 1CT 75-76.) At this point, the following exchange occurred:

> [DDA Levine]: Well, why are you giving [this information] to me? You know I'm going to use it in the case?
>
> [Appellant] Flores: So?

[DDA Levine]: Why are you giving it to me?

[Appellant] Flores: Because we want it. But anyways –

[DDA Levine]: And you're not – that doesn't bother you that I'm gonna use that against you –

[Appellant] Flores: No.

[DDA Levine]: -- and prosecute you –

[Appellant] Amezcua: We know that already.

[Appellant] Flores: We don't care. The whole thing is, we want death, right? The whole thing, we want death before, uhm – when you're incarcerated, we do a lot of weird things. More likely we're going to get hepatitis.

[DDA Levine]: Yeah.

[Appellant] Flores: We're gonna [sic] die [in] what, 20 years? We ain't gonna [sic] make it to that chair, or that . . . bed.

(Supp. III 1CT 76.) DDA Levine explained the charges to appellants Amezcua and Flores, gave them discovery, and discussed other trial matters. At one point, appellant Flores asked for the autopsy photographs because he could "look [at them] all day. Anything with bullet holes." (Supp. III 1CT 78-85.)

2. March 28, 2002, Recording

On March 21, 2002, appellants Amezcua and Flores had another meeting with the DDA Levine. Detective Kerfoot was also present. (Supp. III 1CT 88.) DDA Levine asked appellants Amezcua and Flores, "[W]ould you want to work – give us some information on cases you've been involved in." Appellant Flores answered affirmatively. DDA Levine then stated,

> Okay. I have a little check list. The only thing I . . . need to verify for you guys, so we're comfortable talking to you is, like I've said before, all this stuff can be used against you in these

> conversations. You understand that? You said last time you really didn't care. I don't think you care now. Uhm, the other thing I need to tell you is that you could have a right to a lawyer present . . . and you don't have to talk to us. I mean, your request is to talk to us. That's why we're here.

(Supp. III 1CT 92.) Appellant Flores stated that appellants Amezcua and Flores only needed was assurances that their statements would only implicate themselves, stating, " Like I said from the beginning, I will only state what I did. He will only state what he did." Appellant Flores explained, "Because that's for our own thing for later on, so when we have to show our paperwork, it won't say, 'Well, I told on him.'" (Supp. III 1CT 92.) Appellant Flores stated that he did not want to talk about Renteria or appellant Flores's mother. (Supp. III 1CT 93.) Detective Kerfoot stated that they had not bothered appellant Flores's mother. Appellant Flores stated that appellants Amezcua and Flores had decided to give the prosecution information on two additional murders. (Supp. III 1CT 93.)

Appellants Amezcua and Flores stated that they wanted to talk to the prosecution and understood their right to have a lawyer present. (Supp. III 1CT 93-95.) Appellants Amezcua and Flores stated that they would be fighting the Redlands case. Appellant Flores explained that they wanted to "go to another county jail, meet new people, kick back, enjoy ourselves, spend like two years out there [in Redlands], boom, and then go to death row." (Supp. III 1CT 95-96.)

Later, appellant Amezcua asked, "So how much of a guarantee can we have on the restitution though?" (Supp. III 1CT 99.) DDA Levine answered,

> I don't -- personally, . . . think that's such a major issue, but I don't wear the black robe *(laughing)*. I'm not a judge. But I . . . can't imagine me going to a judge and saying, "Hey, you know, they talked to us about two cases, alright. Here's our reports on that. One of the things we told them was we would do everything we could to get 'em [sic] a $200 restitution instead of

> $10,000 restitution." And all I can tell you is I'll make my best efforts to do it. Now, if . . . we tell him, "Hey, their conversations helped us solve two murders and we . . . have independent evidence that says they're good for it," and all that, and I don't see a judge balking at that at all, because . . . what does it cost any judge really? Nothing.

(Supp. III 1CT 99.) Afterwards, the following exchanged occurred:

> [Appellant] Amezcua: If . . . we figured this stuff, right, if we gonna get . . . tried –
>
> [Appellant] Flores: Yeah, yeah.
>
> [Appellant] Amezcua: -- on these charge[s]?
>
> [Appellant] Flores: Yeah, to anything that definitely can't plead guilty, you have to do a penalty phase and have to take you to court.
>
> [Appellant] Amezcua: No, I'm talking about the –
>
> [Appellant] Flores: But, they'll use –
>
> [Appellant] Amezcua: -- for these murders.
>
> [Appellant] Flores: They'll – yeah. They'll use those ones.

(Supp. III 1CT 100.) DDA Levine explained that, on the two additional murders, he would file the charges and either obtain an indictment by grand jury or conduct a preliminary hearing. Afterwards, DDA Levine stated that he would join all the murders in one case and would not use the additional murders just at the penalty phase. DDA Levine then stated, "But what I'm saying is I think, from what I understand, you guys wanted to go down with what you really did and it to be accurate." (Supp. III 1CT 100.) Appellant Flores replied, "Well, we wanted to . . . give you a couple more." DDA Levine asked, "These two. And there's more. You told me there was more." Appellant Flores answered, "Well, we're figuring this. When we go up . . . there, we might give up another one, you know." (Supp. III 1CT 101.)

Appellants Amezcua and Flores asked about Barber. DDA Levine explained that she was given "use immunity" and that he would "push" for a shorter sentence for her. (Supp. III 1CT 101-105.)

Appellants Amezcua and Flores then detailed the April 11, 2000, shooting (Supp. III 1CT 106-110; Supp. III 1CT 134-135) and the May 25, 2000, shooting (Supp. III 1CT 110-116).

Later, appellant Flores explained that they enjoyed being at "Pomona Superior" and enjoyed the ride to court. They did not want to be tried in downtown Los Angeles. (Supp. III 1CT 128-130.) Appellant Flores explained that they wanted to "sit here, right, and when we spend five years here doing nothing and hanging out and enjoying ourselves -- . . . ." (Supp. III 1CT 131.)

Later, appellant Flores stated, "[W]hen we go to court, . . . I'm going to ask for 30 days to reevaluate my cases before I can enter a plea or anything. Is that cool?" DDA Levine had no objections. (Supp. III 1CT 161.) Appellant Flores stated that he could have "put a better defense" at the preliminary hearing because he found a lot of mistakes made by the prosecution. (Supp. III 1CT 166.) The discussion then turned to appellants's law library privileges and other trial matters. (Supp. III 1CT 167-174.)

3. The Trial Court's Denial

Appellants Amezcua and Flores moved to exclude evidence of the conversation on the ground that its admission would violate the advisement requirement in *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]), that appellants's confessions were induced by promises of leniency, and that admission of the conversations violated their rights to remain silent and to counsel pursuant to section 866.5. (3RT 869-871; 11RT 2675-2677; 8CT 1835-1842; 9CT 2201-2204.) The trial court denied the motion, finding that appellants were "bragging" during the conversation

and "were very proud and very interested in wanting to know if [DDA] Levine had found evidence of the other cases." (3RT 871.) The trial court found that appellant Amezcua and Flores's statements were voluntary, explaining:

> It is unique in the court's experience. That normally investigations are conducted with suspects where suspects are reluctant to talk about what happened. Here, this is 180 degrees from that normal situation. Here you have the defendants encouraging the prosecution to find additional evidence of additional crimes that they have committed.
>
> I think it's clear that these statements were volunteered and spontaneous. And frankly it gives the court great confidence in what [DDA] Levine testified to as to the meeting on February 8th that was not tape-recorded, that the defendants wanted to explain to him they were involved in other crimes.
>
> Frankly, I am aware of some situations where people sit down with investigators and unburden themselves of having done crimes in the past. That does not seem to be the tenor with which the defendants here address the prosecutor. This was more in the nature of taking credit and being proud of these past criminal deeds and seeing if the prosecutor could find them and actually helping them to find them.

(3RT 873.) The trial court also found that the March 28, 2002, interview did not violate *Miranda*, stating:

> Regarding the waiver issue -- I am turning now to the March 28th conversation -- I think that it is certainly sufficient for the waivers. I am not sure it was even necessary under these circumstances given the defendants' clear interests in sharing this information with the people.
>
> You have experienced defendants -- experienced defendants in the criminal justice system. They were well aware of their rights. They were acting pro per. And I think that the admonition of rights was more than sufficient. And so my ruling is to allow all statements played by the defense -- the defendants to [DDA] Levine -- and that would include the February 8th statement, although the prosecution has agreed not to use that statement in their case in chief at the trial.

(3RT 873-874.) Later, appellants renewed their motion to exclude the tape, stating:

> It would be on the 5th and 6th Amendment, that there was no *Miranda*. That the statement was coerced. That the statement was given through threats and promises. That the statement violated their rights as pro per and actually the second statement they may not have even been pro per anymore because they were held to answer at prelim.
>
> If there was a conflict between [DDA] Levine and the district attorney's office and his prosecution of this case, the D.A. should be recused and for all of those reasons and all the reasons stated in argument, we would be objecting to the tape as violative of our client's due process and constitutional rights.

(11RT 2635-2636.)

4. Sentencing

At sentencing, DDA Levine requested that the trial court impose "a less than maximum restitution fine." (14RT 3252.) DDA Levine explained:

> Yes, Your Honor, and that is specifically pursuant to conversations that I had with the defendants where they admitted two murders that were presented at trial, that they had actually requested that the district attorney's office do something in terms of restitution for them. I am keeping my word and I had told them at the time, that it would be up to the court, but that I would make my best efforts to see that on the restitution fine itself, that they receive a $200 restitution fine, and I am honoring my word now.

(14RT 3252-3253.) The trial court replied, "And I am inclined to honor that request." (14RT 3253.) Later, the trial court imposed a restitution fine in the amount of $200. (14RT 3266, 3274.)

B. Appellants Amezcua and Flores Have Forfeited Their Claim

At trial, appellants Amezcua and Flores objected to the admission of the conversations on the grounds that their admission would violate the

advisement requirement in *Miranda*, that appellants's confessions were induced by promises of leniency, and that the conversations violated their rights to remain silent and to counsel pursuant to section 866.5. (3RT 869-871; 8CT 1835-1842; 9CT 2201-2204.) Although appellants Amezcua and Flores argued that their confessions were involuntary because they were induced by a promise by DDA Levine to try to gain a minimum restitution fine (8CT 1840-1841 [promise to gain the minimum prosecution fine was an illegal promise and inducement]; 9CT 2203-2204 ["promise of restitution formed motivating cause for the March 28, 2002 confession"]), they did not argue that the statements were inadmissible as statements made during plea negotiations. Thus, this claim has been forfeited. (Evid. Code, § 353, subd. (a) [a judgment can be reversed because of an erroneous admission of evidence only if "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . . ."]; see e.g., *People v. Rundle* (2008) 43 Cal.4th 76, 116, 120-121, 125-126 [because the defendant's arguments on appeal are not the same as those raised in the trial court, the claims have been forfeited], overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22]; *People v. Polk* (2010) 190 Cal.App.4th 1183, 1194 ["unless a defendant asserts in the trial court a specific ground for suppression of his or her statements to police under *Miranda*, that ground is forfeited on appeal, even if the defendant asserted other arguments under the same decision"].)

Attempting to avoid the forfeiture, appellants contend that they raised this issue to the trial court through the same reasoning, but "without specific references to Evidence Code section 1153 and section 1192.4." (Amezcua AOB 146; Flores AOB 101.) Appellants are mistaken. The purpose of excluding statements made during plea negotiations is "'to promote the public interest by encouraging the settlement of criminal cases

without the necessity of a trial.'" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1404, quoting *People v. Sirhan* (1972) 7 Cal.3d 710, 745, overruled on other grounds in *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 593 fn. 7.) This requires an analysis of whether a challenged statement was a "bona fide offer" to plead guilty. In contrast, the determination of whether a confession was voluntary requires an analysis of whether the defendant's will was "'overborne at the time he confessed.'" (*People v. Maury* (2003) 30 Cal.4th 342, 404, quoting *Lynumn v. Illinois* (1963) 372 U.S. 528, 534 [83 S.Ct. 917, 9 L.Ed.2d 922].) Thus, these claims are not the same because they are based on different legal theories.

C. The Statements Made to DDA Levine on February 21, 2002, and March 28, 2002, Were Not Made During Bona Fide Plea Negotiations

Assuming that their claim has not been forfeited, it should be denied because appellants and DDA Levine were not engaged in bona fide plea negotiations. As a matter of constitutional due process, the government is obligated to honor its promises of immunity that are used to elicit incriminating statements from a defendant. (*People v. Quartermain* (1997) 16 Cal.4th 600, 620.) Further, even without a use-immunity promise, by operation of law, statements made during plea negotiations are immunized from use at trial if the case is not resolved by a plea agreement. (*People v. Tanner* (1975) 45 Cal.App.3d 345, 350-352; *People v. Scheller* (2006) 136 Cal.App.4th 1143, 1149; Pen. Code, § 1192.4; see *People v. Macias* (1997) 16 Cal.4th 739, 750.) Section 1192.4 prohibits introduction into evidence of pleas that are not accepted by the prosecuting attorney and approved by the trial court. Evidence Code section 1153 prohibits the introduction of evidence of guilty pleas that are later withdrawn and offers to plead guilty. In order to effectuate the purpose of Evidence Code section 1153 and Penal Code section 1192.4, these sections are construed to include admissions

made in the course of bona fide plea bargaining negotiations. (*People v. Tanner, supra*, 45 Cal.App.3d 345, 351- 352; see *People v. Magana* (1993) 17 Cal.App.4th 1371, 1376 [plea negotiations immunity requires "bona fide plea negotiations"]; *People v. Posten* (1980) 108 Cal.App.3d 633, 648; *People v. Cummings, supra,* 4 Cal.4th at pp. 1317-1318.)

