IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JOHN ANTHONY GONZALES,** **MICHAEL SOLIZ,** Defendants and Appellants.	S075616 **CAPITAL CASE**

Los Angeles County Superior Court No. KA033736
The Honorable Robert W. Armstrong, Judge

RESPONDENT'S BRIEF

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

JOHN R. GOREY
Deputy Attorney General

STEVEN D. MATTHEWS
Supervising Deputy Attorney General
State Bar No. 137375

300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2367
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov

Attorneys for Respondent

DEATH PENALTY

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STATEMENT OF THE CASE

In a five-count information filed on June 30, 1997, by the Los Angeles County District Attorney's Office, appellants were charged in counts I, IV and V with murder, in violation of Penal Code section 187, subdivision (a),[1/] a serious felony within the meaning of section 1192.7, subdivision (c). It was further alleged as to count I that the offense was committed by appellants while they were engaged in the commission of a robbery, within the meaning of section 190.2, subdivision (a)(17). It was further alleged as to counts I, IV and V: (1) that the offenses charged constituted a multiple-murder special circumstance, within the meaning of section 190.2, subdivision (a)(3); and (2) that the offenses were committed to benefit a street gang, pursuant to section 186.22, subdivision (b)(4). It was further alleged as to counts IV and V that in the commission and attempted commission of the offenses, appellant Soliz personally used a firearm, within the meaning of section 12022.5, subdivision (a), also causing the offenses to become serious felonies pursuant to section 1192.7, subdivision (c)(8). In counts II and III, appellants were charged with

1. All further references are to the Penal Code unless otherwise indicated.

second degree robbery, in violation of section 211, a serious felony within the meaning of section 192.7, subdivision (c). It was further alleged as to counts II and III that the offenses were committed to benefit a street gang, pursuant to section 186.22, subdivision (b)(1). It was further alleged as to counts I, II and III that in the commission of the offenses, appellants personally used firearms, within the meaning of section 12022.5, subdivision (a), also causing the offenses to become a serious felony within the meaning of section 1192.7, subdivision (c)(8). It was further alleged as to counts I, II, III, IV and V that in the commission and attempted commission of the offenses, a principal was armed with a firearm, within the meaning of section 12022, subdivision (a)(1). (2CT 539-543, 544-548.) Appellants pleaded not guilty. (2CT 389.)

Appellant Gonzales was found guilty as charged of first degree murder in counts I, IV and V. The jury further found true as to count I the robbery special circumstance allegation pursuant to sections 190.2, subdivision (a)(17). Appellant Gonzales was further found guilty in counts II and III of second degree robbery. The jury further found true as to counts 1 through III the special allegations pursuant to sections 12022.5, subdivision (a)(1), 12022, subdivision (1), and 186.22, subdivision (b). The jury further found true as to counts IV and V the special allegations pursuant to sections 12022, subdivision (1), and 186.22, subdivision (b). The jury further found true the multiple-murder special circumstance (§ 190.2, subd. (a)(3)). (3CT 740-750, 767-771; 17RT 2412-2419.)

Appellant Soliz was found guilty as charged of first degree murder in counts I, IV and V. The jury further found true as to count I the special allegations pursuant to section 190.2, subdivision (a)(17). Appellant Soliz was further found guilty in counts II and III of second degree robbery. The jury further found true as to counts 1 through V the robbery special circumstance allegation pursuant to sections 12022.5, subdivision (a)(1), 12022, subdivision

(1), and 186.22, subdivision (b). The jury further found true the multiple-murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)). (3CT 751-756, 772-781; 17RT 2420-2427.)

The jury was deadlocked and the court declared a mistrial as to the penalty phase as to counts I, IV and V for appellant Soliz and count I as to appellant Gonzales. (3CT 827, 829; 19RT 2768-2769.)

The jury fixed the penalty for appellant Gonzales as to counts IV and V as life in state prison without the possibility of parole. (3CT 805-806, 827-828; 19RT 2770-2771.) The court imposed a sentence for appellant Gonzales of life in state prison without the possibility of parole as to count IV, and a consecutive sentence of life without the possibility of parole as to count V. The court also imposed a concurrent eight year, four month sentence on counts IV and V. (3CT 842-845; 20RT 2786-2790.) Sentencing as to counts II and III was deferred until a final determination as to appellant Gonzales' penalty on count I after a second penalty phase. (3CT 844, 849-850; 20RT 2789, 2794.)

Following the second penalty phase, the jury returned and fixed the penalty as death for appellant Soliz as to counts IV and V, and life without the possibility of parole as to count I. (4CT 950, 953, 956-957; 34RT 4518-4521.) Appellant Soliz's oral motion for a continuance was denied. (35RT 4529, 4535.) Appellant Soliz's motions to reduce the death penalty (4CT 972-976) and for a new trial (4CT 977-987) were heard and denied. (4CT 1019, 1021; 35RT 4538-4541.)

The court pronounced sentence as follows as to appellant Soliz: (1) count I: life in state prison without the possibility of parole, plus an additional and consecutive ten years for the personal use of a firearm enhancement; (2) count II: seven years in state prison, consisting of the mid-term of three years, plus four years for the section 12022.5, subdivision (a), finding, with the sentences stayed pursuant to section 654; (3) count III: seven

years in state prison, consisting of the mid-term of three years, plus four years for the section 12022.5, subdivision (a), finding, with the sentences stayed pursuant to section 654; (4) count IV: the death penalty, plus a consecutive ten years for the personal firearm use enhancement; and (5) count V: the penalty of death, plus a consecutive ten years for the personal firearm use enhancement. (4CT 1018-1024, 1055-1057, 1067-1071, 1080-1090, 1095-1096; 35RT 4568-4572.)

The second penalty phase jury returned and fixed the penalty as death for appellant Gonzales as to count I. (4CT 952, 954; 34RT 4520.) Appellant Gonzales' oral motion for a continuance was denied. (34RT 4529, 4535.) On December 18, 1998, appellant Gonzales' motions to reduce the death penalty (4CT 958-964) and for a new trial (4CT 965-971), were heard and denied. (34RT 4544, 4554-4555.) The court pronounced a death penalty judgment as to count I, plus a term of 10 years in state prison for the personal firearm use finding, with the term to run consecutively to the two consecutive terms of life without the possibility of parole as to counts IV and V. The court further sentenced appellant Gonzales to two mid-terms of three years each for the robberies in counts II and III, plus two additional mid-term sentences of four years each for the personal use of a firearm findings, with the sentences as to counts II and III stayed pursuant to section 654. (4CT 1012-1017, 1060-1061, 1067-1080, 1093-1094; 35RT 4560-4563.)

Appellants filed notices of appeal. (4CT 1025-1027; 35RT 4573-4574.) These appeals are automatic.

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution Evidence

a. The Robbery And Murder Of Lester Eaton At The Hillgrove Market (Counts I, II And III)

(i) Crime Scene Evidence And Investigation

On Friday, January 26, 1996, a dark blue Chevy Astro mini van, license plate number 3DFH725, was reported to the Los Angeles County Sheriff's Department as having been stolen from a tow yard at 354 Paseo Tesoro. (Peo. Exh. 14; 10RT 1047-1051.)

On Saturday, January 27, 1996, Dorine Ramos left her apartment in West Covina. Ms. Ramos asked Rosemary, a friend living in the same apartment complex, if she could drive her to the store. Rosemary agreed. Ms. Ramos first returned to her house and got some money. (10RT 1053-1054.) She then returned to and entered the backseat of Rosemary's car.[2/] Rosemary sat in the front passenger seat. Randy Irigoyen, Rosemary's boyfriend, drove the car. Mr. Irigoyen went by the nickname "Bird."[3/] (Peo. Exh. 15; 10RT 1055-1056, 15RT 1909.) Mr. Irigoyen claimed membership in the Perth Street gang. (Peo. Exh. 15; 15RT 1909.) Mr. Irigoyen complained about Rosemary offering to give Ms. Ramos a ride, told Ms. Ramos she should get a car, and told her he knew some cars he could get "cheap." (10RT 1059.) Ms. Ramos,

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2. On cross- and redirect examination, Ms. Ramos testified some teen-aged girls that had been in the alley subsequently got into the car and were there until they were dropped off sometime before they went to La Puente. (10RT 1115-1116, 1133.)

3. Throughout trial, Mr. Irigoyen was referred to by witnesses using his gang moniker "Bird." Respondent refers to Mr. Irigoyen by his actual name.

Mr. Irigoyen and Rosemary drove all around La Puente, in the vicinity of Puente Park, to about six different houses, to see if Mr. Irigoyen's friends were around. (10RT 1057-1058.) They first stopped at a street right before Temple, where Ms. Ramos saw a 1973 or 1974 burgundy Monte Carlo, with a couple of bullet holes in it. Ms. Ramos looked at the car, but was not interested in buying it because it had bullet holes and because she had children and wanted a van. (10RT 1059-1060.)

Mr. Irigoyen next told Ms. Ramos that he was going to show her a van he could sell her for $500. Mr. Irigoyen drove a block and a half before they stopped and looked at a 1985 blue Chevy Astro mini van (See Peo. Exh. 14). Ms. Ramos told Mr. Irigoyen she was not interested in buying it because she wanted one with different type of back door. (Peo. Exh. 11; 10RT 1061-1064.)

They next drove two or three blocks to a house, drove past the house, made a U-turn, and returned to the house. At that time, a white 1986 Suburban arrived at the house and parked in the driveway. Mr. Irigoyen parked behind the white Suburban. (10RT 1065-1066.) Two men, three women and three children exited the white Suburban and entered the house. Mr. Irigoyen exited the car and entered the house with them. (10RT 1066-1067.) The women from the white Suburban were aged 17 to 19 years old, and one was pregnant. The two men were at most 18 to 25 years old and had "slicked back" very close cut hair, "like a cholo haircut." (10RT 1067.) Ms. Ramos and Rosemary waited inside the car. Rosemary moved to the front passenger seat. Ms. Ramos and Rosemary spoke together as they waited for Mr. Irigoyen to return. (10RT 1068.)

At some point, Mr. Irigoyen and at most ten males, all 18 to 29 years old and all wearing similar "cholo" hairstyles, exited the house. (10RT 1069.) Appellants were in the group of males that exited the house. Appellants, Mr. Irigoyen and the other males gathered around and began talking. Ms. Ramos

listened to them through the open car window. Appellants spoke "about doing a jale." "Jale" is Spanish slang for "job." "Doing a jale," was gang slang for some type of criminal activity. Ms. Ramos believed appellants were talking about working at a real job. The others in the group joked and laughed amongst each other as appellants spoke to Mr. Irigoyen. (10RT 1070-1074, 15RT 1890.) Appellant Gonzalez was known as "Speedy" and "Rebel." (Peo. Exh. 16; 10RT 1154-1155; 11RT 1235, 1244; 13RT 1660, 1664-1665; 14RT 1675; 15RT 1885.) Appellant Gonzales said he also needed to get a "cuete," which was slang in Spanish for "gun." Appellant Soliz, known by the nickname "Jasper" (or "Casper"), also said he needed a "cuete." (Peo. Exhs. 17, 49; 10RT 1074-1076, 1155; 11RT 1233-1234; 13RT 1665, 1675; 15RT 1886, 1890, 1912.) Appellant Soliz had a mustache and was slightly stockier or heavier than appellant Gonzales. (10RT 1083-1084, 1101.)

Appellants were members of the Perth Street gang, which was a clique of the Puente criminal street gang. (10RT 1155-1156; 15RT 1888-1889, 1909.) "Perth Street" referred to a street in La Puente. (15RT RT 1909.) Appellant Gonzales had a Raider's jacket on his arm. (Peo. Exh. 11; 10RT 1094-1095.) Ms. Ramos said, "It's not about the Raiders. It's about the cowboys," referring to the fact that the Cowboys were playing in the Super Bowl the next day. Appellant Gonzales laughed. (10RT 1095.) When appellant Soliz said "they were going to do a jale with a cuete," Ms. Ramos realized they were not talking about a regular working job. (10RT 1076.)

Appellant Soliz had "cholo" styled short hair, a tattoo on his neck, and wore a white tank shirt and dark or black Levi's pants. (10RT 1077.) Appellant Gonzales had "cholo" styled short hair, and wore eyeglasses, a white shirt, sweater, and dark Levi's jeans. (10RT 1078.) Appellants each had handkerchiefs and dark, black beanies, hanging half way out of their back pockets. (10RT 1078-1079.) Appellants were waiting for somebody to pick

them up. (10RT 1084.) Mr. Irigoyen and appellant Soliz talked about getting a ride to go pick up the van. (10RT 1084-1085.) After a few minutes, Mr. Irigoyen and another male told Ms. Ramos and Rosemary to go to the AM/PM to get hamburgers. Rosemary and Ms. Ramos left the area for about five minutes when they went to the AM/PM. (10RT 1079-1080, 1085.) When they returned, a Honda Prelude arrived and parked across the street. (10RT 1085-1086.) Mr. Irigoyen went up to the driver of the Honda, spoke to him and handed him a silver gun. (10RT 1086-1087.) Appellants spoke to each other across the street, on the lawn of the house, about ten feet away from Ms. Ramos. (10RT 1087-1088, 1106.) Appellant Gonzales said, "Hurry up" and that "he wanted to go hurry up and go do what they have to do." (10RT 1088.) As the Honda drove away, the driver yelled out that he was going to be back to get another "cuete" or gun. (10RT 1087.)