1. The February 21, 2002, Conversation Was Not a Plea Negotiation

Simply put, DDA Levine and appellants Amezcua and Flores were not engaged in plea negotiations. Rather, they were "engaged in . . . a cat and mouse exchange" and gave hints DDA Levine about their unsolved murders. (See 3RT 872.) At the beginning of the February 21, 2002, conversation, DDA Levine wanted information about the "Redlands case." However, to DDA Levine's surprise, appellant Flores wanted to discuss "new," uncharged murders. Appellant Flores then gave DDA Levine hints about the Diaz murder. (Supp. III 1CT 49, emphasis added.)

Before any mention of restitution, appellants Amezcua and Flores told DDA Flores that they did not want anything in exchange for the information about the additional murders. DDA Levine asked appellant Flores, "Why do you want me to make all these murders on you?" (Supp. III 1CT 50.) Appellant Flores responded, "Because I enjoy staying here . . . ." (Supp. III 1CT 50.) DDA Levine then asked appellants Amezcua and Flores if they wanted anything in exchange for the information, stating: "You don't have a thing for me or anything?" Appellant Flores responded, "Nah, nah, we just – we think you're cool, you know. And then after the trial we'll give you another one." DDA Levine replied, "You can give me another murder that you did?" Appellant Flores states, "Another one." DDA Levine asked, "Why?" Appellant Flores states, "Why not?" (Supp. III 1CT 51.)

Later, after DDA Levine made it clear that this case warranted the death penalty, appellant Flores told DDA Levine about another murder that DDA Levine "can't have." (Supp. III 1CT 51-52.) To DDA Levine's surprise, appellants Amezcua and Flores stated that they committed an additional murder in Los Angeles County, and the charges had already been filed with a different deputy. (Supp. III 1CT 51-53.)

It was only after they provided details to the two uncharged murders when appellant Amezcua asked, "Can we talk about restitution?" (Supp. III 1CT 60.) Appellant Flores explained that a lower restitution amount would make it easier for them to purchase a television in prison. (Supp. III 1CT 61-62.)

However, even after appellant Amezcua asked about receiving lower restitution, appellants again made it clear that they did not want anything in exchange for the information, as follows:

> [DDA Levine]: Why do you wanna [sic] give all this stuff [information]?
>
> [Appellant] Amezcua: We don't - - care.
>
> [Appellant] Flores: It doesn't matter.
>
> [Appellant] Amezcua: Your job is to convict us.
>
> [Appellant] Flores: . . . yeah, convict us. You'll get the stripes, we just smile and look good.

(Supp. III 1CT 70.)

Afterwards, appellant Flores asked DDA Levine to make sure that they receive a lower restitution fine. However, DDA Levine was non-committal and replied, "Alright, we'll see." (Supp. III 1CT 74-75.) DDA Levine then asked "How many . . . of these deals are you gonna [sic] . . . [¶] . . . try to make with me?" (Supp. III 1CT 75.) Appellant Flores stated that they had three deals and was willing to give DDA Levine information on

two additional murders. (Supp. III 1CT 75-76.) At this point, DDA Levine again asked appellants why they were providing him with this information and the following exchange occurred:

> [DDA Levine]: Well, why are you giving [the information] to me? You know I'm going to use it in the case?
>
> [Appellant] Flores: So?
>
> [DDA Levine]: Why are you giving it to me?
>
> [Appellant] Flores: Because we want it. But anyways –
>
> [DDA Levine]: And you're not – that doesn't bother you that I'm gonna use that against you –
>
> [Appellant] Flores: No.
>
> [DDA Levine]: -- and prosecute you –
>
> [Appellant] Amezcua: We know that already.
>
> [Appellant] Flores: We don't care. The whole thing is, we want death, right? The whole thing, we want death before, uhm – when you're incarcerated, we do a lot of weird things. More likely we're going to get hepatitis.
>
> [DDA Levine]: Yeah.
>
> [Appellant] Flores: We're gonna die [in] what, 20 years? We ain't gonna make it to that chair, or that . . . bed.

(Supp. III 1CT 76.)

Thus, the record demonstrates that the conversation with DDA Levine on February 21, 2002, was not a plea negotiation. The statements made during the meeting were not made with the understanding that would not be used against appellants. (*People v. Posten* (1980) 108 Cal.App.3d 633, 647-648 [the defendant's offers to plead guilty were admissible when the offer were made to the police "were not made in the course of bona fide plea negotiations but were merely unsolicited admissions by the defendant *without any understanding* that they would be inadmissible"], emphasis

added; see also *People v. Leonard, supra*, 40 Cal.4th at p. 1404 [the defendant's "in-court outburst declaring that he was guilty was not a 'bona fide offer to plead guilty,' but simply an 'unsolicited admission'"], citations omitted.)

DDA Levine advised appellants that their statements could be used against them. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1317-1318 [finding that the defendant's statements during an interview with the prosecutor were not made during the course of plea negotiations and stating "[i]f there was any doubt as to that nature of the interview the express advice that the statement would be used against [the defendant] was adequate to warn him and his attorney that the prosecutor intended to use [the defendant]'s statement at trial."].)

DDA Levine made it clear that he was seeking the death penalty and would not consider a lower penalty. (Supp. III 1CT 51-52.) Appellants's statements indicated that they understood that DDA Levine would "convict" them and get his "stripes." (Supp. III 1CT 70). Appellants Amezcua and Flores stated that they knew that their statements would be used against them and that they did not care. (Supp. III 1CT 76.)

Moreover, appellants told DDA Flores that they did not want anything in exchange for the information about the additional murders and had no intention of pleading guilty. (See *People v. Leonard, supra,* 40 Cal.4th at p. 1404 [the defendant "did not say he wanted to enter a plea of guilty; that is, to formally admit that he had committed each of the charged crimes. Rather, he said he *was* guilty, without explaining what he was guilty of. No plea negotiations were underway, and to exclude statements of this kind would not encourage the settlement of criminal cases."].) Thus, the record reflects that this was not a plea negotiation.

2. The March 28, 2002, Conversation Was Not a Plea Negotiation

Likewise, the March 28, 2002, conversation was not a plea negation. In the beginning of the conversation, DDA Levine told appellants Amezcua and Flores "like I've said before, all this stuff can be used against you in these conversations." (Supp. III 1CT 92.) Thus, it is clear from the conversation that appellants Amezcua and Flores understood that their statements could be used against them.

However, appellants did not care because they wanted to take credit for the murders. Appellants Amezcua and Flores only wanted assurances that their statements would only be used against themselves, stating, "Like I said from the beginning, I will only state what I did. He will only state what he did." Appellant Flores explained, "Because that's for our own thing for later on, so when we have to show our paperwork, it won't say, 'Well, I told on him.'" (Supp. III 1CT 92.) Appellants Amezcua and Flores requested in that they not be asked about Barber, Renteria, or appellant Flores's mother. (Supp. III 1CT 93.) After DDA Levine and Detective Kerfoot agreed, appellant Flores stated that they had decided to give them information on two additional murders. (Supp. III 1CT 93.)

Afterwards, appellant Amezcua asked, "So how much of a guarantee can we have on the restitution though?" (Supp. III 1CT 99.) DDA Levine informed appellants that he would ask the trial court for a lower restitution fine and that he thought the trial court would grant such a request. However, DDA Levine made it clear the trial court decided the restitution fine and that he did not "wear the black robe." (Supp. III 1CT 99.)

Later, DDA Levine asked appellants, "But what I'm saying is I think, from what I understand, you guys wanted to go down with what you really did and it to be accurate." (Supp. III 1CT 100.) Appellant Flores replied, "Well, we wanted to . . . give you a couple more. . . . [¶] . . . [¶] . . . But

we're just satisfied with these two." (Supp. III 1CT 101.) Appellants Amezcua and Flores then detailed the April 11, 2000, shooting (Supp. III 1CT 106-110; Supp. III 1CT 134-136) and the May 25, 2000, shooting. (Supp. III 1CT 110-116.)

At sentencing, DDA Levine requested that the trial court impose "a less than maximum restitution fine" because appellants "admitted two murders that were presented at trial" and "had actually requested that the district attorney's office do something in terms of restitution for them." DDA Levine stated that he was "keeping my word" to make his "best efforts to see that on the restitution fine itself, that they receive a $200 restitution fine . . . ." (14RT 3252-3253.) The trial court honored that request (14RT 3253) and imposed a restitution fine in the amount of $200. (14RT 3266, 3274).

Thus, the record again indicates that appellants and DDA Levine were not engaged in plea negotiations. Appellants understood that their statements were going to be used against them. Appellants asked that DDA Levine not question them about Barber or Flores's mother before agreeing to provide information about the two murders. When appellants asked about a receiving a lower restitution fine, DDA Levine made it clear that only the trial court had the ability to grant such a request. Thus, the record reflects that this was not a plea negotiation.

Appellants Amezcua's and Flores's reliance on *People v. Tanner*, *supra*, 45 Cal.App.3d 345, is misplaced because that case is clearly distinguishable. (Amezcua AOB 153-155; Flores AOB 106-108.) In *Tanner*, the prosecution introduced two letters written by the defendant who was awaiting trial: one to the deputy district attorney handling the case, and one to the district attorney. (*Tanner*, *supra*, 45 Cal.App.3d at p. 348.) In the letters, the defendant complained that the deputy district attorney was biased against the defendant and had not offered him a fair

plea bargain and stated that the defendant did not "'claim to be completely innocent.'" (*Ibid.*) The record contained ample evidence that bona fide plea bargaining was being conducted, including a statement in one of the letters that the defendant was "'unhappy with the deal offered to me,'" the defendant's testimony that the deputy district attorney "'offered'" the defendant a plea agreement, and defense counsel's representation that the parties were "'in the process of plea bargaining'" when the defendant wrote the letters. (*Id.* at pp. 352-353.)

Here, in contrast, there was no evidence that DDA Levine and appellants were engaged in bona fide plea negotiations. DDA Levine rejected the idea that appellants Amezcua and Flores would receive anything but the death penalty. Appellants Amezcua and Flores never offered to plead guilty or sought reduction in their possible sentences -- they wanted to receive the death penalty. They intended to go to trial on the charges and understood that their statements were going to be used against them.

Appellants simply volunteered information about the murders without asking for anything in exchange with respect to either the substantive charges or sentences. In fact, they were aware that the information that they were offering about the murders would lead to additional charges and additional penalties, but they nonetheless did so. To appellants, it was already a foregone conclusion that they would be convicted and sentenced to death. Even after asking about the possibility of receiving a lower restitution fine so they could buy a television in prison, appellants made clear that they did not want anything in exchange for the information they were providing because they "didn't care." Thus, appellants's request for a lower restitution fine was not a term bargained for during bona fide plea negotiations.

Appellants also argue that, in context, their statements to DDA Levine were made during the course of plea negotiations -- particularly, that the statements were made in an effort to receive a lower restitution fine. (Amezcua AOB 147-152; Flores AOB 101-105.) It appears that appellants have misread the record. A plea negotiation is the process of obtaining a negotiated settlement. (See *People v. West* (1970) 3 Cal.3d 595, 604 [during a plea bargain, the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged]; *Tanner, supra*, 45 Cal.App3d at p. 352.) As detailed above, it is clear that that appellants were not offering to plead guilty in exchange for a lower restitution fine. Appellants wanted to go to trial and did not express any interest in pleading guilty. (See *People v. Sirhan, supra*, 7 Cal.3d 710, at pp. 745-746 [stating that the "obvious purpose of the statutes is to promote the public interest by encouraging settlement of criminal cases without the necessity of trial"].) Appellants consistently stated that they did not want anything in return for the information they provided the prosecution. Appellants agreed to provide information to DDA Levine if he did not ask them about Barber or Flores's mother. Although DDA Levine stated he would ask the trial court for a lower restitution fine, he made it clear that it was not his decision.

Appellants have merely taken their request for a lower restitution fine out of context in an attempt to have this Court construe their conversations with DDA Levine as plea negotiations. However, this was not a plea negotiation. Appellants's admissions to the murders were not contingent on receiving a lower restitution fine. Rather, appellants were bragging to DDA Levine about all the murders they committed and wanted to take credit for them. As appellants told the prosecutor, "You'll get the stripes, we just smile and look good." (Supp. III 1CT 70; cf. *People v.*

Magana (1993) 17 Cal.App.4th 1371, 1375-1378, [finding that the trial court erred when it found that the defendant's letter stating that he would accept a "good deal" were made during bona fide plea negotiations because, in context, the statements were "braggadocio, not a statement by an individual seriously interested in a plea bargain"].) They merely requested that DDA Levine make an effort to ensure that they receive a restitution fine in the amount of $200. DDA Levine honored this request. (14RT 3252-3253.) The trial court imposed a restitution fine in the amount of $200. (14RT 3274.) To "exclude statements of this kind would not encourage the settlement of criminal cases." (*People v. Leonard, supra*, 40 Cal.4th at p. 1404.) Thus, the statements were properly admitted at trial and were not made during plea negotiations.

V. APPELLANTS AMEZCUA AND FLORES HAVE FAILED TO SHOW THAT THEIR SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED BY THE ADMISSION OF DR. SCHEININ'S TESTIMONY AND REGARDLESS, ANY ERROR IN THE ADMISSION WAS HARMLESS

Arturo Madrigal was shot and killed on May 25, 2000. (7RT 1702-1703, 1705, 1708.) Two days later, on May 27, 2000, Dr. Carrillo, a Deputy Medical Examiner at the Los Angeles Coroner's Office, performed an autopsy of Madrigal. (7RT 1736.) On July 4, 2000, appellants Amezcua and Flores were arrested. (10RT 2373-2374, 2443.) On December 19, 2000, when the original complaint was filed, appellants Amezcua and Flores were not charged with Madrigal's murder. (1RT 209-231.) On March 28, 2002, appellant Amezcua and Flores admitted to murdering Madrigal. (Supp. III 1CT 110-113, 173.) On January 22, 2003, in an amended in formation, appellants Amezcua and Flores were charged with Madrigal's murder. (7CT 1785-1787.)

Before trial, the prosecution intended to call Dr. Carrillo as a witness. However, on the day that Dr. Carrillo was scheduled to testify, March 2,

2005, he was unavailable because his wife had a baby. Thus, the prosecutor stated that the coroner's office was going to send another coroner that day to "testify off the autopsy report." (7RT 1732-1733.) Appellants Amezcua and Flores did not state an objection to another coroner testifying off the autopsy report. (7RT 1732-1733.) The autopsy report was not admitted into evidence.

Dr. Lisa Scheinin testified at trial. She reviewed an autopsy report for Madrigal prepared by Dr. Carrillo. (7RT 1736.) Dr. Scheinin testified that Dr. Carrillo determined that the cause of Madrigal's death was a gunshot wound to the head and the manner of death was a homicide. (7RT 1738-1740.) Dr. Scheinin provided Dr. Carrillo's observations of the gunshot wound as follows:

> [Dr. Carrillo] described [the bullet] as entering the left side of the face just in front of the ear, then traveling left to right upward, and front to back through the head causing a severe brain injury that consisted of going through the cerebellum, and more importantly, severing the brain stem and hitting the inside of the skull on the right side, and a bullet was recovered from that area.

(7RT 1739.) Dr. Scheinin further explained that

> . . . the cerebellum has various functions including balance, but the brain stem is far more important. All of the relay centers for the basic life reflexes such as heart beat and respiration are centered in the brain stem. So severing the brain stem would result in a very rapid death.

(7RT 1740.) Dr. Scheinin then stated that severing the brain stem would not cause an "instantaneous [death], but close to it." (7RT 1740.) Afterwards, Dr. Scheinin described two illustrations and one photograph that depicted the location of the gunshot wound, which was included in the report. (7RT 1740-1744; Peo. Ex. 19.) Dr. Scheinin's testimony consisted of approximately 12 pages of transcript. (See 7RT 1736-1747.) Appellants Amezcua and Flores did not object in any way to Dr. Scheinin's testimony.

Appellants Amezcua and Flores now argue that the trial court improperly admitted Dr. Scheinin's testimony. Relying on *Crawford v. Washington* (2004) 541 U.S. 36, 42 [124 S.Ct. 1356, 158 L.Ed.2d 177] ("*Crawford*"); *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S. Ct. 2527, 174 L. Ed. 2d 314], and *Bullcoming v. New Mexico* (2011) __ U.S. __ [131 S. Ct. 2705, 180 L. Ed. 2d 610], they claim that Dr. Scheinin's testimony should not have been admitted because she did not actually perform the autopsy of Madrigal and that the results of the autopsy were testimonial evidence. As such, appellants contend that the admission of the Dr. Scheinin's testimony was in violation of the Confrontation Clause. (Amezcua AOB 113-136; Flores AOB 115-142.) As fully briefed below, appellants's Confrontation Clause challenge was forfeited by their failure to object to Dr. Scheinin's testimony at trial on this constitutional basis. Moreover, although it is unclear whether the admission of Dr. Scheinin's testimony regarding Dr. Carrillo's opinion on Madrigal's cause of death may have been error, the admission of Dr. Scheinin's description of objective facts about the condition of Madrigal's body was proper. Thus, even assuming that Dr. Carrillo's opinion on Madrigal's cause of death was testimonial, any error in admitting the testimony was harmless given the overwhelming evidence supporting appellants's convictions for the murder of Madrigal, as well as the minimal influence the Dr. Scheinin's testimony even had on that conviction.

A. Appellants Amezcua and Flores Have Forfeited Their Claim

"'No procedural principle is more familiar to [the United States Supreme Court] than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]" (*United States v. Olano* (1993) 507 U.S. 725,

731 [113 S.Ct. 1770, 123 L.Ed.2d 508].) This principle is codified in California Evidence Code section 353 as follows: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . . ." "Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence. [Citations.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 853-854.)

The contemporaneous objection rule applies to claims of state and federal constitutional error. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 320, fn. 10.) A claim that the introduction of evidence violated the defendant's rights under the Confrontation Clause must be presented to the trial court for decision or it is forfeited on appeal. (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1028, fn. 19; *People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14.) In *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. 305, the United States Supreme Court stated, "The defendant always has the burden of raising his Confrontation Clause objection . . . ." (*Id.* at p. 327.) Also, "[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." (*Id.* at 314, fn. 3.)

Here, the record shows that appellants did not raise a Confrontation Clause objection or any other objection to Dr. Scheinin's testimony at trial. (See Amezcua AOB 118-119; Flores AOB 134-136.) Because appellants did not object to the admission of Dr. Scheinin's testimony on confrontation grounds, their constitutional challenge was not preserved for

appellate review. (See *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1028, fn. 19; *People v. Burgener*, *supra*, 29 Cal.4th at p. 869; *People v. Catlin*, *supra*, 26 Cal.4th at p. 138, fn. 14.)

Appellants Amezcua and Flores argue that their Confrontation Clause claim has not been forfeited because there was no satisfactory reason for their counsels to fail to object to Dr. Scheinin's testimony. (Amezcua AOB 140-142; Flores AOB 134-136.) In assessing claims of ineffective assistance of trial counsel, a reviewing court considers whether counsel's representation "fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) A reviewing court presumes that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Accordingly, the defendant bears the burden of establishing constitutionally inadequate assistance of counsel. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.)

It has been observed by this Court that failure to object will seldom establish ineffective assistance. (*People v. Williams* (1997) 16 Cal.4th 153, 215.) "[C]ompetent counsel may often choose to forgo even a valid objection. '[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal.' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1197; see also *People v. Hillhouse* (2002) 27 Cal.4th 469, 502.)

Here, counsels could have reasonably decided not to object to Dr. Scheinin's testimony. As discussed below, it was uncontested that Madrigal had died as a result of bullet wound to the head. In fact, when appellant Flores described the shooting, he stated, "Because he stopped, we stopped, and I go boom, *domed* him." Appellant Flores then stated, "I'm telling you, he got, I believe, one to the face area, one to, I believe, would be the neck area." (Supp. III 1CT 116, italics added.) Thus, trial counsel may have decided not to object to Dr. Scheinin's testimony because of the relative unimportance of the testimony and in order to prevent delays in the trial.

Moreover, appellants Amezcua and Flores cannot show that they were prejudiced by any alleged error in admitting Dr. Scheinin's testimony. "Generally, . . . prejudice must be affirmatively proved. [Citations.] 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) As set forth below, appellants Amezcua and Flores were not prejudiced by the admission of Dr. Scheinin's testimony because it was uncontested that Madrigal died as a result of a gunshot wound to the head and overwhelming evidence established this.

B. Assuming the Issue Had Been Preserved, There Was No Confrontation Clause Violation

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" (*Crawford, supra*, 541 U.S. at p. 42.) In *Crawford*, the United States Supreme Court held that the confrontation

clause bars the prosecution's introduction of "testimonial" out-of-court statements against a criminal defendant unless the witness is unavailable at trial and the defendant had a prior opportunity for cross-examination. (*Id.* at p. 68.) The core class of testimonial statements covered by the Confrontation Clause includes the following:

> [E]x parte in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

(*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 310, quoting *Crawford*, *supra*, 541 U.S. at pp. 51-52.)

Key cases since *Crawford* have focused on the question of whether written reports documenting scientific testing are "testimonial." In *People v. Geier* (2007) 41 Cal.4th 555, this Court rejected the defendant's *Crawford*-based challenge to the testimony of the prosecution's D.N.A. expert who opined that the defendant's D.N.A. matched the victim's D.N.A., based on testing and a report by another analyst. (*People v. Geier*, *supra*, 41 Cal.4th at pp. 594-596, 607.) This Court explained that "a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial." (*Ibid.*) Applying this test, this Court determined the D.N.A. report was not testimonial because it did not describe a past fact but rather represented "a contemporaneous recordation of observable events." (*Id.* at p. 605.)

Subsequent to *Geier*, the United States Supreme Court issued its decision in *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. 305, in which

it considered whether documents "reporting the results of forensic analysis" were testimonial and therefore subject to the defendant's right to confrontation. (*Id.* at p. 309.) In that case, the trial court, pursuant to Massachusetts law, admitted into evidence (without accompanying testimony) certain "'certificates of analysis' showing the results of the forensic analysis performed on the seized substances." (*Id.* at p. 308.) The documents at issue "were sworn to before a notary public by analysts" at a state laboratory and reported that the seized evidence contained cocaine. (*Ibid.*) A majority of the high court found the certificates were testimonial because they were "quite plainly affidavits" and "the prosecution may not prove an element of its case by sworn certificate without providing live testimony of the signatory at trial or showing that the witness was unavailable and the defense was given a prior opportunity for cross-examination." (*Id.* at p. 310, 312.)

Two years after *Melendez-Diaz*, the high court again held that a laboratory analyst's certificate was a testimonial statement in *Bullcoming v. New Mexico*, *supra*, 131 S.Ct. 2705. The court found the Confrontation Clause was violated when the prosecution introduced into evidence a certificate containing both the results of a forensic analysis, as well as a representation that those results are reliable, without eliciting the in-court testimony of the analyst and making him or her available for cross-examination by the defendant. (*Id.* at 2710, 2713; 2720 (Sotomayor, concurring)). The court explained that another analyst who did not participate in or observe the test on the defendant's sample was an inadequate substitute or surrogate for the analyst who performed the test. (*Id.* at p. 2715.) In making this determination, the *Bullcoming* court reiterated:

> To rank as "testimonial," a statement must have a "primary purpose" of "establishing or proving past events potentially

> relevant to later criminal prosecution. Elaborating on the purpose for which a "testimonial report" is created, we observed in *Melendez-Diaz* that business and public records "are generally admissible absent confrontation . . . because -- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -- they are not testimonial."

(*Bullcoming v. New Mexico, supra,* 131 S.Ct. at 2714, fn. 6.) Thus, the court determined that, in the absence of an explanation for the analyst's absence or a chance for earlier cross-examination by the defendant, the prosecution was required to present testimony from the analyst who made the report. (*Id.* at 2714.)

Most recently in *Williams v. Illinois* (2012) __ U.S. __ [132 S.Ct. 2221, 183 L.Ed.2d 89], a plurality of United States Supreme Court found that a D.N.A. laboratory report relied upon by a testifying expert was not testimonial hearsay for Confrontation Clause purposes. The Court explained that an expert may recount out-of-court statements for the limited purpose of explaining the assumptions upon which his or her opinion is based without implicating the Confrontation Clause. (*Id.* at p. 2228.) The high court distinguished the laboratory reports in *Melendez-Diaz* and *Bullcoming* from the laboratory report in *Williams* because the report in *Williams* did not have the "primary purpose of accusing a targeted individual of engaging in criminal conduct[.]" (*Id.* at 2242.) The Court clarified that the "[i]ntroduction of the reports in [*Melendez-Diaz* and *Bullcoming*] ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial." (*Id.* at 2243.) A report that is not prepared for the primary purpose of obtaining evidence against a targeted individual is not testimonial in nature. "Under these circumstances, there was no 'prospect of fabrication' and no incentive to produce anything other than a scientifically sound and reliable profile." (*Id.* at pp. 2243-2244.)

In light of the "quartet of cases," referring to *Crawford*, *Melendez-Diaz*, *Bullcoming*, and *Williams*, this Court recently reexamined the meaning of "testimonial" within the context of the Confrontation Clause in three California cases. (See *People v. Lopez* (2012) 55 Cal.4th 569; *People v. Dungo* (2012) 55 Cal.4th 608; *People v. Rutterschmidt* (2012) 55 Cal.4th 650.) *Dungo* is most pertinent here.