Mr. Irigoyen went inside the house for a couple of minutes and then returned and spoke to appellants. Mr. Irigoyen gave them bandanas. (10RT 1089.) Appellants laughed and joked as they each placed them on, covering the lower part of their faces. (10RT 1089-1090.)

The Honda Prelude returned less than ten minutes after it had left. (10RT 1088-1089.) Appellants ran up to it, and the passenger in the right front seat exited and opened the seat for appellants to enter. Appellant Soliz entered and sat in the right front passenger seat; appellant Gonzales entered and sat in the backseat on the passenger side. Appellants still had beanies in their back pockets. The Honda Prelude left the area at 6:20 or 6:30 p.m. (10RT 1090-1093.) Mr. Irigoyen, Ms. Ramos and Rosemary left the area about five minutes later. On their way to drop Mr. Irigoyen off in La Puente, they again drove past the area where the van had previously been and saw that it was no longer there. (10RT 1093-1094.) After they dropped Mr. Irigoyen off, Rosemary and Ms. Ramos went home. (10RT 1094.)

Sometime between 6:00 and 7:00 p.m., Richard Alvarez[4/] received a call from appellant Gonzales asking him to pick him up at Jennifer's house. (10RT 1158-1159.) Mr. Alvarez had known and was friends with appellant Gonzales for a couple of years, and his sister-in-law was appellant Gonzales' sister. Mr. Alvarez was known to members of the Perth Street gangs by the nicknames "Richie Rich" and "Rich Dog." (Peo. Exh. 56; 10RT 1170, 1186-1187.) Mr. Alvarez was also friends with appellant Soliz. (11RT 1244.) Mr. Alvarez picked up appellants and Michael Gonzales, who used the nickname "Clumsy" and who was also a member of the Perth Street gang.[5/] (Peo. Exh. 18; 10RT 1157-1160; 11RT 1235; 13RT 1673; 14RT 1676.)

Betty Eaton and Lester Eaton had been married about 43 years. Throughout those 43 years, they owned the small, family-style Hillgrove Market on Clarke Avenue in Hacienda Heights. (9RT 849, 948.) The area around the market was mostly commercial, although there were a lot of residences to the south of Clark Avenue. (Peo. Exh. 12; 9RT 866-867, 909-910.) Clark Avenue ran east-west. The closest major cross street to the east of the Hillgrove Market was Turnbull Canyon Road, approximately three blocks away, and the closest major cross street to the west was Seventh Street, approximately a half a mile away. (Peo. Exh. 12; 9RT 865-866, 898, 909-910.) On the right hand side, towards the rear of the market was a meat display case.

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4. Counsel was subsequently appointed to advise Mr. Alvarez, and upon counsel's advice Mr. Alvarez invoked his right to remain silent when questioned outside the presence of the jurors. (11RT 1223-1226.) Outside the presence of the jurors, the People gave Mr. Alvarez "use immunity" for his testimony, and the court entered an order requiring his testimony. (11RT 1226-1228.) Subsequently, in the presence of the jurors, the Court permitted the prosecuting attorney to treat Mr. Alvarez as a "hostile" witness. (11RT 1241.)

5. Throughout the trial, Mr. Gonzales was referred to by witnesses using his gang moniker "Clumsy." Respondent refers to Mr. Gonzales by his actual name.

Behind the case was an employee work area, and behind that was a work and storage room. (Peo. Exhs. 1, 3; 9RT 868, 874, 882-883.) The front door to the market was at the north end of the market; the checkout counter was towards the front. (Peo. Exhs. 3, 4, 5; 9RT 871-874, 877-881.)

At about 7:30 p.m., Mr. and Mrs. Eaton and their son Rene were inside the market. Two or three customers were also in and out of the market. Mr. Eaton was cutting chickens on the butcher block table behind the meat counter. (9RT 949-950.) Mr. Eaton usually wore a small Colt revolver in a holster on his hip. Mr. Eaton kept a shotgun on a rack behind the work room. (9RT 974, 1147.) Mr. Eaton always wore eyeglasses. (9RT 978.)

At around 7:30 p.m., Rene left to pick up a pizza he had ordered. (Peo. Exh. 3; 9RT 950-951.) At about the same time, Mr. Eaton went to the work room behind the meat counter area to answer the phone on the wall at the southeast corner. (9RT 950-951, 953.) The phone cord stretched to the sink, where Mr. Eaton stood while taking the call. (9RT 952-953.) Mr. Eaton may have held his eyeglasses in his hand while on the phone, as this was his habit. (9RT 978.) While Mr. Eaton was on the phone, Mrs. Eaton went to and stood behind the table at the meat counter. (9RT 952-953.) They were alone inside the market. (9RT 953-954, 974.)

Within five minutes, Mrs. Eaton looked towards the front door and saw behind the swinging gate a Hispanic male, age 18 to 20, wearing a bandana covering the lower half of his face, and some type of skull cap on his head. The male pointed a gun at Mrs. Eaton and said, "Where do you keep your money?" or something to that effect. (9RT 954-956.) Until she saw the gun, Mrs. Eaton initially believed it was a joke. (9RT 956.) She put her hands up, pointed to the cash register in the front of the market, and tried to get her husband's attention by saying, "Les." (9RT 956-957.) Mr. Eaton looked at Mrs. Eaton. (9RT 957.) Mrs. Eaton then saw a second Hispanic male that had quickly

slipped into the market. This second Hispanic male was in his late teens or early twenties, appeared heavier than the first Hispanic male, and did not wear a bandana. His hair appeared as if he had just come from a barber shop, with no hair out of place. Mrs. Eaton saw the second Hispanic male primarily from the back. The second Hispanic male appeared to point a gun at Mr. Eaton, who was still talking on the phone. The second male told Mr. Eaton: "Put that thing down before somebody gets hurt." (9RT 957-959, 966-967, 982.) The second Hispanic male pinned Mr. Eaton against the sink in the meat cutting room. It appeared Mr. Eaton had been hit over his head, as blood was coming from his forehead. Mrs. Eaton considered whether to hit one of the two alarm system's panic buttons, one by the telephone and the other by the register. (9RT 959-960.) Mrs. Eaton believed that if she went to the panic button by the phone, she would be trapped in the same room with the second male and her husband. Mrs. Eaton moved toward the microwave, turned and saw her husband on the floor, in the fetal position. (Peo. Exh. 3; 9RT 960-962.) She then heard two gunshots and knew her husband had been shot. (9RT 962.)

Mrs. Eaton left the market, exiting through the front door. (9RT 963-964.) She then saw a dark blue Chevy Astro van with its taillights on, parked in front of the store, facing east towards Turnbull Canyon Road. (Peo. Ex 11; 9RT 964-965, 979.) Mrs. Eaton made a quick left around the building, onto Ninth Street and up to the closest house she could find. When she heard the tires squeal from a car, she believed they were coming after her. She went along the hedges rather than the street, up to a house, and pounded on the door until the residents opened the door. She ran inside and dialed 911. (9RT 965-966.) After speaking to the 911 operator, Mrs. Eaton returned to the market. The blue Chevy Astro mini van was gone. As she approached the market, a patrol car was pulling in. The officers stopped her as she tried to reenter. (9RT 966.)

At approximately 7:40 p.m., Deputies Jerome Ryan and Philip Johnson of the Los Angeles County Sheriff's Department were in uniform in a marked black and white patrol car when they received a 911 broadcast directing them to a reported robbery at the Hillgrove Market. (Peo. Exhs. 4, 12; 9RT 847-850, 866, 877, 909, 948-949, 992-993.) Deputy Marc Verlich of the Los Angeles County Sheriff's Department and his partner Deputy Jimenez were also driving in a marked black and white patrol car when they heard the 7:40 p.m. 911 broadcast. (10RT 1021.)

At 7:43 p.m., while Deputies Ryan, Johnson, Verlich and Jimenez were on their way to the location, the 911 broadcast was updated by Deputy Pacheco to report a robbery and assault, and that a dark blue mini van was involved. Deputy Pacheco, was already present at the location when the deputies arrived. (9RT 850-851; 10RT 1021-1023.)

Upon their arrival, Deputies Ryan and Johnson entered the market to make sure there was no suspect still inside and to check on the victim. The victim, Lester Eaton, was on the wooden floor boards, behind the meat counter. He appeared to be dead, and had some type of bullet wound to his back. (Peo. Exhs. 1, 3, 6, 22; 9RT 852, 856-857, 867-869, 874-875, 88-887; 11RT 1249-1250.) Mr. Eaton was on his stomach, and a pair of bloodstained eyeglasses were on the floor by his head.[6/] The left lens of the eyeglasses was recovered from the floor in the meat cutting room, next to one of the legs of the saw. Drops of blood went from Mr. Eaton's body to the meat cutting room. A large amount of blood was under Mr. Eaton's right shoulder and the right side of his head. Mr. Eaton's shirt was blood soaked. His left front pocket had been pulled inside out. Mr. Eaton had an empty holster on his belt. Deputy Ryan

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6. The paramedics picked up the eyeglasses and put them on the shelf behind the meat counter, which is where they were recovered. (Peo. Exh. 1; RT 857-858, 884.)

saw no shell casings in the vicinity of Mr. Eaton's body or anywhere else in the store. The cash register was overturned and on the floor. The cash drawer was missing, and no money was inside the register. Unopened packs of cigarettes, loose change, and various other items from the shelves behind the register were on the floor next to the register. (Peo. Exhs. 1-6, 8, 9, 13; 9RT 853, 857-858, 869-876, 878, 881-882, 884, 886-889, 890-893, 925, 932-934, 976-978, 980.) The cash register tray was not located inside the market. (9RT 882.) Taken from the market were Mr. Eaton's wallet, shotgun and revolver, and at least $100 from the cash register. (9RT 974-975.)

Deputies Ryan and Johnson exited the market. Deputy Johnson interviewed a male who called the police and a second victim. (9RT 853-854.) Paramedics arrived within five minutes after their arrival and Deputies Ryan and Johnson escorted them inside the store. The paramedics checked Mr. Eaton for any signs of life, tilted his body to check for vital signs, pronounced him dead, covered his body with a cloth, and then left. (Peo. Exhs. 1, 6; 9RT 854, 857, 883, 885-886.) Deputy Ryan exited the market, stopped anyone from entering, and placed crime-scene tape around the area to secure any shell casings and other evidence. (9RT 855, 865.)

Criminalist Martin Mutac, a Forensic Identification Specialist II with the Los Angeles County Sheriff's Department, arrived at the scene at 9:38 p.m. He photographed and recovered an expended bullet found under Mr. Eaton's body, after it had been rolled over by the coroner's investigator. A red pencil to the right of the expended bullet was also under Mr. Eaton's body when it was rolled over in preparation for taking it to the coroner's office. Criminalist Mutac booked the bullet into evidence at the sheriff's station. (Peo. Exhs. 2, 3, 7; 9RT 872-873, 877, 888-889, 930-935, 941, 945.)

At about 9:40 p.m., Detectives Lynn W. Reeder and Woodrow W. West of the Los Angeles County Sheriffs Department arrived at the market. (9RT

863-864, 1001-1002.) They searched the entire market and located no expended shell casings. (9RT 896.) When a revolver is fired, the shell casing remains inside the gun. When an automatic or semi-automatic weapon is fired, the barrel kicks back and ejects the casing from the gun. (9RT 896-898.) Detective Reeder inferred the weapon used was a revolver based upon the absence of shell casings. (9RT 898.)

A few minutes after the initial 911 broadcast, Deputies Verlich and Jimenez were driving north on Turnbull Canyon and preparing to turn left onto Clark when they observed a 1993 dark blue Chevy Astro mini van, license plate number 3DFH725 (see Peo. Exh. 14), parked in the parking lot on the southwest portion of the street. The businesses using the lot were closed. (Peo. Exhs. 11, 12; 9RT 899, 905-906; 10RT 1023, 1025, 1034-1036, 1041.) Deputies Verlich and Jimenez pulled their patrol car behind the blue Chevy Astro mini van, stopped, exited, approached and illuminated the interior. Deputy Verlich used a pair of black leather gloves and opened the driver's side door. (10RT 1039-1040, 1042.) Deputies Verlich and Jimenez did not enter, touch or move anything inside the van. (10RT 1024, 1042-1043.) The hood of the van felt warm, indicating it had been recently parked. There was damage to the left panel side of the van, and the passenger's door window was shattered, with glass on the passenger seat. A black Raider's jacket was on the bench seat in the rear portion of the van. The cash register drawer from the Hillgrove Market was on the floor, behind the driver's seat. 34 food stamp coupons and receipts from the Hillgrove Market were inside the drawer. A pink hairbrush was behind the driver's seat. A live unfired nine-millimeter bullet was on the floorboard, behind the driver's seat, just to the left of the cash drawer tray. Some papers were on the front passenger seat. (Peo. Exhs. 11, 13; 9RT 900-901, 906-908, 924, 979-982; 10RT 1026-1028, 1032-1034, 1043-1044; 11RT 1271-1281.)

Deputies Verlich and Jimenez secured the van until the detectives arrived. (10RT 1028-1029.) Detectives Reeder and West arrived shortly thereafter and conducted a cursory examination of the van. (Peo. Exh. 12; 9RT 898-899, 901-902, 909-910.) Detectives Reeder and West asked the patrol officers that had secured the van to impound it and transport it to the Industry Station so that a criminalist could thoroughly examine it. (9RT 901, 925.) The van was impounded by Deputy Seminaris and taken to the Industry Station. At that time, the interior and exterior of the van appeared to be in the same condition as when it was first found parked in the parking lot. (Peo. Exh. 11; 10RT 1029-1032, 1034.)