In *Dungo*, as here, the prosecutor presented the expert testimony of a pathologist who did not personally perform the autopsy of the decedent. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 613.) Rather, the testifying pathologist, Dr. Robert Lawrence, testified as to the victim's cause of death based upon his review of the autopsy report and the accompanying photographs prepared by Dr. George Bolduc, the pathologist who performed the autopsy. At trial, Dr. Lawrence independently opined that the victim died from "asphyxia caused by strangulation." In support of his opinion, he pointed out that the victim had "'hemorrhages in the neck organs consistent with fingertips during strangulation'" and "'pinpoint hemorrhages in her eyes,'" which indicated a lack of oxygen. (Id. at p. 614.) He further noted "'the purple color of [the victim's] face," the "'absence of any natural disease that can cause death,'" and the victim bit her tongue shortly before she died. (*Ibid.*) Dr. Lawrence also testified the victim's hyoid bone was not fractured, which suggested she was strangled for "'more than two minutes.'" (*Ibid.*) He explained that the victim could have died sooner if her hyoid bone had been fractured. (*Ibid.*) Dr. Lawrence did not disclose to the jury Dr. Bolduc's conclusions as to the victim's cause of death, nor was Dr. Bolduc's autopsy report admitted into evidence. (*Id.* at p. 619.) Thus, the issue presented in *Dungo* was "whether Dr. Lawrence's testimony about [the] objective facts [contained in the

autopsy report] entitled defendant to confront and cross-examine Dr. Bolduc." (*Ibid.*)[13]

This Court explained in *Dungo*, "[T]estimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution." (*People v. Dungo*, *supra*, 55 Cal.4th at p. 619.)

Concerning the "formality or solemnity" component, this Court determined the portion of an autopsy report that merely documents objective facts is not testimonial in nature. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 619.) "[S]tatements, which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions." They are similar "to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment." (*Id.*, citing *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 312, fn. 2 ["medical reports created for treatment purposes . . . would not be testimonial under our decision today].) Indeed, "[t]he process of systematically examining the decedent's body and recording the resulting observations is thus one governed primarily by medical standards rather than by legal requirements of formality and solemnity." (*People v. Dungo*, *supra*, 55 Cal.4th at p. 624 (conc. opn. of Werdegar, J.).) This Court concluded that "Dr. Lawrence's description to the jury of objective facts about the condition of [the] victim['s] body, facts he derived from Dr. Bolduc's autopsy report and its

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[13] This Court did not decide whether the autopsy report itself was testimonial or whether a pathologist's recorded conclusions as to cause or manner of death are testimonial. (See *Dungo*, *supra*, 55 Cal.4th at p. 622, concurring .)

accompanying photographs, did not give [the] defendant a right to confront and cross-examine Dr. Bolduc." (*Id.* at p. 621.)

As to the "primary purpose" component, this Court noted that autopsies are not limited to criminal investigation and prosecution. (*People v. Dungo, supra*, 55 Cal.4th at p. 621.) Rather, autopsies reveal "the circumstances, manner, and cause" of certain types of death, and autopsy reports serve many important purposes. (*Id.* at pp. 620-621.) For instance, an autopsy report may be useful in a wrongful death action, an insurance policy coverage determination, or provide answers to a grieving family. (*Id.* at p. 621.) Thus, this Court concluded:

> [C]riminal investigation was not the primary purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes. The presence of a detective at the autopsy and the statutory requirement that suspicious findings be reported to law enforcement do not change that conclusion. The autopsy continued to serve several purposes, only one of which was criminal investigation. The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial. [Citation.]
>
> In summary, Dr. Lawrence's description to the jury of objective facts about the condition of [the] victim['s] body, facts he derived from Dr. Bolduc's autopsy report and its accompanying photographs, did not give [the] defendant a right to confront and cross-examine Dr. Bolduc. The facts that Dr. Lawrence related to the jury were not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment's confrontation right, and criminal investigation was not the primary purpose for recording the facts in question.

(*People v. Dungo, supra*, 55 Cal.4th at p. 621.)

Here, like the pathologist in *Dungo*, Dr. Scheinin testified to the objective factual observations made by Dr. Carrillo of Madrigal's physical condition, i.e. that the bullet severed Madrigal's brain stem (7RT 1739), and gave a independent opinion of the cause of Madrigal's cause of death

by explaining that severing the brain stem would cause a rapid death (7RT 1740). Thus, these statements were properly admitted pursuant to *Dungo*.

However, unlike the pathologist in *Dungo*, Dr. Scheinin also testified to Dr. Carrillo's opinion and conclusions on the cause of Madrigal's death that were contained in the autopsy report. Respondent submits that, in this case, the autopsy report, including Dr. Carrillo's opinion and conclusions, was not testimonial because it was prepared before appellant Amezcua and Flores were suspects in Madrigal's murder.

In *Dungo*, the attendant circumstances support an argument that the autopsy report prepared with the primary purpose of accusing the defendant of a crime. The defendant was a suspect at the time the autopsy report was prepared, an investigator was present during the autopsy, and the pathologist had been told of defendant's confession before the autopsy report was written. (*Dungo*, *supra*, 55 Cal.4th at p. 632 (conc. opn. of Chin, J.).) In this case, the autopsy report was plainly not prepared for the primary purpose of accusing a targeted individual. (See *Williams v. Illinois*, *supra*, 132 S.Ct. at pp. 2242-2243 [noting that in all but once case in which the United States Supreme Court found a Confrontation Clause violation the statements at issue involved statements "having the primary purpose of accusing a targeted individual of criminal conduct" and "involved formalized statements"].) The autopsy report was prepared two days after Madrigal's murder on May, 27, 2000. (7RT 1736; *Williams*, *supra*, 132 S.Ct. at p. 2251 (conc. opn. of Breyer, J.) ["[a]utopsies . . . are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial" and "are typically conducted soon after death"].) Appellants Amezcua and Flores were not suspects in Madrigal's murder until March 28, 2002, when they detailed the facts of the murder to DDA Levine. (See Supp. III 1CT 110-113, 173.) There is no indication in the record that a

criminal investigator was present during the autopsy. (See 7RT 1729, 1736-1747.) Thus, because the autopsy report was not created for the purpose of targeting appellants Amezcua and Flores as perpetrators of a crime and not made for "'the primary purpose of creating an out-of-court substitute for trial testimony,'" its admissibility does not violate the Confrontation Clause. (*Williams v. Illinois*, *supra*, 132 S.Ct. at pp. 2243 [emphasizing that a statement not made for the primary purpose of creating an out-of-court substitute for trial testimony does not concern the Confrontation Clause and noting that the forensic reports in *Melendez-Diaz* and *Bullcoming* "ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial"]; see *Dungo*, *supra*, 55 Cal.4th at p. 621 [finding that the criminal investigation was not the primary purpose for the autopsy report's description of the victim's body, but one of several purposes].)

C. Any Purported Error Was Harmless

Even assuming Dr. Scheinin's testimony ran afoul of the Confrontation Clause, the error was harmless beyond a reasonable doubt in light of the overwhelming evidence that Madrigal died as a result of a gunshot wound to the head. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Davis* (2009) 46 Cal.4th 539, 620 [applying *Chapman* to *Crawford* claim].) The *Chapman* harmless-error inquiry requires consideration of "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431, 89

L.Ed.2d 674.) As the majority of the high court observed in *Melendez-Diaz*:

> We of course express no view as to whether the error was harmless . . . . In connection with that determination, however, we disagree with the dissent's contention that only an analyst's testimony suffices to prove the fact that the substance is cocaine. Today's opinion, while insisting upon retention of the confrontation requirement, in no way alters the type of evidence (including circumstantial evidence) sufficient to sustain a conviction.

(*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 329, fn. 14, citation, internal quotation marks, and brackets omitted.)

In this case, the evidence that Madrigal died as a result of gunshot wound to the head was overwhelming and uncontested. The most damning evidence, of course, was appellants Amezcua's and Flores's admission to the prosecutor and investigating officer that they murdered Madrigal (Supp. III 1CT 110-113) and appellant Flores's statement that he "domed" Madrigal and shot Madrigal in the face (Supp. III 1CT 116). Furthermore, Gutierrez testified that a car pulled alongside Madrigal's car and open fired on the vehicle. When the gunfire stopped, Gutierrez ran for help. He knew that Madrigal had been shot because he could hear blood dripping. (8RT 2028-2033.)

Baldwin Park Police Officer Mike Hemenway responded to the scene of the shooting. When he arrived, he saw Madrigal in the Blazer inside the car with blood coming out of his ears and head. (7RT 1703.) It was obvious to Officer Hemenway that Madrigal was dead. (7RT 1705.) Photographs of Madrigal's dead body inside the Blazer were admitted into evidence. (7RT 1708-1709; Peo. Exs. 12a-12d.)

Moreover, even if Dr. Scheinin was not entitled to testify to Dr. Carrillo's findings and conclusions contained in the autopsy report, Dr. Scheinin was allowed to testify how Madrigal's injuries were fatal. Dr.

Scheinin testified that she was trained to conduct autopsies and determine causes of death. (7RT 1736-1738.) Dr. Scheinin testified to Dr. Carillo's description of Madrigal's gunshot wounds, including the fact that a bullet had severed Madrigal's brain stem. (7RT 1739.) When asked about the function of the brain stem, Dr. Madrigal testified that the severing of Madrigal's brain stem would cause a rapid death. (7RT 1740.) Thus, in light of the overwhelming evidence that the cause of Madrigal's death was a gunshot wound to the head, that the killing was a homicide, and the minimal importance of Dr. Carrillo's testimony because the cause of death was hardly an issue at trial, any possible error in was harmless beyond a reasonable doubt.

VI. THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT DID NOT PREJUDICE APPELLANTS AMEZCUA AND FLORES

During the beginning of his closing argument at the guilt phase, DDA Levine stated,

> My concern, and I will tell you right now here my concern is okay, you see one murder. You look at that, wow. You see two murders, wow.
>
> Three, wow.
>
> Four, then the fifth murder you see and you start to think, wow, people really do this. This isn't a movie. This is not a moive. This is not a television show, but what worries me is over time, you can get what? More pictures to look at it, the more you can get numb to it.
>
> This is not their world. But people like you being good enough to serve as jurors who promise to do your best, remember what justice is. Remember what it must have been like to be one of their victims being shot and choking and trying to get your last breath out while your blood is gurgling in your lungs. What it must be like to be one of those people.

> That's what this case is about. The infliction of that kind of pain and cold hearted killing for what? For nothing. For ego. For pleasure. For it to feel like they are big shots and hardcore gang members. And they are going to enhance the reputation of their gang.

(13RT 2861-2862.) Later, when speaking about appellant Amezcua's assault of Jing Huali (count 27) at the Santa Monica Pier, the prosecutor stated,

> What do we know? Jing Huali, while she was laying down, the defendant shot her. An assault with a firearm. I point a loaded gun at your head, the assault is complete. That's it; it's done. You do not have to fire. [¶] I put my left arm around and I put a gun to your head, a loaded gun, completed, done proven. I bet you would feel assaulted if someone had a loaded gun pointed at your head. [¶] She was shot.

(13RT 2895-2896.) Appellants Amezcua and Flores contend that these statements constituted two instance of misconduct by inviting the jury to view the case through the eyes of the victim. (Amezcua AOB 178-187; Flores AOB 137-149.) Respondent disagrees and submits that the claim has been forfeited. In any event, the prosecutor's comments did not render the trial fundamentally unfair, nor was it reasonable probable that appellants would have received a more favorable result absent the alleged instances of misconduct.

A. Appellants Amezcua and Flores Have Forfeited Their Misconduct Claims

In order to preserve a claim of prosecutorial misconduct, a defendant must, in a timely fashion and on the same ground, request an assignment of misconduct and also request that the jury be admonished to disregard the alleged impropriety. (*People v. Hinton* (2006) 37 Cal.4th 839, 863.) "In the absence of a timely objection the claim is reviewable only if an admonition would not have otherwise cured the harm caused by the

misconduct." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1146, citing *People v. Earp* (1999) 20 Cal.4th 826, 858.)

At trial, appellants Amezcua and Flores failed to object to the prosecutor's statements on misconduct grounds and failed to request that the jury be admonished to disregard the impropriety. (13RT 2861-2862, 2895-2896; Amezcua AOB 183; Flores AOB 146.) Appellants Flores argues that the claim has not been forfeited because "the trial court, and not the defense attorney, has the primary duty to curb prosecutorial misconduct." (Flores AOB 141.) Moreover, appellant Flores contends that a prosecutor's remarks that inflame the passions of the jury could not be cured by an admonition. (Flores AOB 141-142.) However, appellant Flores fails to explain how an admonition by the trial court to decide the case on the evidence and not on the basis of sympathy, fear, and passion would not have cured the alleged impropriety. (*People v. McDermott* (2002) 28 Cal.4th 946, 1001 [finding the defendant's seven misconduct claims were forfeited when she failed to show that an objection or request for admonition would be futile or would not cure the harm].) Thus, appellants Amezcua and Flores have forfeited their misconduct claims. (*People v. Redd* (2010) 48 Cal.4th 691, 742-743 [finding that the defendant had forfeited his claims that various statements by the prosecutor were intended to appeal to the jurors' passion or prejudice for failing to object to the statements on that basis].)

To avoid forfeiture, however, appellants Amezcua and Flores argue that their counsels were ineffective by failing to object and request an admonishment. (Amezcua AOB 183-185; Flores AOB 145-147.) To show that trial counsel's performance was constitutionally defective, appellants must prove that their counsel's performance fell below the standard of reasonableness, and that they prejudiced by the deficient performance. (*Strickland*, 466 U.S. at pp. 687–688.) It is the defendant's burden to prove

the inadequacy of trial counsel, and defendant's burden is difficult to satisfy on direct appeal. Competency is presumed unless the record affirmatively excludes a rational basis for trial counsel's choice. (*People v. Ray* (1996) 13 Cal.4th 313, 349; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260.) A reviewing court will reverse on the ground of inadequate assistance on appeal only if the record affirmatively discloses no rational tactical purpose for counsel's act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) If the record sheds no light on the reasons for counsel's actions, a claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Here, as explained below, because it was not reasonably probable that, absent the alleged misconduct, a result more favorable to appellants would have occurred. Thus, appellants cannot show that they were prejudiced by their counsels's failure to object to DDA Levine's statements on misconduct grounds.

B. The Prosecutor's Comments Did Not Render the Trial Fundamentally Unfair and Appellants Cannot Show That They Were Prejudiced by the Comments

Under federal law, to support a claim of prosecutorial misconduct, appellant has the burden to demonstrate that the prosecutor's alleged misconduct "'comprise[d] a pattern of conduct "so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process."'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214–1215; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Harris* (1989) 47 Cal.3d 1047, 1084, citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642–643 [94 S.Ct. 1868, 40 L.Ed.2d 431]; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *People v. Benavides* (2005) 35 Cal.4th 69, 108.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair under federal law, is

prosecutorial misconduct under state law if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] The ultimate question to be decided is, had the prosecutor refrained from the misconduct, is it reasonably probable that a result more favorable to the defendant would have occurred.'" (*People v. Haskett* (1982) 30 Cal.3d 841, 866, quoting *People v. Strickland* (1974) 11 Cal.3d 946, 955; see also *People v. Gray* (2005) 37 Cal.4th 168, 215-216.)

When the claim of prosecutorial misconduct focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) When conducting this inquiry, a reviewing court "'do[es] not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*Ibid.*, citations omitted.)

"'It is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." [Citation.]' [Citations.]" (*People v. Redd, supra*, 48 Cal.4th at pp. 742-743.) "It has long been settled that appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial." (*People v. Fields* (1983) 35 Cal.3d 329, 362.) Specifically, "'a prosecutor may not invite the jury to view the case through the victim's eyes, because to do so appeals to the jury's sympathy for the victim.'" (*People v. Lopez* (2008) 42 Cal.4th 960, 969-970, quoting *People v. Leonard, supra*, 40 Cal.4th at p. 1406.)

Here, appellants Amezcua and Flores cannot show that they were prejudiced by the prosecutor's passing remarks, given the overwhelming

evidence of guilt. (See, e.g., *People v. Leonard, supra*, 40 Cal.4th at p. 1407 [the prosecutor's improper passing remark asking the juror to imagine the thoughts of the victims in their last seconds of life[14] was harmless given the overwhelming evidence]; see *People v. Mendoza* (2007) 42 Cal.4th 686, 704 ["the prosecutor's request that the jury imagine the fear defendant's victims experienced was clearly improper. However, the misconduct was not prejudicial, as his comments were brief and he did not return to the point. Moreover, this was not a close case; evidence of defendant's guilt was overwhelming."].)

The first challenged statements consisted of approximately five lines of transcript. (13RT 2862, lines 3-7 ["Remember what it must have been like to be one of their victims being shot and choking and trying to get your last breath out while your blood is gurgling in your lungs. What it must be like to be one of those people."]; see Amezcua AOB 179; Flores AOB 138.) The second challenged statement consisted of approximately three lines of transcript. (13RT 2895, lines 6-8 ["I bet you would feel assaulted if someone had a loaded gun pointed at your head."]; see Amezcua AOB 179; Flores AOB 138.) Furthermore, the jury was instructed

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[14] The improper passing remarks consisted of the following statements:

> "You know, Ms. Lange talk [sic] about in connection with the Round Table Pizza, imagine yourself, put yourself there. I ask you to put yourself there, also. [¶] Imagine in that last millisecond before the lights go out, when you hear the report of the gun, when you feel the wetness, which they do not know but we would know, the small vapor of blood that is blown out the back or the side of their head and they fall to the floor, and in their last moment of consciousness, they think, I misjudged this man."

(*People v. Leonard, supra*, 40 Cal.4th at p. 1407, fn. 7.)

> You must not be influenced by pity for or prejudice against a defendant. You must not be biased against a defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than not guilty. You must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and a defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

(13RT 2940; 17CT 4505.) "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; see *Boyde v. California* (1990) 494 U.S. 370, 384 [110 S.Ct. 1190, 108 L.Ed.2d 316] [arguments of counsel "generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law."].) Thus, in light of the overwhelming evidence that appellants Amezcua and Flores had committed the crimes, including their own admissions, and the brevity of the challenged statements, any alleged error was harmless.

VII. UNDER THE CIRCUMSTANCES OF THE CASE, THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY WITH CALJIC NO. 3.00

Appellant Amezcua claims that the trial court erroneously instructed the jury with CALJIC No. 3.00,[15] which states that an aider-abettor is

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[15] CALCRIM No. 3.00, as given, provided:
Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals
(continued...)

"equally guilty" of a crime committed by a direct perpetrator. He claims that CALJIC No. 3.00 is defective because it failed to inform the jury that an aider-abettor can be guilty of a lesser homicide crime than the perpetrator. (Amezcua AOB 91-114.) Specifically, appellant Amezcua claims that he "was entitled to have the jury correctly instructed that his liability for [the first degree murders of Diaz (count 42) and Madrigal (count 45) and the attempted willful, deliberate, and premeditated murder of Gutierrez (count 46)] rested on his personal mens rea." (Amezcua AOB 110-111.)

Respondent disagrees and submits that this claim has been forfeited because appellant Amezcua failed to ask the trial court to modify or clarify CALJIC No. 3.00. (Amezcua AOB 94; 12RT 2795-2798; 13RT 2958.) Specifically, given that the "equally-guilty" instruction was generally an accurate statement of law, the failure to request modification or clarification thus forfeited this contention. Alternatively, the claim fails because CALJIC No. 3.00's "equally-guilty" language was an accurate statement of the law in general and, under the circumstances of this case, was not misleading. In any event, any alleged instructional error was harmless.

A. Appellant Amezcua Has Forfeited His Claim

When discussing the jury instructions about aiding and abetting, the trial court stated that it felt that it was appropriate to instruct the jury with "[CALJIC No.] 3.00, principals and [CALJIC No.] 3.01 aiding and abetting, to define that." (12RT 2795.) Appellants Amezcua and Flores

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(...continued)

include: [¶] 1. Those who directly and actively commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission of the crime.

(17CT 4515.)

did not object to the jury being instructed with CALJIC No. 3.00. (See 12RT 2795-2798.)

The evidence showed that appellants Amezcua and Flores committed two drive-by shootings -- one on April 11, 2000, and the other on May 25, 2000. During closing argument, the prosecutor discussed the aiding and abetting instructions in regards to the drive-by shootings, stating:

> What's [appellants Amezcua's and Flores's] roles in this case. From here [appellant] Amezcua is the driver. [Appellant] Flores, we know, is the shooter. What did we know? [Appellant] Flores, he does not like to drive.
>
> I want you to understand that both are to be considered principals in this crime. The driver is just as culpable as the shooter in a drive-by shooting. What are they known as? They are typically the wheel man. Basically, principals are defined as follows: Persons who are involved in committing a crime are referred to . . . as principals in that crime.
>
> Each principal, regardless of the extent or manner of participation is equally guilty.
>
> Principals include those who directly and actively commit the act constituting the crime, and those who aid and abet the commission of the crime.
>
> A driver aids and abets, and you will hear the instruction for aiding abetting now is actually when a person with knowledge of the unlawful purpose with the intent to commit or encourage the crime by act or advice aids or encourages the crime. Those who aid and abet are equally guilty, a driver is equally guilty.

(13RT 2868.) Appellants Amezcua and Flores did not object to this argument. (13RT 2868.) The trial court later instructed the jury with CALJIC Nos. 3.00 and 3.01. Appellants Amezcua and Flores did not object to these instructions. (13RT 2958; see 17CT 4515-4516.)

In *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 ("*Samaniego*"), the court considered whether a challenge to CALCRIM No. 400[16] (the CALCRIM analogue to CALJIC No. 3.00) had been forfeited by the defendant's failure to object to the instruction in the trial court. The *Samaniego* court stated, "Generally, '"[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."'" (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1163, citations omitted.) The court stated that the pattern instruction "is generally an accurate statement of law," but misleading in exceptional cases where the jury can find the codefendants acted with differing mental states. (*Ibid.*) Therefore, because the instruction at issue on appeal was generally accurate and only potentially misleading, appellants were "obligated to request modification or clarification and, having failed to have done so, forfeited this contention." (*Ibid.*; see also *People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 503; *People v. Hart* (1999) 20 Cal.4th 546, 622.)

Here, both appellants failed to object to CALJIC No. 3.00 or to request appropriate clarifying or amplifying language. Accordingly, appellants have forfeited this claim. (*People v. Mejia* (2012) 211 Cal.App.4th 586 [the defendants forfeited their claim because CALJIC No.

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[16] Former CALCRIM No. 400 provided, in pertinent part, "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is [equally] guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." However, CALCRIM No. 400 has been amended to remove the "equally guilty" language. (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1119, fn. 5.)

3.00, in most cases, is a correct statement of law and they failed to request modification or clarification below]; *People v. Lopez*, *supra*, 198 Cal.App.4th at pp. 1118-1119 [because CALCRIM No. 400, as given, "was generally accurate, but potentially incomplete in certain cases, it was incumbent on [the defendant] to request a modification if she thought it was misleading on the facts of this case. Her failure to do so forfeits the claim of error."]; *People v. Canizalez* (2011) 197 Cal.App.4th 832, 849 [finding CALCRIM No. 400 to be "correct in law" and that the defendant was obligated to object to the instruction if he believed that the instruction was inaccurate to the facts presented in his case]; *People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1163; but see *People v. Nero* (2010) 181 Cal.App.4th 504, 517-518 [finding CALJIC No. 3.00 and CALCRIM No. 4.00's "equally guilty" language to be misleading "even in unexceptional circumstances"].)

B. Given the Circumstances of the Case, the Trial Court Did Not Err When It Provided CALJIC No. 3.00 to the Jury

Assuming the issue has been preserved, there was no instructional error. As discussed above, CALJIC No. 3.00 is generally an accurate statement of law. (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-119; *People v. Canizalez*, *supra*, 197 Cal.App.4th at p. 849; *Samaniego*, *supra*, 172 Cal.App.4th at p. 1163.) Here, given the circumstances of this case, CALJIC No. 3.00 was not misleading. In addition to CALJIC No. 3.00, the trial court also instructed the jury with CALJIC No. 3.01, which states, in pertinent part:

> "A person aids and abets the commission of a crime when he or she: [¶] (1) with knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages, or instigates the commission of the crime."

(17CT 4516; 13RT 2958.) Thus, although the jury was told that an aider and abettor is "equally [as] guilty" as the direct perpetrator, it was also instructed that an aider and abettor must (1) *know* of the perpetrator's unlawful purpose, (2) *intend* to facilitate or assist that unlawful purpose, and (3) *act* in some manner that does assist or facilitate the unlawful purpose. The jury was also instructed with CALJIC No. 17.00 as follows:

> You must decide separately whether each of the defendants is guilty or not guilty. If you cannot agree upon a verdict as to both the defendants, but do agree upon a verdict as to any one of them, you must render a verdict as to the one as to whom you agree.

(13RT 2977; 17CT 4534.)

By instructing the jury with CALJIC Nos. 3.00, 3.01, and 17.00, the trial court effectively told the jury that, to find appellant Amezcua guilty of the drive-by shootings, it must separately find that appellant Amezcua was *aware* of appellant Flores's unlawful purpose and, through act or advice, *intentionally* promoted the accomplishment of that purpose. CALJIC Nos. 3.01 advised the jury that it must base its decision of each defendant's liability not simply on the mental state of the direct perpetrator of the crime, but on that defendant's state of mind and the extent to which he knew of and intended to facilitate the purpose contemplated by the perpetrator. CALJIC No. 17.00 properly instructed the jury to separately decide the level or degree of homicide responsibility for appellant Amezcua and Flores. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 220, citing *People v. Lewis* (2001) 25 Cal.4th 610, 649 ["in assessing a claim of instructional error, we consider the entire charge to the jury, and not simply the asserted deficiencies in the challenged instruction"].)

Moreover, the evidence did not suggest that appellants Amezcua and Flores might have had differing states of mind and therefore might be guilty of different crimes. Rather, the evidence showed that appellants Amezcua

and Flores had targeted Diaz because they thought he was a gang member (Supp. III 1CT 122-123 [appellant Flores stating that he did not kill Gonzales because Gonzales did not appear to be a gang member]) and that appellant Amezcua had driven past Diaz and circled back around toward Diaz (Supp. III 1CT 135). The evidence further showed that appellants Amezcua and Flores were "driving around [their] neighborhood looking for people to kill" when they committed the drive-by shooting involving Madrigal and Gutierrez. (Supp. III 1CT 114.) Moreover, appellant Flores stated that they committed the drive-by shootings because "it's territorial" and that they were "trying to better the gang and instill fear to the rest of the gangs." (Supp. III 1CT 138-140.) Both appellants Amezcua and Flores admitted to the murders of Diaz and Madrigal. Appellant Amezcua did not stat that he did not share in appellant Flores's intent to kill Diaz or Madrigal. (Supp. III 1CT 50, 106-116, 134-135.) Thus, given the facts in this case, CALJIC No. 3.01 adequately clarified any ambiguity created by the "equally guilty" language of CALJIC No. 3.00. The charge as a whole, therefore, did not mislead the jury. (*People v. Mejia*, *supra*, 211 Cal.App.4th at pp. 624-625 [finding that CALJIC Nos. 3.00 and 3.01 did not mislead the jury and effectively instructed the jury to base each defendant's liability on that defendant's state of mind and noting that the evidence did not suggest that the defendants had differing states of mind].)