Patrol officers drove Mrs. Eaton by the corner of Clark Street and Turnbull Canyon. At that location, Mrs. Eaton saw what appeared to be the same blue van she had earlier seen in front of the market. The patrol officers next drove her to the Industry Station. (9RT 973.)

On January 29, 1996, at about 11:45 a.m., Donald Keir, a Forensic Identification Specialist II with the Los Angeles County Sheriff's Department, went to the Industry Station to investigate the impounded blue Chevy van. He took photographs of the van and recovered evidence from the inside. Detectives West and Reeder were present. (Peo. Exh. 11; 11RT 1271-1273.) Specialist Keir recovered and booked into evidence the cash register tray, the items found in it, and the paper from the front passenger seat. (Peo. Exhs. 11, 13, 26, 27; 11RT 1274-1281.) Fingerprints were recovered by laser and luminous powders from the cash register drawer tray. Two latent fingerprints were recovered by the chemical Ninhydrin from two of the pieces of paper recovered from the front passenger seat. The recovered latent prints were photographed. (Peo. Exhs. 28, 29; 11RT 1288-1292.) The two fingerprints recovered from the pieces of paper matched appellant Gonzales' fingerprints.

(Peo. Exhs. 28, 29; 11RT 1291-1293.) Appellants' prints did not match the print recovered from the cash drawer tray. (11RT 1293-1294.)

On July 3, 1996, Detective Reeder returned to the Hillgrove Market. At that time, Mrs. Eaton gave him an expended bullet, which she earlier found on the floor in a little space between the wooden planks on the floor, directly behind the meat counter. Detective Reeder booked it into evidence. (Peo. Exhs. 3, 10; 9RT 902-904, 928-929, 987-989.)

On Sunday morning, July 28, 1996, Richard Varela found some of Mr. Eaton's business cards in front of a storm drain on Turnbull Canyon. Mr. Varela had known Mr. Eaton for approximately 15 years. Mr. Varela walked home and called the Sheriff's Department and Kenneth Eaton, Mr. Eaton's son. Kenneth and his sister went to Mr. Varela's home. A Sheriff's Deputy came to Mr. Varela's home that morning and took Mr. Varela, Kenneth and his sister to where Mr. Varela found the business cards. (Peo. Exh. 12; 10RT 1139-1143, 1147-1148.) While there, Mr. Varela found Mr. Eaton's National Rifle Association membership card on Valecito Drive, about 300 feet away. (Peo. Exh. 12; 10RT 1143-1145.) Mr. Varela gave the cards to the Sheriff's Deputy. (10RT 1145.) Scattered along Turnbull Canyon Road and Valecito Drive, Kenneth found Mr. Eaton's fishing and hunting licenses, one of his thoroughbred cards, his breeder's cards, some family photographs, a part of his money clip, and his wallet. Mr. Eaton's money clip was found closest to the store. (Peo. Exh. 12; 10RT 1148-1152.) Kenneth gave all of the items he found to the sheriff's deputy. (10RT 1152.)

Appellants were present at their preliminary hearing on March 5 and 6, 1997. Ms. Ramos identified appellants at the hearing. (10RT 1099-1100.) Mr. Alvarez's statements to Detectives West and Reeder were presented as evidence at the hearing. (11RT 1256-1257.)

At trial, Mr. Alvarez testified appellants spent the entire evening with him at Jennifer's house. (10RT 1160-1161.) At trial, appellants both looked different than they did on January 27, 1996. Appellants' hair was longer. (Peo. Exhs. 16, 17; 10RT 1100-1101; 11RT 1234-1236.) Appellant Gonzales was not wearing glasses on January 27, 1996. (10RT 1101.) Appellants' DMV photographs showed them as they appeared on January 27, 1996. (10RT 1101-1102.)

(ii) Witness Interviews And Taped Conversations

(a) Betty Eaton

Officer Johnson interviewed Betty Eaton at the Hillgrove Market, within 30 minutes of the incident. She was visibly shaken up, but she could think clearly, gave reasonable and rational responses to his questions, and she was not hysterical. (9RT 993-994.) Mrs. Eaton told Officer Johnson that two males she believed were Hispanic had entered and robbed her and her husband; that one wore a dark bandana over his face and a dark knit cap on his head; that the other was a tan or light-colored bandana over his face and a dark cap or dark hooded-jacket type hood; and that both had guns. (9RT 994-996.)

At about 12:30 a.m., about five hours after the incident, Mrs. Eaton spoke with Detectives Reeder and West. (9RT 902, 968, 972, 1002-1003.) Mrs. Eaton was extremely traumatized, shaking and occasionally tearful, but was responsive to questions, quiet and reflective, had no trouble understanding the officers, and was able to answer most questions, although she had trouble recounting what had happened. (9RT 1003-1004.) Mrs. Eaton said she believed the two males were Hispanics, approximately in their 'late teens" and approximately five feet seven inches tall (9RT 1004, 1006); that both wore bandanas over their faces, one wore a dark knit cap and the other wore a dark cap, and that both had revolvers (9RT 1005); that the person that stayed near

her was heavier built than the man who attacked her husband (9RT 1006); and that the lighter built male entered the back room and hit her husband in the head with a gun (9RT 1007). Mrs. Eaton said that while she was watching television and her husband spoke on the telephone, she observed two suspects near the swinging gate at the end of the meat counter. Mrs. Eaton said that she said, "Les" to get her husband's attention, and that Mr. Eaton said, "Come on buddy, put that thing down." Mrs. Eaton then said that the suspect by the wash basin hit her husband in the forehead with the gun he was holding. (9RT 1013.) Mrs. Eaton described the suspect that hit her husband as a male Hispanic in his late teens, five feet seven inches tall, medium build, not husky, who wore a light bandana over his face and a dark-knit cap on his head. (9RT 1013-1014.) Mrs. Eaton said the other male suspect asked her, "Where's the money?" and she replied, "It's in the register, take it." She described this suspect as a male Hispanic, late teens, approximately five feet seven inches tall, and heavier than the Hispanic male that had attacked her husband. (9RT 1014.) Mrs. Eaton said the male that attacked her husband wrestled with him on the floor behind the meat display case, near the butcher block. (9RT 1014-1015.) Detective West recorded in his report what Mrs. Eaton told him. (9RT 1014.)

(b) Dorine Ramos

When Dorine Ramos got home, she watched the news on television and saw a report about the robbery and murder that had taken place that evening at the Hillgrove Market. The report showed the blue Chevy Astro van and she said, "that was the van, that was the exact same van." (10RT 1095-1097.) Ms. Ramos heard additional broadcasts concerning the incident on the following day. She eventually called the police three days later. She waited three days because she lived in the apartments, she had children, Mr. Irigoyen knew where she lived, and she was scared and worried something would happen to them.

(10RT 1097-1098.) Ms. Ramos spoke to Detective West on the phone and told him what she had seen. (10RT 1099-1100.)

When Ms. Ramos was later interviewed by officers investigating a different crime, the officers showed her a photograph of appellant Soliz. She told the officer, "I know this guy from the -- the -- he's the one that was in that -- was in the other one that Detective West was working on." (10RT 1134-1135.)

(c) Richard Alvarez

On October 3, 1996, Detectives West and Reeder interviewed Richard Alvarez in the interview room at the Industry Station. Mr. Alvarez was not under arrest and was free to go at any time. (10RT 1161-1162; 11RT 1250-1251.) Detective West advised Mr. Alvarez that they were investigating the Hillgrove Market robbery murder of January 27, 1996. (11RT 1251.) Mr. Alvarez initially said he knew appellants but that the only thing he knew about the murder was what he had heard on the news. When asked if he had ever seen appellants together, Mr. Alvarez responded that "he had never seen them together in a van." (11RT 1252.) Detectives West and Reeder had not previously said anything to Mr. Alvarez about a van being involved. Detective West told Mr. Alvarez this and further told him that they knew he was withholding information. Mr. Alvarez said that "we had caught him in a lie and that he would tell us what happened." (11RT 1253.)

Mr. Alvarez then told Detectives West and Reeder that at approximately 6:00 to 7:00 p.m. on the day of the Hillgrove Market robbery murder, he had been home when appellant Gonzales called and asked him to come to Jennifer's house and pick him up. (11RT 1253.) Mr. Alvarez went to Jennifer's house and met with appellants and Michael Gonzales ("Clumsy"). (11RT 1254.) Mr. Alvarez next followed appellants and Mr. Gonzales, who were together in the

blue van, to the location of a closed business on Turnbull Canyon in Hacienda Heights. (11RT 1254-1255.) Mr. Gonzales drove the blue van. When they arrived, Mr. Alvarez was told to wait in his car. (11RT 1255.) Appellants and Mr. Gonzales departed and returned in the blue van a short time later. (11RT 1255-1256.) They parked and exited the blue van, and then entered Mr. Alvarez's car. Mr. Alvarez drove them back to Jennifer's house, where they stayed and "partied" the remainder of the evening. (11RT 1256.)[7/]

On March 15, 1997, Mr. Alvarez visited with appellant Gonzales at the county jail. They spoke on a jailhouse phone, separated by glass. Mr. Alvarez's conversation with appellant Gonzales was tape-recorded.[8/] Mr. Alvarez did not know anyone was listening to their conversation, or that it was being taped. (Peo. Exhs. 19, 20, 21; 10RT 1165-1171; 11RT 1236-1238, 1247-1248.) During their conversation Mr. Alvarez referred to "Kimberly." (10RT 1171.) Kimberly was a friend of appellant Gonzales and Mr. Alvarez. (11RT 1239-1240.) Kimberly had previously told Mr. Alvarez about what had happened at appellants' preliminary hearing. (11RT 1171-1172.) Kimberly told Mr. Alvarez that his name had been mentioned in court. (11RT 1240-1241.) During his conversation with appellant Gonzales, Mr. Alvarez said, "Kimberly's getting me kind of nervous, dog. What happened?" Mr. Alvarez asked appellant Gonzales, "Is it -- is it true what Kim said?" and appellant Gonzales responded, "What?" Mr. Alvarez replied, "About the Sh Sh." and

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7. At trial, Mr. Alvarez denied making these statements to Detectives West and Reeder (10RT 1162-1164); denied dropping appellants and Mr. Gonzales off before the robbery (10RT 1175); and denied waiting for appellants at Turnbull Canyon (11RT 1242).

8. The tape was twice played for the jury, but not transcribed. A transcript of the tape was distributed to the jury and admitted into evidence. (Peo. Exhs. 19, 20, 21; 10RT 1167-1168; 11RT 1238-1239.) The parties stipulated at trial that the tape was a true and accurate tape recording of Mr. Alvarez's jail visit with appellant Gonzales. (11RT 1267.)

appellant Gonzales responded, "Oh -- not nothing with you, man. Don't even trip." Mr. Alvarez replied, "Nah, she, she, said something that they said my name and shit." Appellant Gonzales replied, "Yeah, they said your name, but don't worry about nothing. Richie Rich -- who's -- there's a gang of Richie Riches. Know what I'm talking about?" (Peo. Exh. 21; 10RT 1174.) Mr. Alvarez told appellant Gonzales: "She said they described the vehicle and everything, dog." (Peo. Exh. 21; 11RT 1241.) Mr. Alvarez was worried about his car being discussed about at the preliminary hearing. (11RT 1242.) Mr. Alvarez believed he needed to move out of town. (11RT 1244-1245.)

(d) Luz Jauregui

On October 19, 1996, the San Gabriel Valley Tribune newspaper ran an article describing the Hillgrove Market robbery murder. The article indicated appellant Gonzales had been arrested for the murder; and quoted a member of the District Attorney's Office saying that "there were two more suspects outstanding" in that murder. (11RT 1267-1268.)[9/]

On December 16, 1996, Luz Emily Jauregui met with appellant Soliz at the Men's Central Jail. Their conversation was tape-recorded and transcribed. (Peo. Exh. 24; 11RT 1268.)[10/] Appellant Soliz told Ms. Jauregui that he was letting his moustache grow "Cause they said these fools are young. That did this shit. I got some glasses. I'm gonna let my hair grow a little. Comb it when

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9. Testimony concerning the newspaper article was admitted by stipulation. (11RT 1267-1268.)

10. The parties stipulated that the tape recording marked as People's Exhibit 25 was a true and accurate recording of the visit between Jauregui and appellant Soliz. (11RT 1268; 16RT 2153-2154.) The tape was played for the jury but not transcribed by the court reporter. A transcription of the tape was marked and distributed as People's Exhibit 24, and was admitted into evidence. (11RT 1268-1269, 2153-2154.)

I start to court. Put on a suit and tie." (Peo. Exh. 24.) When referring to the newspaper article, appellant Soliz told Mr. Jauregui, "It says -- 'cause -- what does it say on Rebs? They got two more suspects. They haven't found 'em yet? Damn, they got one of 'em right here. 'But your honor, I'm a changed man.'" (Peo. Exh. 24.)

(iii) Autopsy Evidence

On January 30, 1996, Dr. Lee Bockhacker, a deputy medical examiner in the Los Angeles County Coroner's Office, performed an autopsy Mr. Eaton's body. He observed a total of five gunshots wounds, to which he arbitrarily assigned numbers. (10RT 1191.)

Gunshot Wound No. 1 was to the parietal or the upper top portion of Mr. Eaton's head. The angle of the wound was steeply downward, back to front, at about a 70 to 80 degree angle. Gunshot Wound No. 1 had stippling around it, indicating the bullet had been fired at close range, between a half an inch and 18 inches. (Peo. Exh. 22; 10RT 1192-1195, 1196-1197, 1208.) The bullet passed through Mr. Eaton's scalp, through his skull and brain, and lodged in the base of his skull. This was a fatal shot, and the bullet would have caused almost instantaneous death. (10RT 1195-1196, 1211.) The bulk of the bullet was recovered from the back of Mr. Eaton's skull, and additional fragments were recovered from his scalp area. (10RT 1196.) The angle of Gunshot Wound No. 1 was consistent with Mr. Eaton sitting on the floor, with the perpetrator standing behind and shooting him. (10RT 1198.)

Gunshot Wound No. 2 was to Mr. Eaton's right temple area and was a near contact wound, meaning it had been shot from within a half an inch. The bullet was at a downward 70 to 80 degree angle, penetrated Mr. Eaton's scalp, through his head and throat, and exited the right side of his neck. (Peo. Exh. 22; 10RT 1198-1203, 1208.) The bullet went all the way through, and so no

bullet was recovered. (10RT 1200.) A large lead bullet fragment was recovered near the base of Mr. Eaton's tongue. (10RT 1203-1204.) The path of this bullet wound was also consistent with Mr. Eaton having been seated on the floor, with the shooter standing over and behind him. (10RT 1201.) This wound was serious and possibly fatal. (10RT 1203.)

Gunshot Wound No. 3 was on the left side of Mr. Eaton's lower chest, and the angle was front to back, slightly downward and left to right. (Peo. Exh. 22; 10RT 1204-1205, 1207.) This bullet went through his diaphragm, spleen and lung and then exited his lower back. (10RT 1205, 1207-1208.) This wound would have been fatal. (10RT 1205-1206.) There was no evidence of stippling or scorching of the wound, which indicated the bullet was fired at a distance greater than one and a half feet away. The location and trajectory of this wound was consistent with Mr. Eaton lying on the floor on his back, and the shooter standing over to the left near Mr. Eaton's head, and then firing into his chest. (10RT 1206-1207.)

Gunshot Wound No. 4 was a superficial gunshot wound which grazed Mr. Eaton's right lateral chest. (Peo. Exh. 2; 10RT 1206-1207.) This wound was nonfatal, and there was no evidence of stippling or scorching, indicating that the bullet had been fired from a distance of greater than one and a half feet. (10RT 1207.) No projectile was recovered. (10RT 1209.)

Gunshot Wound No. 5 was a superficial grazing gunshot wound to the front of Mr. Eaton's right chest. It did not perforate his skin. No projectile was recovered. (Peo. Exh. 22; 10RT 1208-1209.)

Dr. Bockhacker took each of the fragments and projectiles removed from Mr. Eaton's body and placed them in separate envelopes. (Peo. Exhs. 23(a), 23(b) and 23(c); 10RT 1212-1214.)

Mr. Eaton also had a less than one inch sized laceration on his head caused by blunt force trauma. The wound was consistent with what would

occur had he been struck by the barrel of a gun. (Peo. Exh. 22; 10RT 1209-1211.) The gunshot wounds through Mr. Eaton's clothing were consistent with the gunshot wounds to his body. (10RT 1211.) Dr. Bockhacker opined that Gunshot Wound No. 1 was the cause of death, although Gunshot Wounds Nos. 2 was 3 would likely have also been fatal in the absence of Gunshot Wound No. 1. (10RT 1211-1212.)

b. The Murders Of Elijah Skyles And Gary Price (Counts IV and V)

(i) Evidence Of The Charged Crimes

On April 14, 1996, victim Gary Price (count V) had just turned 18 years old. (12RT 1436.) Mr. Price was Vondell McGee's cousin. (12RT 1435.) Mr. McGee had been friends with victim Elijah Skyles (count IV) for about a year and a half. (12RT 1435-1436.) Mr. Skyles was 15 years old. (12RT 1436.) At about 12:30 or 12:40 a.m., Mr. McGee was with Messrs. Skyles and Price on the north sidewalk of San Bernadino Road, in front of the Shell gas station at San Bernadino Road and Azusa Avenue in Covina. Messrs. Skyles and Price had first met with Mr. McGee at the Chuck E. Cheese just up the street on Azusa Avenue, where Mr. McGee had worked that evening. (Peo. Exh. 34; 12RT 1436-1438.) When they left the Chuck E. Cheese, Messrs. Skyles and Price walked, and Mr. McGee had a bike. (12RT 1437.) While they stood and talked on the sidewalk in front of the gas station, a tan or beige Honda Accord, which belonged to Agustin Mejorado, came southbound through the gas station lot and towards the driveway that enters at the south end of the lot. The Honda Accord stopped and the occupants appeared to look at Messrs. McGee, Skyles and Price for a minute. It then turned left and proceeded eastbound onto San Bernadino Road. (Peo. Exhs. 45, 50; 12RT 1438-1443; 13RT 1670-1671; 14RT 1676, 1680, 1802-1803.)

The occupants of the Honda were all Hispanic. (12RT 1440-14441.) There was a female in the backseat. It had approximately two females and two males, or two males and a female. There were two people in the front seat and three in the backseat. A woman sat in the backseat. (12RT 1440-1441; 13RT 1618.)

Alejandro Garcia[11/] was working inside the office at the Shell gas station, which was open 24 hours a day. (13RT 1607-1610.) Mr. Garcia saw the Honda slowly pass by the front of the station. (Peo. Exh. 45; 13RT 1617-1620.)

After the Honda Accord left, Messrs. McGee, Skyles and Price continued speaking to each other for about five minutes while they stood on the sidewalk. Mr. McGee then went across San Bernadino Road to get some change for Messrs. Skyles and Price to use the phone. (12RT 1443.) Mr. McGee returned, gave them the change, gave one of his two pagers to Mr. Price, got on his bike, and then rode his bike across the street, through the shopping center parking lot, and south towards his house. (12RT 1443-1445.)

At about 12:40 or 12:45 a.m., Carol Mateo was in her Ford Fiesta driving eastbound in the lane closest to the center yellow line on San Bernadino Road, just past the crosswalk at Azusa Avenue. (Peo. Exh. 34; 12RT 1456-1459.) Ms. Mateo was measuring a two-mile mark because her husband Jose was training for a physical in which he had to run two miles. (12RT 1457; 13RT 1569-1570.) Mr. Mateo sat in the backseat, and Ms. Mateo's 15-year-old brother Jeremy Robinson sat in the front passenger seat. (12RT 1458; 13RT 1568-1569.) Mr. Robinson and Ms. Mateo heard more than five loud shots or

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11. Mr. Garcia also went by the name "Alejandro Mora," as "Mora" was his mother's maiden name. (13RT 1607.) Mr. Garcia testified through a Spanish language interpreter. (13RT 1606.)

popping sounds.[12] Ms. Mateo slowed down, initially believing something was wrong with her car. (12RT 1458-1459, 1461; 13RT 1570.) Mr. Robinson pointed in the direction of the gas station, and screamed, "Oh, shit. Look. Look over there at the gas station. That guy's shooting those guys." (Peo. Exh. 34; 12RT 1460-1462; 13RT 1570-1571, 1573.)[13] Ms. Mateo looked in the direction to which Mr. Robinson had pointed and saw "two Black kids falling." Ms. Mateo and Mr. Robinson saw a man they identified in court as appellant Soliz, shooting the two victims.[14] The victims, two young Black males, had been standing next to a phone booth and by a Lotto sign, and had been facing appellant Soliz. (12RT 1462, 1465-1466; 13RT 1571-1572, 1574-1576.) Appellant Soliz was four or five feet from the victims, and he held the gun in his right hand, with his arm at shoulder length. (12RT 1463-1464; 13RT 1572.) One victim wore a dark blue and black-checkered flannel-type shirt. (12RT 1464-1465.) After this victim fell, he tried to "scoot himself away." As he did so, appellant Soliz walked up to him and shot him again. (12RT 1466.) Ms. Mateo slowly passed through the intersection. (Peo. Exh. 34; 12RT 1459-1461; 13RT 1573.)

As Mr. McGee rode on his bike through the shopping center lot, he heard 10 or 12 gunshots. (12RT 1444-1445.) Mr. McGee ran for cover, making sure he was out of danger, and then rode back to his house. (12RT 1445.)

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12. On cross-examination, Ms. Mateo testified she heard more than five but "maybe less than twelve" continuous shots, and that she did not see the shooter until approximately half of the shots had been fired. (12RT 1485-1486.)

13. Mr. Robinson testified he said, "Oh, shit. Look. The guy's shooting another person on the ground." (13RT 1573.)

14. On redirect examination, Ms. Mateo testified that her car at this time was either barely rolling or stopped. (13RT 1561.)

At about 12:40 a.m., Mr. Garcia was on the phone when he heard several gunshots coming from the area near the phone booth or east of the bathrooms. (13RT 1609, 1611-1612.) When appellant Soliz stopped firing, he looked in Ms. Mateo's direction for about five seconds, put his hands in his pocket, turned and ran to a four-door beige Honda Accord. (Peo. Exh. 45; 12RT 1467-1469; 13RT 1576-1578, 1586-1587.) Mr. Garcia saw two people run from the area of the phones to the same Honda he had earlier seen. Both men entered and sat in the backseat. (Peo. Exh. 45; 13RT 1612-1613, 1619-1620.) One of the men appeared to be about 22 years old and had bald or a shaved head. He appeared to be carrying something black, about the size of a handgun, in his hands. He entered the Honda on the driver's side. (13RT 1613, 1616.) The Honda appeared to be full, and there was a girl in the backseat. (13RT 1617.) Ms. Mateo saw appellant Gonzales standing outside of the Honda. (12RT 1472-1473.) The Honda departed northbound through the lot, east across the northeastern end of the lot, and out of the northeastern-most drive, then north on Azusa Avenue. (13RT 1619-1620.)

Ms. Mateo was scared and drove eastbound on San Bernadino Road, but turned around when she saw the street she was on was "pitch black." (12RT 1469-1470, 1578-1579.) When she drove down San Bernadino Road, she passed the gas station and saw the two victims on the ground, next to the fence and by the Lottery sign. (Peo. Exh. 34; 12RT 1470; 13RT 1579-1580.) The Honda was no longer present at the scene. (12RT 1470; 13RT 1579.) Ms. Mateo next drove north on Azusa Avenue, pulled into the driveway at the Chuck E. Cheese on the west side of Azusa Avenue, north of San Bernadino Road, and used the phone booth outside to call 911. While Ms. Mateo told the 911 operator what she had seen, the Honda Accord went into and then out of the Chuck E. Cheese driveway. Appellants sat in the front seats of the Honda. (12RT 1471-1473; 13RT 1579-1580, 1587-1588, 1602.)

When Mr. McGee got home, he paged Mr. Price. (12RT 1445.) He told his mother to see if there was a return call from the pager. Mr. McGee used the bathroom, returned to the gas station and saw that Messrs. Price and Skyles were both dead, lying side by side, on the ground near a wall and the telephone. (12RT 1446.)

At approximately 12:48 a.m., Detective John Curley[15] of the Covina Police Department was dispatched to the Shell gas station at 871 West San Bernardino Road, on the northeast corner of San Bernardino Road and Azusa Avenue, in Covina, in reference to an assault with a deadly weapon call. (Peo. Exh. 35; 12RT 1308, 1357-1358.) The station was open and all the station lights were on. (10RT 1138.) Two Black male juveniles, approximately 15 to 17 years old, were on the ground. (Peo. Exhs. 31, 33; 12RT 1309, 1312-1314.) Detective Curley checked the victims for a pulse and found none. (12RT 1309.) He observed three to four expended shell casings, but left them undisturbed. The paramedics arrived, checked the victims and untucked one victim's shirt and moved him slightly to his side. The victims were pronounced dead at the scene. Detective Curley and other officers secured the scene until the assigned investigating detectives arrived. (12RT 1310-1311.)

Sergeant Joe Holmes and his partner Deputy David Castillo of the Los Angeles County Sheriff's Department arrived at the Shell gas station at 1:48 a.m. (Peo. Exh. 34; 12RT 1340-1341, 1345-1346; 14RT 1790.) The entire area was very well lit. (12RT 1353, 1348-1352.) The two victims, Elijah Skyles and Gary Price, were on the ground, between the curb and the wooden fence, near a telephone pole, a trash receptacle with graffiti on it, and the air and water platform. Mr. Skyles was on his stomach, with his head facing northbound, his feet and legs facing southbound, and his right cheek on the asphalt facing west.

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15. Respondent uses the spelling "Curley," as testified to by the witness, rather than "Curly" as taken down by the court reporter. (12RT 1307.)

Mr. Price was on his right side, with his head facing southbound and his feet and legs pointing in a northeasterly direction. Mr. Skyles' face and head were in the crotch area of Mr. Price. (Peo. Exhs. 31, 32, 33, 34, 35, 36, 37; 12RT 1341-1342, 1346-1347, 1358-1361, 1364-1365, 1369, 1373, 1376-1377, 1379-1380.) Mr. Skyles wore a long-sleeved black-and-white-checked jacket or heavy-duty shirt, red pants, and a red belt with a "P" on the buckle. Mr. Skyles' attire, including the wearing of a "P" for "Piru," was consistent with being a member of a Blood street gang. (Peo. Exh. 37; 12RT 1342-1343, 1382.) "Piru" was a street in Southeast Los Angeles in the Compton/Willowbrook area for which original members of the Bloods street gang named their gang. (12RT 1343-1344.) Mr. Price wore a blue windbreaker and baggy blue pants, with a black belt with the letter "R" on it. (Peo. Exh. 37; 12RT 1343-1344, 1381.) Mr. Price's clothing was consistent with that of member of the Crips street gang. (12RT 1344.)