C. Any Alleged Error Was Harmless

In any event, any instructional error was harmless. (*Chapman*, *supra*, 386 U.S. 18; *People v. Gonzales* (2011) 51 Cal.4th at p. 941, fn. 28 [discussing the *Samaniego* court's harmless error analysis, and finding "*Samaniego* does not aid defendant"]; *People v. Canizalez*, *supra*, 197 Cal.App.4th at pp. 850, 852-853 [any "equally-guilty" language error was harmless under *Chapman*].) There was ample evidence demonstrating that

appellant Amezcua drove the car in the drive-by shootings with intent to kill Diaz, Madrigal, and Gutierrez.

Specifically, the evidence showed that appellants Amezcua and Flores committed the drive-by shootings because they thought that Diaz and Madrigal were gang members. Both appellants Amezcua and Flores admitted committing the murders to DDA Levine. Appellant Amezcua never stated that he did not share in appellant Flores's intent to kill, and there is no indication that appellant Amezcua harbored a different intent. Again, appellant Amezcua stated that he was "driving around [their] neighborhood looking for people to kill" when they committed the drive-by shooting involving Madrigal and Gutierrez. Appellant Flores also stated that Madrigal was "not supposed to be in the neighborhood." (Supp. III 1CT 114.) Appellant Flores then explained "People should not be there [in my neighborhood]." Appellant Flores continued, "That's my neighborhood man. And it's territorial. Uh, Wolf pees on every spot that's his . . . ." (Supp. III 1CT 139-140.) At trial, Detective Reynoso opined that appellants Amezcua and Flores perceived Madrigal to be rival gang member in territory claimed by ESBP. (11RT 2259-2563.) Thus, ample evidence showed that appellant Amezcua drove the car with the intent to find rival gang members to murder.

Moreover, appellant Flores described the murder of Diaz and stated that he did not kill Gonzales because Gonzales did not appear to be a gang member. (Supp. III 1CT 122-123.) Appellant Flores further stated that appellant Amezcua had driven past Diaz and circled back around toward Diaz, before the drive-by shooting. (Supp. III 1CT 135.) Likewise, Gonzales testified that the car used in the drive-by drove past them and made a U-turn, before gunfire erupted. (6RT 1640-1643.) Detective Reynoso also opined that appellants Amezcua and Flores perceived Diaz and Gonzales to be rival gang member in territory claimed by ESBP.

(11RT 2259-2563.) Thus, given the strength of the evidence demonstrating appellant Amezcua drove appellant Flores around their neighborhood with the intent to kill rival gang members and circled back around so that appellant Flores could do so, any alleged error was harmless beyond a reasonable doubt.

PENALTY PHASE ISSUES

VIII. COUNSELS FOR APPELLANTS AMEZCUA AND FLORES WERE NOT INEFFECTIVE FOR ADHERING TO THEIR CLIENTS WISHES TO FORGO PRESENTING A DEFENSE AT THE PENALTY PHASE, AND THE TRIAL COURT PROPERLY DETERMINED THAT APPELLANTS HAD PERSONALLY WAIVED THEIR RIGHT TO PRESENT A DEFENSE

A. Relevant Proceedings

Appellants Amezcua and Flores requested a hearing with the trial court, which was held outside the presence of the prosecutor and jury. (12RT 2816.) Counsel for appellant Amezcua, Ezekiel Perlo, explained that he was forgoing the presentation of a defense at the penalty phase pursuant to appellant Amezcua's wishes.

Perlo stated that, throughout his representation of appellant Amezcua, appellant Amezcua indicated that he did not wish to have his family members called as witnesses in the penalty phase, "should that arise." Perlo explained that appellant Amezcua "has expanded that now to the point that he does not wish me to put on any defense, any witnesses in the course of the penalty phase." Appellant Amezcua agreed that Perlo would be allowed to prepare for the penalty phase of trial, but appellant Amezcua "would not allow [Perlo] to call any witnesses." (12RT 2817.)

Perlo stated that he prepared for the penalty phase and explained to appellant Amezcua the nature of the defense he wished to present. After the explanation, appellant Amezcua maintained that he did not want any evidence introduced on his behalf at the penalty phase. (12RT 2817.)

Perlo then explained to appellant Amezcua the risks involved with forgoing a penalty defense, i.e., that there would be "a substantial increase" in the chances that he would receive the death penalty and that a life without parole sentence would be "diminished if not eliminated." (12RT 2817.) Perlo stated that he believed that appellant Amezcua understood the risks and continued to "desire that I present nothing." (12RT 2817.)

Appellant Flores's counsel, James Bisnow, stated that appellant Flores had "the same desire." (12RT 2819.) Bisnow detailed the evidence that would be introduced at the penalty phase in appellant Flores's defense. This evidence would include calling appellant Flores's mother, sister, and stepmother as witnesses to testify to the neglect, abuse, and violence that appellant Flores was exposed to as a child. Bisnow also intended to call three expert witnesses to explain appellant Flores's cognitive disabilities. Bisnow stated that he had explained the evidence to appellant Flores, but appellant Flores stated that he did not want any witnesses called on his behalf. (12RT 2819-2820.)

Perlo also detailed the evidence that would be introduced at the penalty phase on appellant Amezcua's behalf. The evidence would include seven to ten family members that would be called as witnesses to testify to the abuse that appellant Amezcua suffered from family members and the police. In addition, Perlo would present expert testimony regarding appellant Amezcua's cognitive abilities and play the recording of the hostage negotiations. (12RT 2820-2821.)

The trial court explained to appellants Amezcua and Flores that it was required to ensure that appellants had knowingly and voluntarily waived their right to present a defense at the penalty phase, stating:

> What I am charged with doing at this stage in a situation like this is to make sure that it is very clear as to what the defendant wants, and so I am going to be asking both of you what it is you really want here.

> It's also important for me to establish that your decision is knowing and voluntarily made.
>
> In other words, we've now heard what counsel has told you about the existence of specific mitigating evidence, counsel's readiness to present it and their recommendation that it be presented.
>
> I am also charged with the responsibility of trying to persuade one or both of you to change your mind, to encourage you to consult further with your attorney before making any final decisions on this.
>
> And I am also charged with the responsibility of telling you that if you make such a decision to not put on mitigating evidence, that could result in a verdict of death, and that your decision to not put on mitigating evidence will not be a basis for a reversal of that verdict.

(12RT 2821-2822.)

The trial count then stated that it was going to speak with appellants Amezcua and Flores together and individually to ensure that "one is not influencing the other." (12RT 2822.) The trial court first spoke with appellant Flores. Appellant Flores explained his reasons for waiving his right to present a defense at the penalty phase, stating:

> If, in fact, they say that I'm guilty and I did all these crimes, I do not want my attorneys to -- how would you say -- put my family and friends or whoever on there and make it -- blame them for something I may have done, and that is my thing. [¶] I did this supposedly, or whatever they allege that I did, I did it without them. In my mind, I stand alone. I would feel incorrect and will not -- am very *adamant* about it -- will not allow anybody, nobody to get them on the stand.

(12RT 2823, emphasis added.) Appellant Flores then stated that he had made this decision when he was arrested on July 4, 2000, and that it was "[p]ractically a five-year decision." (12RT 2823.)

The trial court then spoke with appellant Amezcua. Appellant Amezcua explained:

> To the same effect that I don't want to have nobody up there crying on my behalf when I didn't think about them when I was out there. And it doesn't change the fact that I care about them, but that's my own personal thing; that it doesn't matter if 12 people know it or not. I know it. I don't have to show it to them. Whether I live or die does not really matter to me. But the thing is I am not going to be up there and have all these people try to portray me out like I am an idiot or something. I'd rather choose not to.

(12RT 2824.) Appellant Amezcua stated that he "fully" understood the consequences of his decision and that his counsel had "done a great job in defending me in the guilt phase and [preparing for] the penalty phase." (12RT 2824.) Appellant Amezcua then stated that, if Perlo would have gone against his wishes, appellant Amezcua "*would have gone pro per.*" (12RT 2824-2825.) Appellant Amezcua then explained that if he was convicted of murder, he wanted the death penalty, stating "I don't want to be in the circumstance that I took a life, I deserve to give a life back, and that's my life. It doesn't mean I am a religious person, because I am not religious. You know what I mean? But the only thing is I accept what I got coming." (12RT 2825.)

Appellant Flores acknowledged that his counsel had prepared a defense for the penalty phase and stated "[b]ut that's what I am not going to let happen." (12RT 2826.) Appellant Amezcua also acknowledged that counsel had prepared a defense for the penalty phase of trial, "absolved [counsel] from any lack of effort," and stated that waiving his right to present a defense at the penalty phase was his decision "ever since I got arrested." (12RT 2826.)

The trial court expressed concern that appellants Amezcua and Flores were giving up on their lives and putting themselves in a position where the State would kill them. Appellant Flores responded,

> I understand your feeling. I understand what you are saying, and I mean it seems to admit in an odd way, but my thing is I feel if I

> do get death, more than likely I will die on death row by natural causes of old age. So I mean, you know. I mean, there is 640 people [on death row] before me -- actually, 639 because one just got a reversal, so.

(12RT 2827.) Appellant Amezcua responded

> . . . the day that I got arrested, I had three choices: either take my own life, get arrested, or either let them do it themselves. And I knew by me taking my life was a coward way out. I will let them do it, but also, I want a fair fight. I never was going to get one, so might as well give my family an opportunity to say good-bye to me and I say good-bye to them, also, and let them understand that it's not their fault, because they blame themselves and I don't want to have them up there saying the same thing that I just said.

(12RT 2827-2828.) Appellant Flores stated that he did not want to die, "[b]ut my thing is if I do go to death row, *I am going to get a way better appeal action*. And if I were to get the L-WOP, it's going to go only so far and I ain't [sic] got the education to complete it." (12RT 2828, emphasis added.) The trial court warned appellants "you both understand that if you get a death verdict, you know that this is not going to be a grounds for reversal." (12RT 2829.) The trial court also stated:

> And the main thing is to say this: you are in control of the evidence that is offered at a penalty phase; okay? You seem to know that already, but that is the law. And even though Mr. Bisnow and Mr. [Perlo] have prepared and want to put on the mitigating evidence and they want to argue to the jury that you should not get the death penalty, you are the controlling person and you can say no, I don't want you to put that evidence on.

(12RT 2831-2832.)

Outside the presence of appellant Amezcua, appellant Flores reiterated his desire to forgo presenting a defense at the penalty phase of trial. The trial court asked appellant Flores to think about his decision and

that the trial court would ask Bisnow for appellant Flores's decision at the penalty phase. (12RT 2832-2837.)

Outside the presence of appellant Flores, appellant Amezcua reiterated his desire to forgo presenting a defense at the penalty phase of trial. The trial court asked appellant Flores to think about his decision and that the trial court would ask Perlo for appellant Amezcua's decision at the penalty phase. (12RT 2837-2842.)

At the start of the penalty phase of trial, appellants Amezcua and Flores stated that they did not want to present a defense at the penalty phase, did not want their attorneys to cross-examine the witnesses, and did not want their attorneys to present any argument. (13RT 3015-3017.) Both Perlow and Bisnow objected to forgoing a defense at the penalty phase. (13RT 3019.)

Relying on *People v. Sanders* (1990) 51 Cal.3d 471 ("*Sanders*"), the trial court stated that "you two defendants are in charge . . . [¶] . . . for the penalty phase. You really are. That's what the cases tell me." (13RT 3017.) The trial court detailed the circumstances in *Sanders*, including the fact that defense counsel only asked a few questions of the prosecution's witnesses and offered no evidence. (13RT 3018.) The trial court stated that it was "uncomfortable" with letting appellants forgo presenting a defense at the penalty phase "but that seems to be what happened in *Sanders*." (13RT 3019-3020.) Appellants Amezcua and Flores reiterated their desire to forgo presenting a defense at the penalty phase. (13RT 3020.) Bisnow and Perlo stated that they believed appellants Amezcua and Flores were sincere in their beliefs behind their decision to forgo presenting a defense at the penalty phase. (13RT 3020.)

The trial court then warned appellants that their knowing decision to forego presenting mitigating evidence, cross-examining witnesses, and presenting argument at the penalty phase "estops [them] from now claiming

an entitlement to a reversal based on those decisions." (13RT 3020-3021.) Appellants Amezcua and Flores acknowledged that they would be waiving their right to raise the issues challenging the penalty phase on appeal. (13RT 3021-3022.)

The trial court accepted "the statements of their counsel that both [appellant] Amezcua and [appellant] Flores have intended from the point of their arrest or soon after being arrested, that they thought the death penalty was the appropriate punishment." (13RT 3023.) The trial court noted the "practical considerations" that appellant Flores stated was driving this decision, which included the fact that there were "more than 600 people on death row" and "more people die on death row of natural causes than execution because of the problems "And I think this is an informed decision that they are making. And I am prepared to let them make it." (13RT 3023-3024.) The trial court then accepted appellants Amezcua and Flores's decision to forgo presenting any evidence or argument at the penalty phase. (13RT 3024.)