Sergeant Holmes observed 11 nine-millimeter shell casings and four bullets and bullet fragments in the vicinity of the victims' bodies. Photographs were taken of the casings and bullets, and they were recovered and later booked into evidence. A bullet was recovered from Mr. Skyles' left sleeve. (Peo. Exhs. 31, 33, 37, 38, 39; 12RT 1361-1366, 1377, 1380, 1382, 1384-1387, 1389-1390.) There was a bullet hole in the fence which went through and exited the Lottery sign, traveling from a southeasterly direction. (Peo. Exhs. 33, 37; 12RT 1366-1367, 1376-1377, 1380-1381.) A bullet was imbedded into the wood of the fence. (Peo. Exh. 33; 12RT 1367-1368, 1380-1381.) Two expended projectile fragments were found under Mr. Skyles body. (Peo. Exh. 32; 12RT 1368-1370.) Bullet strike marks were in the asphalt. (Peo. Exhs. 32, 37; 12RT 1370-1371, 1377, 1383.) A nine-millimeter shell casing was found under Mr. Price's right wrist. (Peo. Exh. 32; 12RT 1371.) Three nine-millimeter shell casings were recovered from the pool of blood beneath

Mr. Price's head. (Peo. Exh. 32; 12RT 1371-1372.) A nine-millimeter shell casing was recovered from the cement slab area, and two other nine-millimeter shell casings and the button or snap from a jacket or shirt were recovered from the area northwest of the victims' bodies. (Peo. Exh. 36, 37; 12RT 1372-1375, 1376-1377.) The shell casings recovered from the crime scene were later submitted to the Sheriff's crime lab for fingerprint testing. The lab was unable to obtain any fingerprints from the shell casings. (Peo. Exh. 38; 16RT 2139.)

(ii) Motive Evidence

The following evidence of the murder of Billy Gallegos, a member of appellants' gang, by a rival gang member, committed two weeks before the murders of Messrs. Skyles and Price, was admitted to show appellants' motive.

On March 31, 1996, at about 6:00 p.m., 16-year-old Billy Gallegos, known as "Weasel," was driving a Honda Accord on Sunset Avenue in La Puente. Raymond Flores, known as "Huera," sat in the front passenger seat; 15-year-old Gabriel Urena sat in the backseat. Mr. Urena hung around with members of the Ballista clique of the Puente gang, including Mr. Gallegos. (Peo. Exhs. 42, 59; 15RT 1977-1980, 1989-1990, 1995.) At that time, a red car pulled up beside the driver's side. There were two Black males in the red car, one wearing what could have been a North Carolina jersey. (15RT 1981-1982.) One of the Black males in the red car made a gang gesture for an "N," which stood for "Neighborhood Crips," a primarily Black street gang in that area. (15RT 1984.) Mr. Urena then heard gunshots and ducked. When he got up, he saw that Mr. Gallegos had been shot in the head. (15RT 1985-1986.) The Honda crashed between a tree and a brick wall. Mr. Urena looked and saw that Mr. Gallegos had been shot in the head. Mr. Flores had a lot of Mr. Gallegos blood on him. (15RT 1987.)

Detective Keith Wall and his partner Deputy Dwight Miley of the Los Angeles County Sheriff's Department responded to the shooting. (15RT 1997-1998.) A Honda was parked over the curb and on the sidewalk at the intersection. It had come to a rest after hitting "a pole or wall or something," and rested between a tree, a cinder block fence, and a wrought-iron fence. There were three Hispanic Male occupants inside the Honda. The driver, Mr. Gallegos, was slumped in the driver's seat, with his head in the lap of the passenger, Mr. Flores. Mr. Gallegos had a gunshot wound to his head, and Mr. Flores had been shot in the shoulder or back. Mr. Flores had Mr. Gallegos blood on him. (Peo. Exhs. 59-61; 15RT 1998-2000, 2006-2007.) Mr. Gallegos was transported to Presbyterian Hospital after the shooting and was pronounced dead. The coroner determined the cause of death to be a gunshot wound to the head. (15RT 1995.)[16/]

Detective Wall and Deputy Miley interviewed Mr. Urena at the scene within minutes of their arrival. (15RT 1987-1989, 2000, 2004.) Mr. Urena described how the shooting took place. (15RT 2000-2001.) Mr. Urena said two Black males, aged somewhere in their 20's, and with shaved heads, were in a red car that pulled alongside of them. The person in the right front passenger seat wore a gray North Carolina or University of North Carolina jersey with a white T-shirt under it. (15RT 2001.) When one of the Black males yelled, "Where are you from?" Messrs. Urena, Gallegos and/or Flores responded by yelling, "Puente." (15RT 1983-1984, 2001.) The Black males yelled, "Neighborhood" and flashed the gang sign for the Neighborhood Crips street gang. (15RT 1984-1985, 2001-2002.) The Black male sitting in the right front passenger seat produced a handgun, at which point Mr. Urena ducked and heard several shots. (15RT 1986, 2002.)

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16. This evidence was admitted by stipulation. (15RT 1995.)

Deputy Thomas Kerfoot and his partner Investigator Biehn of the Los Angeles County Sheriff's Department arrived at the scene at about 8:30 p.m. They recovered three .38 caliber spent shell casings from the southbound lanes of Sunset, just north of the red Honda. (Peo. Exh. 60; 15RT 2007-2008.) There was a bullet strike to the left rear passenger window of the red Honda, in the glass near the door post dividing the rear of the car from the front passenger area. (15RT 2008-2009.) The driver's side window was shattered, and shards of glass were in the driver's seat area. (Peo. Exh. 61; 15RT 2009.)

Deputy Kerfoot and Investigator Biehn interviewed Mr. Urena. Mr. Urena described the occupants of the suspect who shot Messrs. Gallegos and Flores as Black males; said the Black males asked where they were from; said that the occupants of the victim's car replied they were from La Puente; and said that one of the Black males in the shooter's car threw a gang sign for "Neighborhood Crips" and shouted "Neighborhood Crips" before shooting Mr. Gallegos. (15RT 2010-2011.)

Detective Scott Lusk of the Los Angeles County Sheriff's Department investigated the murder of Mr. Gallegos. Mr. Gallegos claimed membership in the Puente gang, and specifically the Ballista clique. Mr. Gallegos went by the nickname "Weasel." (16RT 2090.) The person that had been riding in the front passenger seat, "Little Ducky," was a member of the Puente gang. The person in the left backseat, Gabriel Urena, was not at that time known to Detective Lusk. Detective Lusk later learned from contacts with Mr. Urena that Urena was probably a "hanger on or an associate gang member, not quite a hard-core gang member." (16RT 2091.)

(iii) Identification Evidence

Sergeant Holmes showed a number of eyewitnesses a series of six-pack photographic lineup folders. (12RT 1390-1392; 13RT 1650-1652.) Appellant

Soliz appeared in position No. 2 in one of the line-up cards. (Peo. Exh. 40; 12RT 1392-1393.)[17/] Appellant Gonzales did not appear in any of the photographic lineup cards as he was not a known suspect at that time. (13RT 1652.)

When Ms. Mateo was in Los Angeles, she was admonished by Sergeant Holmes and then shown a photographic lineup card. Photographs of appellants were not included on this card. Ms. Mateo could not identify anyone in the lineup card she was shown. (Peo. Exhs. 42, 46; 12RT 1474-1476; 13RT 1650-1652.) On May 14, 1996, when Ms. Mateo was in Texas, she was again admonished and when she was alone she was shown two different photographic lineup cards. After looking at one of them, she immediately identified a photograph of appellant Soliz in one of the two lineup cards. (Peo. Exhs. 40, 41, 46; 12RT 1475-1479; 13RT 1502, 1650-1651.) Ms. Mateo wrote on the form, "The mug shot of picture number two, Folder C [Appellant Soliz; Peo. Exh. 40], looks identical to the man I saw with the gun. I believe this was the man who shot the two men." (12RT 1478.)

Mr. Robinson was admonished and shown three six-pack photographic lineup cards. He identified appellant Soliz's picture in position No. 2 on People's Exhibit 40 and said he looked like the shooter. (Peo. Exhs. 40, 42, 43, 47, 48; 13RT 1581-1584, 1602-1603, 1651-1652.)

Sergeant Holmes and Deputy Castillo admonished Mr. Garcia and then showed him four photographic lineup cards. (Peo. Exhs. 40, 41, 42, 43, 48; 13RT 1622-1623, 1652.) Mr. Garcia identified the photograph of appellant

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17. Mr. Irigoyen's photograph appeared in position No. 3 of another lineup card. (Peo. Exh. 43; RT 1395-1396, 1398.)

Soliz in position No. 2 on People's Exhibit 40.[18] (Peo. Exh. 40, 48; 13RT 1620-1621, 1623-1625, 1652.)

On March 4, 1997, Ms. Mateo and Mr. Robinson went to the Men's Central Jail in Los Angeles for a live lineup. (12RT 1480, 1588-1589; 13RT 1654.) Deputy David Vasquez of the Los Angeles County Sheriff's Department was assigned to the Men's Central Jail Lineup Detail, and he was responsible for conducting two lineups, Lineup No. 5, in which appellant Soliz was supposed to stand as a suspect, and Lineup No. 6, in which appellant Gonzales was supposed to stand as a suspect. (Peo. Exhs. 16, 49; 13RT 1641, 1644-1647.) Appellants were asked to stand in a lineup for purposes of being viewed by witnesses. Appellants refused to stand in the lineup. (13RT 1647-1649, 1654.) Thus, neither Ms. Mateo nor Mr. Robinson saw a live lineup. (12RT 1480; 13RT 1588-1589, 1654.)

At trial, appellant Soliz (Peo. Exh. 17; 12RT 1468-1469) and appellant Gonzales (Peo. Exh. 16; 12RT 1473) both had more hair than they had on April 14, 1996. Mr. Garcia was unable to identify anyone at trial. (13RT 1621.)

(iv) Statements And Testimony From Judith Mejorado

On November 3, 1996, at about 7:20 p.m., Sergeant Holmes and Deputy Castillo arrived and knocked on the door at Judith Mejorado's house. She answered, and they identified themselves and told her they were investigating a murder, that she had been implicated, and that they wanted to interview her regarding her involvement in it. Ms. Mejorado said she had her baby with her and that she was the only one home. When they asked if she could find a

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18. On cross-examination, Mr. Garcia testified that he wrote on the form, "Number 2 resembles the person that ran to the car after the shots. I didn't took [sic] time to look at his face." (13RT 1628.)

babysitter so they could conduct the interview at the Industry Sheriff's Station, Ms. Mejorado walked across the street, and spoke to a woman who agreed to watch Ms. Mejorado's child. Ms. Mejorado was then taken to the Industry Sheriff's Station. (14RT 1791.)

When they arrived, Ms. Mejorado was taken into the office trailer and was asked about the shooting of Messrs. Skyles and Price on April 14, 1996. (14RT 1793.) The interview was tape recorded without her knowledge. (13RT 1663; 14RT 1790.)[19] Deputy Castillo and Sergeant Holmes never threatened to arrest Ms. Mejorado or her brother Agustin, nor did they call a social worker to check on her or threaten to take away her child. (14RT 1792-1793.) Ms. Mejorado said she had been picked up at her house by Agustin (her brother), Clumsy (Michael Gonzales), and appellants, in Agustin's car. (14RT 1793-1794.) Agustin was intoxicated and sat in the right front passenger seat. (14RT 1794.) Agustin had earlier called her on the phone and was intoxicated, so Ms. Mejorado told him to come by and pick her up because she did not want him driving in that condition. (14RT 1794-1795.) When they arrived at her house, Michael was driving; Agustin sat in the front passenger seat; appellants sat in the backseat. Ms. Mejorado entered and sat on the console in the front seat, between Michael and her brother Agustin. (14RT 1795.)

At some point they drove northbound on Azusa Avenue and passed a Shell gas station. (14RT 1795-1796.) Three Black males stood in the vicinity of the station. (14RT 1796-1797.) Michael drove into the north driveway of the station and then out the south driveway onto San Bernadino Road. Appellants announced that they knew the three Black males. Michael then drove a short distance, made a U-turn, returned to the station and turned into the

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19. At trial, Ms. Mejorado testified that she did not recall telling Sergeant Holmes and Deputy Castillo that appellants claimed Perth Street as their gang. (14RT 1672-1673.)

same driveway they had earlier exited. (14RT 1797.) Only two Black males victims were now at the station. (14RT 1798.) Michael stopped the car by the pay telephones on the east side of the station lot. (14RT 1798-1798.) Appellants exited the car from the backseat and walked to the rear passenger side of the car. The pay phones were in close proximity to the car. (14RT 1798-1799.) Appellant Soliz approached the two Black males while appellant Gonzales stayed by the car. Appellants argued with the two Black males. (14RT 1799.) One of the Black males said, "No. I didn't mean to do you that way. I'm sorry. I didn't mean to do you that way." Appellant Soliz replied, "No. No." and made some other statements. (14RT 1799-1800.) Ms. Mejorado next heard several shots. She turned and observed appellant Soliz pointing a gun, extending his right arm out and firing it. Fire emitted from the barrel of the gun. Appellant Soliz then entered the driver's side rear passenger door. (14RT 1800.)[20] At about the same time, appellant Gonzales entered the right passenger side, also sitting in the backseat. (14RT 1799-1800.) Appellants said, "You better," and "You didn't see nothing. You don't know nothing." (14RT 1800.) Agustin got very upset with appellants for involving Ms. Mejorado, and there was some arguing inside the car. They drove out of the station, turned right and exited out of the north driveway, and then drove northbound on Azusa. (14RT 1801.) They ended up on Unruh in La Puente, where appellants and Michael exited the car. Ms. Mejorado then drove home with Agustin. (14RT 1801-1802.)

After Deputy Castillo and Sergeant Holmes finished interviewing Ms. Mejorado, they drove her back to her residence. Once there, Deputy Castillo and Sergeant Holmes told Ms. Mejorado they were going to interview Agustin. Ms. Mejorado was concerned for his safety "from the people involved in this

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20. On cross-examination, Deputy Castillo testified Ms. Mejorado said appellant Gonzales also had a gun. (14RT 1810.)

incident." Deputy Castillo asked her permission to process Agustin's car. Ms. Mejorado backed the car out of the garage. Deputy Castillo and Sergeant Holmes took photographs of the car. (Peo. Exh. 45; 14RT 1802-1803, 1829-1830.)

On March 6, 1997, immediately prior to appellants' preliminary hearing, the prosecuting attorney interviewed Ms. Mejorado in the presence of Sergeant Holmes. (14RT 1834-1835.) The conversation was cordial. Ms. Mejorado was not shown any police reports, nor was she shown a transcript of her earlier statements. She was not told what to say at the preliminary hearing. She was told to tell the truth. (14RT 1835-1836.) Ms. Mateo testified at appellants' preliminary hearing and identified appellant Soliz. (12RT 1479-1480.)[21/] Ms. Mejorado testified at the preliminary hearing that she was present at the Shell station on Azusa when the shooting took place. (14RT 1679.) She arrived at the station in her brother Agustin Mejorado's four-door Honda. (14RT 1681-1682.) Agustin was a member of the Perth street gang. (15RT 1889.) Ms. Mejorado referred to Agustin as "Augie," but his nickname was "Listo." (Peo. Exh. 50; 13RT 1668-1669; 15RT 1887.)[22/] The Honda was driven by Clumsy (Michael Gonzales); Ms. Mejorado sat in the middle of the front seat; Agustin sat in the front passenger seat. Agustin did not drive because he had been drinking and was drunk. (14RT 1683-1685.) Appellants sat in the backseat. (14RT 1685.) Ms. Mejorado saw the Black males talking amongst themselves as they stood in front of the station. (14RT 1693-1694.) Michael drove off of Azusa Avenue and into the station, through the parking lot and then drove out

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21. On cross-examination, Mr. Robinson testified he had been unable to identify anyone at the preliminary hearing. (13RT 1589, 1605.)

22. At trial, Ms. Mejorado testified that she only heard Agustin referred to as "Listo" because the prosecuting attorney and the detectives kept calling him that. (13RT 1669-1670.)

onto the street. (14RT 1698.) Michael then made a U-turn and drove back to and entered the station. (14RT 1699.) Two Black males stood by the phone booth. (14RT 1702-1703.) Michael stopped the car in front of the phone booth. (14RT 1704.) Appellants exited out of the back doors and walked towards the phone booth. (14RT 1708-1709.) Appellant Gonzales stayed closer to the car. (14RT 1710.) Appellants and the two Black males loudly talked to each other at the rear part of the car. (14RT 1713-1714, 1716-1718.) Ms. Mejorado heard several fast gunshots coming from one gun. She looked in the direction of the shots, to the rear of the car and saw a gun and "fire, like sparks" coming from it. (14RT 1728-1729.) After firing the gun, appellant Soliz entered the backseat on the driver's side, while appellant Gonzales entered the backseat on the passenger side. (14RT 1730-1732.) Appellants said, "Take off." (14RT 1730, 1732.)

Ms. Mejorado testified at trial she could not recall any of the events that occurred in April, 1996, could not recall anything she told Deputy Castillo and Sergeant Holmes when they interviewed her, and could not recall her testimony at the preliminary hearing. (14RT 1676-1688, 1724-1725, 1727, 1732-1737.)[23/]

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23. The court declared Ms. Mejorado to be a hostile witness, and outside the presence of the jury made a finding that she was feigning her lack of recollection and that she was deliberately perjuring herself. (14RT 1678, 1691, 1779, 1782.) At the conclusion of her testimony, she was remanded into custody until the trial was concluded so as to preserve her presence should her testimony be required. (14RT 1779-1780.) On cross-examination, Ms. Mejorado recalled telling the deputies that she did not know who did the shooting. (14RT 1775-1776.) She further testified on cross-examination that this "was always my position," that she told the deputies on many occasions that she did not know who did the shooting; that to her knowledge she did not know who did it; and that she had speculated that appellant Soliz had done it because she was "forced into that answer." (14RT 1776-1778.)

(v) Conversation Of Appellant Gonzales And Agustin Mejorado

On March 29, 1997, Agustin Mejorado visited appellant Gonzales in county jail. Their conversation was tape recorded and transcribed. (Peo. Exhs. 51, 52; 14RT 1837-1839.)[24/] Appellant Gonzales told Agustin that he wanted Ms. Mejorado "just to lie, homes, or whatever. You know what I'm saying? Try to clean her shit up." Appellant Gonzales told Agustin that they might bring him in as a witness because he had been in the car, although he had been drunk. Appellant Gonzales told Agustin that he wanted Ms. Mejorado to "change it around. That's it," and to "Just bullshit 'em around." or even "make a fucked up statement" like that she had not even been there. Appellant Gonzales told Agustin that Ms. Mejorado should "Just try to hook some shit up" and to "scribble it up . . . so fuckin' bad, that no." (Peo. Exh. 52.)

(vi) Autopsy Evidence

On April 16, 1996, Dr. Lisa Scheinin, a deputy medical examiner in the Los Angeles County Coroner's Office performed the autopsy on Mr. Skyles. (Peo. Exh. 31; 14RT 1842-1843) Deputy Castillo and Sergeant Holmes were present at the autopsy. (Peo. Exh. 31; 12RT 1375; 15RT 1883.) Mr. Skyles had nine gunshot wounds of various types. (Peo. Exh. 53; 14RT 1843-1844, 1866.) Dr. Scheinin observed no sooting or stippling, which meant the bullets had been fired from a distance greater than two feet. (14RT 1868.) Dr. Scheinin arbitrarily labeled the nine wounds. (14RT 1844.)

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24. The parties stipulated the tape recording (Peo. Exh. 51) and transcript (Peo. Exh. 52) accurately recorded appellant Gonzales and Agustin. The tape recording was played for the jury, but not transcribed by the court reporter. (14RT 1838-1839.)

Gunshot Wound No. 1 entered Mr. Skyles' back, followed a sharply downward left to right, passing through the chest and fractured the fifth rib, and went through the left lobe of the lung, the heart, the diaphragm, and the liver, before becoming embedded in the wall of the abdomen. (14RT 1844-1845.) The bullet was recovered from his hip area and booked into evidence. (Peo. Exh. 39; 14RT 1845, 1848, 1869-1870.) This was a fatal wound because there was perforation of the lung, heart and liver. (14RT 1845-1846.) The wound and trajectory of the bullet were consistent with Mr. Skyles being shot from behind while he was kneeling on the ground, with his torso leaning a little bit forward. (14RT 1847.) Dr. Scheinin opined that this wound was the cause of Mr. Skyles' death. (14RT 1856.)

Gunshot Wound No. 2 entered on the outside of Mr. Skyles' left arm at the level of the bicep and exited on the inside of the arm. (Peo. Exh. 53; 14RT 1848-1849.) No bullet was recovered. The wound fractured the humerus. This was a nonfatal wound. (14RT 1849.)

Gunshot Wound No. 3 was in the area where Mr. Skyles' hip and thigh came together, on the left side, going upward, left to right and front to back, and exiting his left buttock. No bullet was recovered. This wound did not cause any serious injury and was nonfatal. (Peo. Exh. 53; 14RT 1849-1850.)

Gunshot Wound No. 4 entered the front part of Mr. Skyles' left thigh, left to right and front to back and slightly upward in the thigh area. This was a nonfatal wound. The bullet was recovered from deep in his thigh and was booked into evidence. (Peo. Exhs. 39, 53; 14RT 1850-1851, 1869-1970.)

Gunshot Wound No. 5 was on the side of Mr. Skyles' right ankle. This wound had the appearance of several fragments of material entering the same area. Two of the fragments traveled upward and right to left, very slightly back to front in the soft tissue of the lower part of his leg. Two small metal fragments were recovered from the medial, inner calf side of his leg. (Peo.

Exhs. 39, 53; 14RT 1851-1853, 1869-1870.) There appeared to be multiple small entrance wounds, indicating it was a shrapnel wound of fragmented projectiles that first struck some intermediate target, causing it to break up and possibly bounce at an angle. (14RT 1852.) This was a nonfatal wound because the fragments traveled into soft tissue without doing any major damage. (14RT 1853.)

Gunshot Wound No. 6 entered at the area slightly above Mr. Skyles' left knee, through the kneecap and then became embedded in the lower part of his femur or large thigh bone. The bullet was recovered and booked into evidence. (Peo. Exhs. 39, 53; 14RT 1853, 1869-1870.) This wound was nonfatal. (14RT 1853-1854.)

Gunshot Wound No. 7 went through Mr. Skyles' right hand, entering at the base of his large knuckle of the third finger, fracturing two bones in the back of his hand, and exited very close to his wrist. No bullet was recovered. This was a nonfatal wound. (14RT 1854.)

Gunshot Wound No. 8 was a grazing wound to Mr. Skyles' right thigh. (Peo. Exh. 53; 14RT 1854-1855.) This wound had "skin tags," small tears at the edges of the wound, which pointed upwards, meaning the bullet likely came from the front and downward. This was a nonfatal, very superficial wound. (14RT 1855.)

Gunshot Wound No. 9 entered Mr. Skyles' left facial cheek, just to the side of his mouth, went through the soft tissue of his cheek, and exited below his ear. This was a nonfatal wound that went through soft tissue. (Peo. Exhs. 51, 53; 14RT 1855-1856.)

Also on April 16, 1996, Dr. Stephen Scholtz, deputy medical examiner in the Los Angeles County Coroner's Office, performed the autopsy on Gary Price. (Peo. Exhs. 31, 54, 55; 14RT 1857-1859.) Deputy Castillo and Sergeant Homes were also present. (Peo. Exh. 31; 12RT 1375; 15RT 1883-1884.) Mr.

Price had a total of seven gunshot wounds, which were arbitrarily given letters A though G. (14RT 1858-1859.) There was no sign of sooting or stippling, meaning the bullets were fired from a distance greater than two feet. (14RT 1868-1869.)

Gunshot Wounds "A" and "B" both entered the left side of Mr. Price's head, went through his brain, and exited the right side of his head. One of the bullets went through his head in the frontal area, near his forehead. The other bullet went through the back of Mr. Price's head, slightly behind the ear. (Peo. Exhs. 54, 55; 14RT 1860-1861, 1866.) Both wounds were very serious and were almost always fatal. No bullets were recovered from these wounds. (14RT 1861.)

Gunshot Wound "C" entered the left side of Mr. Price's back, passed through the skin and soft tissue, and exited the right side of his back. This nonfatal wound involved soft tissue damage, and no bullet was recovered. (Peo. Exhs. 54, 55; 14RT 1861-1862, 1866.)

Gunshot Wound "D" entered Mr. Price's right arm at the shoulder area, and exited his shoulder at the back. The bullet went through soft tissue and the muscle of his shoulder and did not fracture the bone. This was a nonfatal wound, and no bullet was recovered. (Peo. Exhs. 54, 55; 14RT 1862, 1866.)

Gunshot Wound "E" entered Mr. Price's right buttock, through the soft tissue, through the lower abdomen, large intestine, caused hemorrhage, and then became embedded in his right hip area. The bullet was recovered and booked into evidence. (Peo. Exhs. 39, 54, 55; 14RT 1862-1864, 1866, 1869-1872.) Dr. Scholtz opined this wound could have been fatal, as there was a perforation of the colon, which could cause peritonitis. There was also evidence of bleeding and loose blood in the abdomen and in the soft tissues behind the abdomen, which could potentially have been fatal. (14RT 1864-1865.)

Gunshot Wound "F" was a grazing wound to the left side of Mr. Price's thigh, slightly above his knee. No bullet was recovered. This was a minor, nonfatal wound. (Peo. Exhs. 54, 55; 14RT 1865-1866.)

Gunshot Wound "G" was a superficial wound to the right side of Mr. Price's hip. This wound appeared to have occurred when a bullet struck the area, caused a surface wound, and did no further damage. It was a nonfatal wound. No bullet was recovered from the body, although a fragment was recovered from Mr. Price's undershorts, in the right hip area. (Peo. Exh. 54; 14RT 1865-1866.)

Dr. Scheinin opined Mr. Price died from multiple gunshot wounds, and specifically Gunshot Wounds "A," "B" and "E," each of which could have been fatal. (14RT 1872.)