Later, counsel for appellants requested that the jury be instructed with proposed penalty phase jury instructions. (14RT 3195.) The trial court asked, counsel whether the proposed instructions were "with the approval of your client?" Appellant Flores stated that he objected to the proposed jury instructions and explained that the instructions were "surreptitiously slipped in without my knowledge. I been sandbagged, I believe the word is. (14RT 3195-3196.) Appellant Amezcua also objected to the proposed jury instructions. (14RT 3196.) The trial court stated that it would not give the proposed penalty phase instructions, but would include them as part of the record. (14RT 3196; 18CT 4740-4746.) Counsel for appellants stated that the defense was requesting the instructions and that it was appellants's decision to exclude them. (14RT 3196.)

B. The Trial Court Did Not Err When It Acquiescence to Appellants Amezcua's and Flores's Request to Forgo Presenting a Defense at the Penalty Phase

Relying on *Sanders*, the trial court allowed appellants Amezcua and Flores to forgoing presenting a defense at the penalty phase of trial, over the objection of their counsels. Appellant Flores contends that the "court's acquiescence to a defendant's objection to his counsel's intention to present a penalty phase defense is error because the decision of what defense to present belongs to counsel, not the client, and because a contrary rule would defeat the state's fair interest in fair, accurate, and reliable death judgments." (Flores AOB 217.) Respondent disagrees, and submits that, because appellants waived their right to present a defense, the trial court properly relied on *Sanders*, which involved an analogous situation.

In *Sanders*, the jury found the defendant guilty of first degree murder with four special circumstances. (*Sanders*, *supra*, 51 Cal.3d at p. 524.) Before the penalty phase, defense counsel explained to the trial court that the defendant wished that no mitigating evidence be presented on his behalf because the defendant could not accept a sentence of life without parole. (*Ibid.*) After observing that he was unsure whether he had the power to present mitigating evidence over the express wishes of his client, defense counsel requested that the court appoint a medical expert to examine his client. (*Ibid.*)

The trial court asked the defendant whether the defendant believed that his chances for a reversal on appeal would be enhanced if he declined to participate in the penalty phase. (*Id.* at pp. 524-525.) Defendant replied in the negative, and explained that he believed that a sentence of life without parole was unacceptable. (*Id.* at p. 525.) The court then appointed an experienced criminal defense attorney to counsel defendant about the decision and psychiatrist to examine him. (*Ibid.*)

Afterwards, the defendant did not change his mind about forgoing presenting a defense at the penalty phase. (*Ibid.*) The defendant further instructed defense counsel to refrain from cross-examining the prosecution's penalty phase witnesses and stated that he would not be addressing the jury himself. (*Ibid.*) Defense counsel explained that the defendant found both a sentence of life without parole and death to be "objectionable" and for that reason would "just as soon not present any evidence at this time." (*Ibid.*) Defense counsel conceded that he did not believe defendant's position was irrational and that he believed the defendant was sincere in his belief. (*Ibid.*)

The trial court tried one last time to persuade the defendant to change his mind, but the defendant did not relent. The prosecutor thereafter presented his penalty phase evidence and gave his closing argument to the jury. Defense counsel waived argument, and the case was submitted to the jury. (*Ibid.*)

This Court "identified two potential theories which may cast doubt on a penalty verdict when a capital defendant decides to forgo presentation of mitigating evidence at the penalty phase." First, the Court stated that the absence of mitigating evidence may undermine "'the state's interest in a reliable penalty determination.'" (*Ibid.*, quoting *Deere I.*, *supra*, 41 Cal.3d at p. 364.) Second, the Court stated that "a defense counsel's performance may be deemed constitutionally inadequate if he or she simply accedes to his client's wishes instead of 'making an independent tactical judgment about the presentation of the mitigating evidence.'" (*Sanders*, *supra*, 51 Cal.3d at pp. 525-526, quoting *People v. Williams* (1988) 44 Cal.3d 1127, 1151.) On appeal, the defendant relied on both these theories. (*Sanders*, *supra*, 51 Cal.3d at p. 526.)

As to the state's independent interest in achieving a reliable penalty verdict, this Court denied the defendant's claim and reiterated its holding that

> "[T]he required reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, *which the defendant has chosen to present.* A judgment of death entered in conformity with these rigorous standards does not violate the Eighth Amendment reliability requirements."

(*Ibid.*, quoting *People v. Bloom, supra*, 48 Cal.3d at p. 1228, footnote omitted and emphasis added.)

This Court also found that counsel does not necessarily provide constitutionally inadequate representation when he or she accedes to a client's wishes and declines to present available mitigating evidence at the penalty phase of a capital trial, "[a]t least in the absence of evidence showing counsel failed to investigate available mitigating evidence or advise defendant of its significance." (*Sanders, supra*, 51 Cal.3d at p. 526.)

This Court found that "these circumstances [did] not support a reversal of the penalty judgment." (*Id.* at p. 527.) This Court further found that the defendant's "knowing and voluntary decision to forgo his right to present mitigating evidence, cross-examine adverse witnesses, and present closing argument at the penalty phase of his trial estopped him from claiming an entitlement to a reversal based on those decisions. (*Ibid.*)

Likewise, in this case, appellants Amezcua and Flores knowingly and voluntarily decided to forgo their right to present mitigating evidence, cross-examine adverse witnesses, and present closing argument at the penalty phase. Their counsels investigated the available mitigating evidence, detailed what evidence they would have presented at the penalty

phase, advised appellants of the significance of forgoing presenting a defense at the penalty phase, but acceded to their clients's wishes. Both of their counsel also believed that appellants were sincere in their beliefs. The trial court attempted to persuade appellants to change their minds, but eventually acquiesced to appellants Amezcua's and Flores's request. The prosecution discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of the death penalty statute. The death verdict was returned under proper instructions and procedures. Thus, the jury considered the relevant mitigating evidence that appellants Amezcua and Flores had chosen to present -- none.

Appellant Flores attempts to distinguish *Sanders* because the case involved a claim of ineffective assistance of counsel. (Flores AOB 217.) Instead, appellant Flores purports to present a different claim, i.e., that the trial court's "acquiescence in a defendant's objection to his counsel's intention to present a penalty phase defense is error because the decision of what defense to present belongs to counsel, not the client, and because a contrary rule would defeat the state's fair interest in fair, accurate, and reliable death judgments." (Flores AOB 217.) However, that is what essentially occurred in *Sanders*. Defense counsel told the trial court that the defendant wished that no mitigating evidence be presented on his behalf. (*Sanders, supra*, 51 Cal.3d at p. 524.) Defense counsel was "unsure whether he had the power to present mitigating evidence over the express wishes of his client." (*Ibid.*) The defendant objected to his counsel's intention to present a penalty phase defense. (*Id.* at p. 525.) The trial court unsuccessfully attempted to persuade the defendant to change his mind and acquiesced to the defendant's wishes. (*Ibid.*) Defense counsel presented no defense at the penalty phase. (*Ibid.*) This Court reiterated its holding that the state's independent interest in achieving a reliable penalty verdict is attained, in part, when "the trier of penalty has duly considered

the relevant mitigating evidence, *if any, which the defendant has chosen to present.*" (*Id.* at p. 526, italics added.) Again, this Court found that "these circumstances d[id] not support a reversal of the penalty judgment." (*Id.* at p. 527.)

Moreover, in *Sanders*, this Court denied the claim that the trial court acquiescence to a capital defendant's request that no evidence be presented at the penalty defeated "the state's interest in fair, accurate, and reliable death judgments." (Flores AOB 217.) Again, this Court stated, "We have identified two potential theories which may cast doubt on a penalty verdict when a capital defendant decides to forgo presentation of mitigating evidence at the penalty phase." (*Sanders*, *supra*, 51 Cal.3d at p. 525.) Those theories include a claim of ineffective assistance counsel *and* that the absence of mitigating evidence may undermine "'the state's interest in a reliable penalty determination.'" (*Ibid.*) The defendant in *Sanders* relied on *both* theories. (*Ibid.*) This Court denied both claims. Thus, this Court in *Sanders* rejected the claim that a trial court's acquiescence undermined the state's interests in a reliable penalty determination. Therefore, appellant Flores's claim to the contrary must be denied.

In addition, appellant Flores contends that the trial court erred for failing to give penalty phase jury instructions that were requested by counsel, arguing that the decision was a "tactical" one. (Flores AOB 224-226.) However, "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." (*Florida v. Nixon* (2004) 543 U.S. 175, 187 [125 S.Ct. 551, 160 L.Ed.2d 565] [finding that counsel does not have the authority to consent to a guilty plea on behalf of a defendant].) "Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action." (*Ibid.*) Although matters of trial strategy and tactics rests exclusively within the discretion of

counsel, the decision whether to present a defense at all is a "fundamental" decision made by the defendant that counsel must respect. (See *Chambers v. Mississippi* (1973) 410 U.S. 284 [302, 93 S.Ct. 1038, 35 L.Ed.2d 297] ["[f]ew rights are more fundamental than that of an accused to present witnesses in his [or her] own defense"]; *People v. Cudjo* (1993) 6 Cal.4th 585, 638, [the right to be heard is essential to due process of law and includes the right to summon and examine witnesses whose testimony is expected to support the defense case]; *People v. Frierson* (1985) 39 Cal.3d 803, 812 [in a capital case, the defendant's decision to present a defense at the guilt/special circumstance phase of trial is a fundamental right and not a matter of trial tactics]; *People v. Turner* (1992) 7 Cal.App.4th 1214, 1220-1221 ["counsel may not deprive the defendant of certain fundamental rights" including the right "to not present mitigating evidence at the penalty phase of a capital trial"], citing *People v. Deere* (1991) 55 Cal.3d 705, 717 (*Deere II*); *People v. Schroeder* (1991) 227 Cal.App.3d 784, 787 [noting the "right of a criminal defendant to present a defense and witnesses on his or her behalf is a fundamental element of due process guaranteed under the Fourteenth Amendment to the United States Constitution"]; cf. *People v. Hinton* (2006) 37 Cal.4th 839, 874 [the right to separate proceeding on the prior-murder-conviction special circumstance allegation is not a fundamental right because it is statutory not constitutional].)

Here, appellants's counsels had acceded to their request to forgo presenting mitigating evidence, cross-examine adverse witnesses, and present closing argument at the penalty phase. Trial counsels's attempt to request certain pinpoint jury instructions was an unsuccessful attempt to override appellants's decision to forgo presenting a defense at the penalty phase. (See 14RT 3195-3196; 18CT 4740-4746.) Both appellants objected to these requested pinpoint jury instructions, which the trial court excluded,

and counsels stated for the record that they were requesting the instructions, but it was appellants' decision to exclude them.

Appellant Flores's reliance on *People v. Towey* (2001) 92 Cal.App.4th 880, 884, is misplaced because that case is clearly distinguishable. (Flores AOB 205.) In *Towey*, the defendant did not waive his right to present a defense. (*People v. Towey*, *supra*, 92 Cal.App.4th at p. 883.) Rather, his trial counsel made the tactical decision to forgo instructing the jury that the defendant may rely on the state of the evidence and that no inference of guilt may be drawn from the fact that the defendant did not testify. (*Ibid.*) The prosecutor requested that the defendant waive these jury instructions on the record. (*Ibid.*) The Court of Appeal found that that the right to have these instructions given to the jury is not a fundamental right that required a personal waiver from the defendant. (*Id.* at pp. 883-884.) In contrast, in this case, appellants waived their right to present a defense at the penalty phase. Their counsels's request for penalty phase instructions was not a tactical decision. Rather, it was an attempt to make a fundamental decision for their clients against their clients's wishes.

In any event, defense counsels were not entitled to pinpoint penalty phase instructions following appellants's waivers of their right to present a defense at the penalty phase. "An accused is entitled on request to nonargumentative instructions that 'pinpoint' the theory of the defense." (*People v. Webster* (1991) 54 Cal.3d 411, 443, italics omitted.) Since appellants had no defense theory at the penalty phase to "pinpoint," defense counsels's were not entitled to the requested instructions.

C. A Capital Defendant Has the Right to Self-Representation at the Penalty Phase of Trial

Before the penalty phase, appellants Amezcua and Flores were adamant in their choice to forgo presenting a penalty phase defense, which they made at the time they were arrested. (12RT 2823-2825.) In fact,

appellant Amezcua then stated that, if counsel would have gone against his wishes, appellant Amezcua "*would have gone pro per.*" (12RT 2824-2825, italics added.) Anticipating an argument that appellants could have discharged their attorneys at the penalty phase if counsels presented mitigating evidence over appellants's objections, appellant Flores contends that a capital defendant has no right to represent himself at the penalty phase. Respondent disagrees. As appellant Flores acknowledges (Flores AOB 219, fn. 40), this Court has repeatedly held that a capital defendant has the right to self-representation at the penalty phase of trial. (*People v. Blair* (2005) 36 Cal.4th 686, 736-737["We consistently have held . . . that the Sixth Amendment right to self-representation extends to the penalty phase."]; *People v. Clark* (1990) 50 Cal.3d 583, 617 [the right to self-representation recognized in *Farretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525] extends to the penalty phase of trial in a capital case].) As this Court has noted, any rule requiring defense counsel to present mitigating evidence over his client's wishes be unenforceable and self-defeating because the defendant could discharge his counsel, represent himself, and forgo presenting a defense. (See *People v. Blair*, *supra*, 36 Cal.4th at p. 737; *People v. Bloom* (1989) 48 Cal.3d 1194, 1227-1228.) Because appellant Flores provides no persuasive reason for departing from this precedent, his claim should be rejected.