Dr. Scheinin gave Sergeant Holmes four envelopes containing the projectiles recovered from Mr. Skyles' body. Dr. Scholtz gave Sergeant Holmes one projectile recovered from Mr. Price's body. (Peo. Exhs. 37, 39; 12RT 1375, 1381-1384, 1387-1389.)

c. Appellant Gonzales' Conversation With Salvador Berber

Sometime prior to July of 1996, Salvador Berber, a member of the East Side clique of the Puente gang, and who used the nicknames "Psycho" and "Cyclone,"[25/] spoke to appellant Gonzales while the two were on the street. Mr.

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25. On cross-examination, Mr. Berber testified he also went by the name "Tweety," and that he and appellant Gonzales got shot together on another occasion, and that he testified in court in the proceeding related to the shooting. (15RT 1935-1936.) On further redirect examination, Mr. Berber clarified that he had previously testified in a case in which appellant Gonzales and Mr. Berber had been the victims of a shooting, that he had been called to testify against the people who shot at them. Mr. Berber further testified on redirect examination that he had not been paid anything for his testimony in that case,

Berber wanted to buy appellant Gonzales' .38 caliber gun. (15RT 1888, 1890-1891.) Mr. Berber had known appellant Gonzales for about ten years, appellant Soliz for about eight years, and Agustin Mejorado ("Listo") for about two years. (15RT 1889.) Mr. Berber asked appellant Gonzales if the gun was "dirty," meaning "hot" or had been used for anything. (15RT 1891.) Appellant Gonzales said he had two .38 caliber guns; one they used to murder a man during a robbery at the Hillgrove Market, and another one they stole from the man who had been murdered. (15RT 1890-1892.) Appellant Gonzales said appellant Soliz had been with him when he committed the robbery. (15RT 1892.)

Sometime in July of 1996, Mr. Berber was arrested for robbery and he was taken to the Industry Sheriff's Station. (15RT 1892.) In a hope for leniency, Mr. Berber told the police what he had learned from appellant Gonzales. At that time, Mr. Berber had a prior felony conviction for robbery, and was told he could receive a sentence of 10 to 17 years. (15RT 1893.) No promises were made to him by the detectives, and they did not tell him what the effect on his sentence would be in exchange for relating his conversation with appellant Gonzales. (15RT 1894-1895.) Mr. Berber was subsequently arraigned on the robbery charges and transported to Los Angeles County Jail. (15RT 1895.) While in jail, Mr. Berber again spoke to appellant Gonzales, who was also in custody. Appellant Gonzales again spoke about the Hillgrove Market robbery murder. (15RT 1895.)

Mr. Berber later spoke to Deputy Castillo and to Detectives West and Reeder. Based on his conversations with the detectives, Mr. Berber agreed to ride in a Sheriff's transport van with appellant Gonzales. Mr. Berber agreed to

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that by his testifying in that case he was not "trying to get out from underneath another case," and that as a result of having been shot, he still had $20,000 in hospital bills. (15RT 1974.)

do so in the hope of getting some leniency on his own case. (15RT 1896.) No detective or officer made any promise to Mr. Berber. No detective or officer promised Mr. Berber anything about what effect his cooperation would have on his case. (15RT 1896-1897.)

On September 25, 1996, Mr. Berber rode with appellant Gonzales in a sheriff's transport van from Los Angeles County Jail to the Pomona Courthouse. (15RT 1897.) The trip took 90 minutes to two hours, and during the trip they also talked about other things unrelated to the crimes. (15RT 1900-1901.) Their conversation was tape-recorded and transcribed. (Peo. Exhs. 57, 58; 15RT 1901-1902, 1905.)[26/] The transcript accurately transcribed what was on the tape recording of their conversation.[27/] The tape recording played for the jury contained only the part of their conversation concerning appellant Gonzales' discussion of the Hillgrove Market robbery murder and the double murder at the Shell gas station, but some of their conversation about unrelated matters was also on the edited tape. (Peo. Exhs. 57, 58; 15RT 1903-1905, 1908, 1910-1911, 1914, 1916.)

While in the van, appellant Gonzales told Mr. Berber that he "killed the old man" in the Hillgrove Market robbery murder. (Peo. Exh. 58; 15RT 1897.) Appellant Soliz and Richard Alvarez ("Richie Rich") were there with him.

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26. The recording was played but not transcribed by the court reporter. Copies of the transcription were distributed to the jury. (Peo. Exh. 58; 15RT 1902, 1905.)

27. The jury was eventually given three different transcriptions: (1) an 11-page version (Peo. Exh. 58; 15RT 1902); (2) a 31-page, single spaced version (Def. Exh. S; 15RT 1924; 16RT 2146); and (3) a 53-page version (15RT 1926). The jury was instructed the tape recording was the best evidence. (15RT 1926-1927.) The tape recording containing the redacted conversation was admitted as People's Exhibit 57 (15RT 1901), and the entire unredacted conversation inside the van was recorded on two cassette tapes and was admitted as Defense Exhibit T (15RT 1934-1935; 16RT 2146).

(Peo. Exh. 58; 15RT 1897-1898.) Michael Gonzales ("Clumsy") drove them to the location. (Peo. Exhs. 18, 58; 15RT 1898-1899.)

Appellant Gonzales also discussed the double murder of two young Black males at a gas station in Covina. Appellant Gonzales told Mr. Berber that they "caught" the victims "at a phone both," and that they killed them. Appellant Gonzales said he had shot the two men using a nine-millimeter gun. Appellant Gonzales said they "came from a party or something"and that they were in Agustin Mejorado's ("Listo's") car. Agustin's sister (Judith Mejorado) and appellant Soliz were in the car with him. (Peo. Exh. 58; 15RT 1899.)[28/]

Mr. Berber told appellant Gonzales, "I hope I go to a firme joint." A "firme joint" was a decent prison. (Peo. Exh. 58; RT 1906.) Mr. Berber asked appellant Gonzales if he thought appellant Soliz's ("Jasper's") fingerprints were on the van, and appellant Gonzales replied, "Oh no, they're trying to get him on the terrones. We used, uhm, Listo's, Listo's car." (Peo. Exh. 58, at 1; RT 1906-1907.) Mr. Berber asked: "So you guys used Listo's car for that one?" and whether Listo had been driving, appellant Gonzales replied: "Yeah. Listo and his sister in the front seat, and me, Jasper -- Clumsy -- and me and Jasper. See and they said that Jasper's fingerprints on the door and everything. They don't got shit." (Peo. Exh. 58, at 2.) When Mr. Berber asked what door appellant Gonzales was talking about, appellant Gonzales replied: "I mean not

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28. Mr. Berber testified on cross-examination that at some point during their conversation, appellant Gonzales said that he fought with appellant Soliz to see who would shoot the Black males. (15RT 1955-1956.) This statement could not be heard on the tape recording and did not appear in the transcript. (15RT 1956-1957.) Outside the presence of the jury, the court ruled these statements were volunteered and nonresponsive, that they should be stricken and that the jury should be instructed to disregard them. (15RT 1960, 1969-1970.) Also outside the presence of the jury, appellants moved for a mistrial. (15RT 1970-1971.) The court denied the motion. (15RT 1971.) In the presence of the jury, the court struck the testimony and ordered the jury to disregard it. (15RT 1972.)

on the door, on the, on the, uhm, pole." (*Ibid.*) Mr. Berber asked: "Where you guys got off?" and appellant Gonzales replied, "By the telephone, telephone pole. Yeah, I got off. I ran up on 'em. Cause the tintos was right there by the phone. They were right here by the phone and we were here. I got out the car and I went like that. And I ran up on 'em. They were like, 'No, no, no.' I let the motherfuckers have it." "Tintos" was slang for a Black person. (Peo. Exh. 58, at 2; 15RT 1907.) Appellant Gonzales told Mr. Berber that one of the victims tried to run away, that appellant Gonzales was close him, and then "boom, boom, boom." (Peo. Exh. 58, at 3.)

Mr. Berber asked appellant Gonzales whether, "Listo's *** cause his carnala was there." "Carnala was slang for 'sister.' Appellant Gonzales replied, '*** I guess cause he was kind of drunk and shit.' Mr. Berber laughed, and appellant Gonzales said, 'When he gets drunk, he's stupid.'" (Peo. Exh. 58, at 3; 15RT 1907.) Mr. Berber said, "They said they got his fingerprints on the --" and appellant Gonzales interjected, "On the telephone pole or one of these --" and Mr. Berber replied: "Oh they, they can't prove that though. I mean, shit, how many people use that phone?" Appellant Gonzales replied: "He, but he -- he didn't get out. . . . He didn't get out. It was just me -- the only one that got out." (Peo. Exh. 58, at 3.) Appellant Gonzales told Mr. Berber he did not know whether they could see him, and that he did not know if he had his hood on. (Peo. Exh. 58, at 3-4.) Appellant Gonzales told Mr. Berber that when he got back in the car, he said, "Sorry, Judith you had to see that" and that he said, "You got him? They're, they're gone?" and he said "Yeah." (Peo. Exh. 58 at 4.) Appellant Gonzales then told Mr. Berber that Listo was upset and kicked them out of the car, and that they then "jumped in Bird's [Randy Irigoyen's] car, I think." (Peo. Exh. 58, at 4; 15RT 1908.)

Mr. Berber said, "Hey, them fools from Dial used to mistreat Richie Rich [Richard Alvarez], huh?" "Dial" was the name of a street in La Puente,

and the name of another clique of the Puente gang. (Peo. Exh. 58, at 4; RT 1910.)

Mr. Berber and appellant Gonzales discussed the time Mr. Berber wanted to buy one of appellant Gonzales' .38 caliber guns. Appellant Gonzales referred to one of the .38 caliber guns and said, "One [of the guns] got -- fools from the Varrio got busted with one. And gave Clumsy $150 for it," and that they had been "busted" at "Jimmy's pad." (Peo. Exh. 58, at 5; 15RT 1911.) "Varrio" referred to "Varrio Puente," another clique in the Puente gang. (15RT 1912.) Appellant Gonzales then said that the .38 caliber gun that "we killed the old man with" had been sold to a "Paisa." "Paisa" referred to an undocumented immigrant that had recently crossed the border from Mexico. Appellant Gonzales said the "old man's" gun had been left at "Curley's pad." The "old man's" gun had his initials on it on the side, and appellant Gonzales said, "[W]e scratched them off. It was a Colt. See, I kept getting Rossi's. See I had -- I gave one to a fuckin,' uhm -- what the fuck's his name? Uh, da, da, Scrampy, from Ballista." (Peo. Exh. 58, at 6; 15RT 1912-1913.) "Scrampy" claimed membership in the Ballista clique of the Puente gang. Ballista was a street in La Puente. (15RT 1913.)

Appellant Gonzales told Mr. Berber: "I done about three -- two niggers and that old man -- about four mother fuckers when I got out this time. Fuck that." (Peo. Exh. 58, at 7.) Appellant Gonzales referred to a "meat market" in Hacienda Heights "by Turnbull and Seventh." (Peo. Exh. 58, at 7.) Appellant Gonzales told Mr. Berber that they wore hoods and sweatshirts, and that he had worn gloves, but that his gloves had ripped, probably when he grabbed the cash register tray at the front of the store. The tray only had $200 or $300 in it. (Peo. Exh. 58, at 8.) On the way to the market, appellant Gonzales was worried what might happen if they were pulled over because: "I had the cuete right here. I had the shotgun with the cuete. Clumsy was driving and Jasper had the, uhm,

the nine right ***." "Nine" referred to a nine-millimeter gun. (Peo. Exh. 58, at 9; 15RT 1914.)

Appellant Gonzales told Mr. Berber that he had heard that the newspapers had referred to Mr. Eaton and "tried to make him out to be, 'Oh, he's more, he's more than a butcher, more like a' -- motherfucker -- 'More than a father figure too. He wasn't only a butcher, but a father figure, too.' Says that in the paper. I don't want to hear that bullshit. ***, Smoke the motherfucker." (Peo. Exh. 58, at 9.)

Appellant Gonzales said that the "old man" had "tried to reach for his gun, that's why I hit him with -- I was trying to wrestle, I grabbed his gun, I started hitting him with the other one. It was on. I tried to shoot him but it fucking -- when I hit him, cause I was holding it like this, cracking him, bam. Fucking, uh -- I pressed the button to *** --." (Peo. Exh. 58.) When Mr. Berber asked, "The cylinder popped out or what?" appellant Gonzales replied, "Yeah. Popped out a little, but I didn't know and I was trying to -- blam. He was already on the ground already and I had already got his cuete. Boom, boom, boom."[29] Mr. Berber then asked if appellant Gonzales had shot him in the face, and appellant Gonzales replied, "Like right here. Straight open face, all the shots hit him." (Peo. Exh. 58, at 11; 15RT 1916.)

Appellant Gonzales told Mr. Berber that if the "jaina" had not been there and run away, they "could have looked for a safe or something. But she broke running to a house." Appellant Gonzales also said, "I said we're going out. If the fuckin' Juras pull us over, we're fucking letting them have it." (Peo. Exh. 58, at 9; 15RT 1914-1915.) "Juras" referred to "cops." "Jaina" was slang for a woman. (15RT 1915.) Appellant Gonzales said that the "jaina" had "just

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29. On cross-examination, Mr. Berber testified that when appellant Gonzales said this, he held his hand and gestured with it as if he were holding a gun. (15RT 1950-1951.)

took off screaming, running," and that "the newspaper said her son had just left to get some pizza. He was on his way back. But he didn't make it." (Peo. Exh. 58, at 9.) When Mr. Berber asked if the "jaina" had seen their faces, appellant Gonzales replied, "I don't know. They probably see, see -- blew her mind though. She probably crazy now." (Peo. Exh. 58, at 10.)