D. The Failure to Present a Defense at the Penalty Phase Did Not Violate Appellants's Right to, and the State's Interest in, a Reliable Judgment of Death

Appellant Amezcua contends that the failure to present a defense at the penalty phase violated his rights to, and the State's interest in, a reliable judgment of death. (Amezcua AOB 188- 205.) Specifically, relying on Justice Stanley Mosk's concurring opinion in *Deere II*, supra, 55 Cal.3d at pp. 727-1728, appellant Amezcua argues that the trial court erred by

allowing appellants to forgo presenting a defense and that the error violated the "state's independent interest in the reliability of its death judgments requires this Court's review of the case upon a complete record." (Amezcua AOB 203.) Appellant is mistaken. This Court has repeatedly rejected the argument that the "failure to present mitigating evidence in and of itself is sufficient to make a death judgment unreliable" and held that a verdict is constitutionally reliable "when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present." (*People v. Bloom, supra,* 48 Cal.3d at p. 1228, fn. 9; see *People v. Snow* (2003) 30 Cal.4th 43, 119 [*Bloom* held that a sentence was not unconstitutionally unreliable merely because a self-represented defendant chose not to present mitigating evidence at the penalty phase]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1372[citing *Bloom* with approval]; *People v. Diaz* (1992) 3 Cal.4th 495, 566 [same].)

IX. THE TRIAL COURT DID NOT ERR WHEN IT INSTRUCTED THE JURY THAT DEATH IS A GREATER PUNISHMENT THAN LIFE WITHOUT POSSIBILITY OF PAROLE

Appellant Amezcua contends that the trial court erred when it instructed the jury that death is a greater punishment than life without the possibility of parole. Specifically, appellant Amezcua argues that California law does not support this instruction and requests that this Court reconsider its previous holdings that death is a greater punishment than life without parole under California law. (Amezcua AOB 206-224.) Respondent disagrees; this Court has repeatedly held that an instruction that death is a greater punishment than life without the possibility of parole is a

correct statement of California law. (*People v. Tate* (2010) 49 Cal.4th 635, 707 [an instruction that death is a more severe penalty than life without parole is a correct statement of law]; *People v. Harris* (2005) 37 Cal.4th 310, 361 [same].) Because appellant Amezcua provides no persuasive reason for departing from this precedent, his claim should be rejected. (*People v. Thomas* (2011) 52 Cal.4th 336, 361-362 [rejecting the defendant's argument that no California statue or court decision specifies that death is a greater penalty than life without parole].)

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

Appellants Amezcua and Flores present several challenges to the constitutionality of California's death penalty statute. (Amezcua AOB 225-262; Flores AOB 228-254.) First, appellants Amezcua and Flores argue that section 190.2, which sets forth the circumstances in which a death sentence may be imposed, is impermissibly broad. (Amezcua AOB 227-229; Flores AOB 230-231.) This Court has repeatedly rejected this argument. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1288; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Farley* (2009) 46 Cal.4th 1053, 1133.) Because appellants provide no persuasive reason for departing from this precedent, this claim should be rejected.

Appellants Amezcua and Flores next contend that section 190.3, subdivision (a), which allows the jury to find aggravation based on the "circumstances of the crime," resulted in an arbitrary and capricious imposition of the death penalty. (Amezcua AOB 229-231; Flores AOB 232-234.) This Court has repeatedly rejected this contention. (*People v. Virgil, supra,* 51 Cal.4th at p. 1288; *People v. Lee, supra,* 51 Cal.4th at p. 651; *People v. Gutierrez* (2009) 45 Cal.4th 789, 831; *People v. Williams* (2008) 43 Cal.4th 584, 648; *People v. Cook* (2007) 40 Cal.4th 1334, 1366;

People v. Harris, *supra*, 37 Cal.4th at p. 365; *People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Lewis* (2001) 26 Cal.4th 334, 394; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750] ["The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence"].) Because appellants provide no persuasive reason for departing from this precedent, this claim should be rejected.

Appellants Amezcua and Flores next contends that the trial court erred when it failed to instruct the jury that it needed to find the presence of any particular aggravating factor beyond a reasonable doubt, except for prior criminality, or that the jury had to find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors. (Amezcua AOB 232-235; Flores AOB 235-237.) This Court has rejected the argument that the reasonable doubt standard applies to capital penalty phase proceedings. (*People v. Bivert* (2011) 52 Cal.4th 96, 123-124; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 208 [reiterating the holding that that the jury is not required to find beyond a reasonable doubt that (1) the aggravating factors have been proved, (2) the aggravating factors outweigh the mitigating factors, or (3) death is the appropriate sentence]; *People v. Harris*, *supra*, 37 Cal.4th at p. 365; see *People v. Prieto*, *supra* 30 Cal.4th at p. 275; *People v. Hillhouse*, supra, 27 Cal.4th at pp. 510-511.)

Appellants Amezcua and Flores, however, argue that *Cunningham v. Washington* (2007) 549 U.S. 270, 293 [127 S.Ct 856, 166 L.Ed.2d 856] ("*Cunningham*"), *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2531, 159 L.Ed.2d 403] ("*Blakely*"), *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] ("*Ring*"), and *Apprendi v. New Jersey* (2000) 530 U.S. 466, [120 S.Ct. 2348, 147 L.Ed.2d 435]

("*Apprendi*") require that any jury finding necessary to the imposition of a death sentence must be found true beyond a reasonable doubt. Thus, they contend that the trial court erred when it failed to instruct that the jury that it may only impose the death penalty if they are persuaded beyond a reasonable doubt that the aggravating factors were present and the aggravating factors outweigh the mitigating factors. (Amezcua AOB 236-247; Flores AOB 237-247.) This Court has also held that *Cunningham*, *Blakely*, *Ring*, and *Apprendi* have not altered the conclusion that the jury is not required to find beyond a reasonable doubt that the aggravating factors have been proved and that death is the appropriate sentence. (*People v. Bivert, supra*, 52 Cal.4th at p. 124; *People v. Whisenhunt, supra*, 44 Cal.4th at p. 227; *People v. Brown, supra*, 33 Cal.4th at p. 401.) Because appellants provide no persuasive reason for departing from this precedent, this claim should be rejected.

Appellants Amezcua and Flores also contend that California's death penalty statute is constitutionally flawed because it does not require the jury to make written findings during the penalty phase of trial. Appellants argue that the lack of such a requirement makes impossible the constitutionally required meaningful review of the judgment and denies them equal protection of the law. (Amezcua AOB 247-250; Flores AOB 247-249.) This Court has repeatedly rejected this contention. (*People v. Brown, supra*, 33 Cal.4th at p. 401; *People v. Hughes* (2002) 27 Cal.4th 287, 405; *People v. Hillhouse, supra*, 27 Cal.4th at p. 510; *People v. Caitlin* (2001) 26 Cal.4th 81, 178; *People v. Kraft* (2000) 23 Cal.4th 978, 1078; *People v. Bemore* (2000) 22 Cal.4th 809, 859; *People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779.) Because appellants provide no persuasive reason for departing from this precedent, this claim should be rejected.

Appellants Amezcua and Flores further contend that the failure to provide intercase proportionality review violates their constitutional rights. (Amezcua AOB 250-252; Flores AOB 249-251.) The United States Supreme Court has held that intercase proportionality review is not constitutionally required. (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29].) Likewise, this Court has held that "[c]omparative intercase proportionality review by the trial or appellate courts is not constitutionally required." (*People v. Snow*, *supra*, 30 Cal.4th at p. 126; accord *People v. Demetrulias* (2006) 39 Cal.4th 1, 44; *People v. Blair*, supra, 36 Cal.4th at p. 753; *People v. Stitely*, *supra*, 35 Cal.4th at p. 574; *People v. Anderson*, *supra*, 25 Cal.4th at p. 602.) Because appellants provide no persuasive reason for departing from these precedents, his claim should be rejected.

Appellants Amezcua and Flores contend that the prosecution's reliance on unadjudicated criminal activity, pursuant to 190.3, factor (b), during penalty proceedings violated their constitutional rights. Further, relying on *Blakely*, *Ring*, and *Apprendi*, appellants argue that, even if permissible, the unadjudicated criminal activity could not serve as a factor in aggravation unless it was found to be true beyond a reasonable doubt by a unanimous jury. (Amezcua AOB 252-253; Flores AOB 251-252.) This Court has held that a jury may properly consider unadjudicated criminal activity at the penalty phase and need not make a unanimous finding on each instance of such activity. (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 208 ["The [death penalty] statutes are not invalid because they permit the jury to consider in aggravation, under section 190.3, factor (b), evidence of a defendant's unadjudicated offenses. [Citation.]"]; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308 [unanimous finding on unadjudicated offenses not required]; *People v. Bunyard* (2009) 45 Cal.4th 836, 861 [same]; *People v. Elliot* (2005) 37 Cal.4th 453, 488 [same].) Because

appellants provide no persuasive reason for departing from these precedents, his claim should be rejected.

Appellants Amezcua and Flores argue that California's death penalty scheme violates the Equal Protection Clause of the Fourteenth Amendment because it provides a capital defendant fewer procedural protections than a non-capital defendant. (Amezcua AOB 257-259; Flores AOB 252-254.) This Court has repeatedly rejected the argument that California's death penalty law violates equal protection principles. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243 [because capital defendants are not similarly situated to noncapital defendants, the absence in California's death penalty law of certain procedural rights provided to noncapital defendants does not violate equal protection; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1287.) Because appellants provide no persuasive reason for departing from these precedents, this claim should be rejected.

Appellants Amezcua and Flores argue that the regular use of the death penalty violates international law and the Eighth and Fourteenth Amendments. (Amezcua AOB 260-262; Flores AOB 254-256.) This Court has repeatedly rejected the claims that the death penalty violates international law or the Eighth and Fourteenth Amendments. (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1290; *People v. Lewis*, *supra*, 43 Cal.4th 415, 537-538.) Because appellants provide no persuasive reason for departing from these precedents, this claim should be rejected.

Appellant Amezcua contends that the list of potential mitigating factors with such adjectives such as "extreme" and "substantial" (18CT 4733-4734 [CALJIC No. 8.85]; § 190.3, factors (d) & (g)) violated his constitutional rights by impermissibly acting as barriers to consideration of mitigation by the jury. (Amezcua AOB 253.) This Court has repeatedly denied this argument. (*People v. Avila* (2006) 38 Cal.4th 491, 614-615; see *People v. Valencia* (2008) 43 Cal.4th 268, 310.) Because appellant

Amezcua provides no persuasive reason for departing from this precedent, his claim should be rejected.

Appellant Amezcua argues that the trial court erred when it failed to instruct the jury that the statutory mitigating factors were relevant solely as potential mitigators. (Amezcua AOB 253-256.) This Court has held that a trial court is not required to instruct that statutory mitigating factors are relevant solely as potential mitigators. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1097; see also *People v. Streeter* (2012) 54 Cal.4th 205, 268.) Because appellant Amezcua provides no persuasive reason for departing from this precedent, his claim should be rejected. Accordingly, appellants Amezcua's and Flores's constitutional challenges to California's death penalty statute must be denied.

XI. THE JUDGMENT AND SENTENCE NEED NOT BE REVERSED FOR CUMULATIVE ERROR

Appellant Amezcua contends that the cumulative effect of errors during the guilt and penalty phases requires reversal of the death verdict. (Amezcua AOB 263-264.) Respondent disagrees because there was no error, and, to the extent there was error, appellants have failed to demonstrate prejudice given the overwhelming evidence that they committed the crimes.

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

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: June 21, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General

VIET H. NGUYEN
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 41,497 words.

Dated: June 21, 2013

KAMALA D. HARRIS
Attorney General of California

VIET H. NGUYEN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Amezcua and Flores***
No.: **S133660**

I declare:

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

On June 21, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

David H. Goodwin
Attorney at Law
P.O. Box 93579
Los Angeles, CA 90093
(Counsel for Joseph C. Flores)

Janyce Keiko Imata Blair
Attorney at Law
321 Richmond Street
El Segundo, CA 90245
(Counsel for Oswaldo Amezcua)

Darren R. Levine
Deputy District Attorney
Los Angeles County District Attorney's Office
Crimes Against Peace Officers Section
320 W. Temple Street, Suite 780
Los Angeles, CA 90013

The Honorable Robert J. Perry, Judge
Los Angeles County Superior Court
Clara Shortridge Foltz Justice Center
210 West Temple Street, Department 104
Los Angeles, CA 90012-3210

Addie Lovelace
Los Angeles County Superior Court
Death Penalty Appeals Clerk
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street, Room M-3
Los Angeles, CA 90012

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Governor's Office, Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

California Courts of Appeal
Second Appellate District
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013
(hand-delivered)

On June 21, 2013, I caused thirteen (13) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at **350 McAllister Street, San Francisco, CA 94102-4979** by **Fedex.**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 21, 2013, at Los Angeles, California.

Marianne A. Siacunco
Declarant

Signature

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