Appellant Gonzales told Mr. Berber that when they left the market, they jumped in Clumsy's getaway van, which had been parked about a half a block away, drove down the street, "hit Turnbull Canyon, parked in an empty parking lot there, took off. Jumped in Richie Rich's car, went all the way up Turnbull Canyon, dropped the cuetes off, and backtracked down." (Peo. Exh. 58.)

At the end of the tape were audible sounds of the sheriff's deputies approaching the van. (15RT 1916.) To this point, appellant Gonzales and Mr. Berber had been alone. The sheriff's deputies opened the door, took them out and returned Mr. Berber to jail. (15RT 1916-1917.)

At no time prior to September 25, 1996, did anyone from the Sheriff's Department or the District Attorney's Office make any promises to Mr. Berber about his pending case. After the tape recording was obtained, the case against Mr. Berber was resolved in some fashion. The prosecuting attorney on Mr. Berber's pending case was the same prosecuting attorney prosecuting the case against appellants. (15RT 1917.) Mr. Berber was charged with a robbery and with having a prior conviction for robbery. (15RT 1917-1918.) Mr. Berber faced a possible sentence of 14 years in state prison, "with maybe 80 percent."[30/] Mr. Berber was represented by a lawyer. Mr. Berber's case was resolved when the court struck one of Mr. Berber's prior strikes, and sentenced him to five years, with the sentence suspended. (15RT 1918-1919.) When he testified at appellants' trial, Mr. Berber was on five years of felony probation. If he

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30. On cross-examination, Mr. Berber testified he believed he was facing "about nine years." (15RT 1939.)

violated any term of his probation he would go to prison for five years. His plea agreement required him to tell the truth and truthfully testify about the murders. (15RT 1919.) If he did not testify truthfully, his plea agreement would be forfeited and the case against him could be re-filed, including the prior strike. (15RT 1919-1920.) Part of the plea agreement also relocated Mr. Berber out of Los Angeles County. (15RT 1920.)

d. Firearms Expert Testimony

Deputy Patricia Fant of the Los Angeles County Sheriff's Department was a firearms examiner in the Scientific Services Bureau. (16RT 2016.) Deputy Fant examined and compared the 11 nine-millimeter expended shell casings found at the murder scene of Messrs. Skyles and Price (Peo. Exh. 38) with the live nine-millimeter round found in the get-away van at the murder-robbery of Mr. Eaton (Peo. Exh. 26) and determined they had all been fired or come from the same magazine. (16RT 2027-2032, 2145-2146, 2153-2154.) Deputy Fant further opined they were all nine-millimeter rounds manufactured by Winchester. (Peo. Exhs. 26, 38; 16RT 2035-2036, 2145-2146, 2153-2154.)

Deputy Fant also examined and compared the live round found by Ms. Eaton at the Hillgrove Market sometime after the murder (Peo. Exh. 10), and the bullet removed during the autopsy of Mr. Eaton (Peo. Exh. 23) and opined that the general rifling characteristics were the same, and thus they could have been fired from the same gun. (16RT 2034-2035, 2145-2146, 2153-2154.) Deputy Fant further opined that revolvers made by the Rossie, Astra, F.I.E., and Security Industries were types of gun that could have been used to fire the two bullets. (Peo. Exhs. 10, 23; 16RT 2035-2036, 2145-2146, 2153-2154.)

Sergeant Bruce Wayne Harris of the Los Angeles County Sheriff's Department was assigned to the Weapons Training Center, and was formerly Section Supervisor of the Sheriff's Firearms Identification Section. (16RT

2048.) He was an expert in firearms identification,[31] including the comparison of expended bullets to determine whether they had been fired from the same gun. (16RT 2049.) Sergeant Harris compared the bullets from the autopsy of Mr. Eaton (Peo. Exhs. 23(a), 23(c)) and opined they could have been fired from the same firearm, and that the markings were consistent with them having been fired from the same firearm. (16RT 2050-2051.) The caliber of the firearm would have been a .38 special or .357 magnum, probably from a revolver, and consistent with revolvers made by Astra, F.I.E., Rossi and Security Industries. (16RT 2051-2052.) Sergeant Harris compared the .38 or .357 caliber bullet recovered by Mr. Mutac at the Hillgrove Market murder scene (Peo. Exh. 7), with the expended rounds in People's Exhibit 23, and determined People's Exhibit 23(c) and People's Exhibit 7 had been fired from the same firearm. (16RT 2052-2053.)

e. Gang Expert Testimony

Detective Lusk testified as a gang expert that the Puente gang was within the jurisdiction of the Industry Station, mostly centered in La Puente, and that the gang's borders were Valley Boulevard on the South, Chatterton Avenue on the East, the West Covina City border on the North, and Willow Avenue on the West. (16RT 2064.) La Puente Park was in the middle of the gang's territory. Detective Lusk had interviewed 200 or more members of the Puente criminal street gang over the course of his career, and had qualified in superior and municipal courts as an expert on the Puente gang on 40 or more occasions. The primary ethnicity of the Puente criminal street gang was Hispanic. (16RT 2065.)

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31. The parties stipulated to this evidence. (16RT 2049.)

From January to April 1996, there were approximately 100 "hard-core" members of the Puente criminal street gang. "Hard-core" members were those that could be counted on at a moment's notice to go where needed to go to back up another gang member or to commit a crime. (16RT 2065-2066.) "Associates" were those who may still "claim" the gang, and have gang tattoos, but were not among those to whom a hard-core gang member might go if he needed backup. (16RT 2066.) Tattoos demonstrated to fellow gang members that membership was important enough that the member was willing to put a tattoo on his body. (16RT 2066-2067.) Gang tattoos also advertised to people that "I'm from this gang; stay out of my way." While "Puente" was the name of the gang, members used other variations such as "P13," with "P" standing for "Puente" and "13" standing for the letter "M," for "marijuana." Within the gang culture in Southern California, "M" also stood for "Mexico." Members also referred to themselves as "Varrio Puente." "Varrio" is Spanish for "neighborhood." They also referred to themselves as "VP13," which stood for "Varrio Puente One Three," and "Puente Trece" which was Spanish for "Puente 13." (16RT 2067.)

"Surenos" referred to "Southern California," and "Nortenos" stood for "Northern California." The Nortenos used the number 14, which stood for the letter "N," the fourteenth letter in the alphabet. There was a rivalry between the Nortenos and the Surenos. (16RT 2068.)

A clique was a sub group or sub gang within the larger gang. A clique could be named after a street within the neighborhood, or to an age group of individuals that grew up around the same time, such as "Tiny Locos" or "Tiny Winos." (16RT 2068-2069.) Most Puente cliques were named after streets within the city of La Puente. (16RT 2069.) Puente cliques still owed allegiance to the larger gang. Members of cliques associated, hung out and committed crimes together, and backed each other up, if necessary. The 11 or 12 cliques

within the Puente gang got along with each other. (16RT 2069.) "Perth Street" was a clique of the Puente gang, and it was named for a street in La Puente, in a neighborhood claimed by the Puente gang. (16RT 2069-2070.) "Dial," "Ballista" and "Varrio Puente" were other cliques of the Puente gang. (16RT 2070-2071.)

Detective Lusk had 20 to 30 prior contacts with appellant Gonzales. (16RT 2072.) Appellant Gonzales told Detective Lusk he was a member of the Puente gang. (16RT 2076.) Detective Lusk opined appellant Gonzales was a member of the Puente criminal street gang and had been a member since at least 1990; that he belonged to the Perth Street clique; and that he had member at the time of the murder and robbery of Mr. Eaton at the Hillgrove Market on January 26, 1996, and the double murder of Messrs. Skyles and Price on April 14, 1996. (16RT 2073-2074.) Appellant Gonzales also had gang tattoos indicating membership in the Puente gang. (Peo. Exh. 66; 16RT 2074-2076.)

Detective Lusk had five to ten prior contacts with appellant Soliz. (Peo. Exh. 49; 16RT 2076-2077.) Appellant Soliz admitted membership in the Puente gang. (16RT 2078.) Detective Lusk opined appellant Soliz was a member of the Puente gang, Perth Street clique, at the time of the murder and robbery of Mr. Eaton at the Hillgrove Market on January 26, 1996, and at the time of the double murder of Messrs. Skyles and Price on April 14, 1996. Detective Lusk's first contact with appellant Soliz was in 1990 or 1991, and appellant Soliz had been a member of the Puente gang since at least that date. (16RT 2077.) Appellant Soliz also had tattoos indicating membership in the Puente gang. (16RT 2077-2078.)

Detective Lusk had less than five prior contacts with Michael Gonzales, with the first being sometime in 1992 or 1993. (Peo. Exh. 18; 16RT 2078-2080.) Michael had tattoos indicating membership in the Puente gang. Detective Lusk opined Michael was a member of the Puente gang, Perth Street

clique, and had been a member at the time of the murder and robbery of Mr. Eaton at the Hillgrove Market on January 26, 1996, at the time of the double murder of Messrs. Skyles and Price on April 14, 1996. (16RT 2079-2081.)

Detective Lusk had investigated "probably a couple hundred" crimes committed by Puente gang members. Based on his experience, Detective Lusk opined that the specific purpose of the Puente gang was to commit crimes and further their reputation on the streets. (16RT 2080.) Members of the Puente gang committed crimes ranging from petty theft and simple assaults to armed robberies, attempted murders and murders. (16RT 2080-2081.)

Detective Lusk investigated Case No. KA006317, involving defendant David Cavillo and Michael Ortega, two people he opined were members of the Puente gang. (16RT 2081-2082.) On September 9, 1990, Messrs. Cavillo and Ortega were "partying" late at night in La Puente Park with 20 or 30 other members or associates of the Puente gang. Four other non-gangmembers arrived; two females known to some of the gang members present, and two males not known. One of the males was from out of the State; he wore an all-red sweat suit and was accused by gang members as being a member of the Norteno gang. He denied it and a fight started. Messrs. Cavillo and Ortega and a third suspect ran to some bushes, retrieved some guns, and shot at the four victims. In 1991, Messrs. Cavillo and Ortega were convicted of attempted murder. (16RT 2082-2083.)

Detective Lusk was the lead investigator in Case No. KA030201, involving defendant Jose Torres. (16RT 2083.) In 1996, Mr. Torres was convicted of a robbery committed on November 6, 1995. A pizza delivery man attempted to deliver pizza to an apartment within an apartment complex. After knocking on the apartment door, the delivery person/victim was told "they didn't know what he was talking about." When he turned around, he was confronted by four males who attacked him with a knife and a metal pipe. They

took the pizza and all the money he had. While being beaten, his car was broken into and his stereo was stolen. (16RT 2084.) Mr. Torres claimed membership in the Puente gang. Detective Lusk opined Mr. Torres was a member of the Puente gang. (16RT 2085.)

Detective Lusk was the lead investigator in Case No. KA035811, involving defendants Agustin Mejorado and Caesar Montiveros. Messrs. Mejorado and Montiveros committed a string of approximately six armed robberies over about a two-hour period in April 1997. (16RT 2085-2086.) They were convicted of several counts of armed robberies in July 1997. Detective Lusk had six to twelve prior contacts with Mr. Mejorado, who used the nickname "Listo," and he opined Mr. Mejorado was a member of the Puente gang at the time he committed the crimes. (Peo. Exh. 50; 16RT 2086-2087, 2124.) Based upon his prior contacts with Mr. Montiveros, Detective Lusk opined he was a member of the Puente gang when he committed the crimes. (16RT 2087, 2124.)

The crimes committed by Messrs. Calvillo, Ortega, Torres, Mejorado and Montiveros were committed for personal monetary gain, enhancement of their reputation in the Puente gang, and enhancement of the reputation of the gang itself. (16RT 2088.)

Detective Lusk opined the murder and robbery of Mr. Eaton at the Hillgrove Market on January 26, 1996, was a good example of crimes committed to enhance the individual's reputation within the gang, as well as to enhance the reputation of the gang itself. (16RT 2088-2089.) Detective Lusk further opined the double murder of Messrs. Skyles and Price on April 14, 1996, was probably done in retaliation for the murder of Mr. Gallegos two weeks earlier. (16RT 2092-2094.) Detective Lusk specifically testified that the fact that the victims were not gang members did not mean they were not killed in retaliation for the murder of Mr. Gallegos as "if the individual or individuals

are found within the general area of that gang and they meet the right race; the right age; possibly the right style of dress, they're gonna be targeted." (16RT 2093.) He further testified that "even if they don't hit the right target, it goes back to enhancing the street gangs reputation: these guys are so crazy they don't care who they kill; they'll kill anybody." Thus, Messrs. Skyles and Price were killed "regardless of whether they were involved in the Gallegos murder; regardless of whether they were gang members themselves, their appearance; their age fit the general description of who needed to be taken out." (16RT 2094.) Detective Lusk further opined the double murder of Messrs. Skyles and Price on April 14, 1996, would have enhanced the reputation of the gang and the reputation within the gang of those members who committed the crimes. (16RT 2094-2095.)

Detective Lusk opined a gang member might brag to another gang member and take credit for a shooting, when he actually was only a backup that assisted another gang member in committing a shooting, for respect and to improve his ranking in the gang. (16RT 2098.) The gang member who provided the backup assistance considered himself a part of the crime because his assistance was an intimidation factor in the crime, because he was there if they needed more assistance, and because his presence insured his crime partner did what he was supposed to do. (16RT 2098-2099.)

2. Defense Evidence

a. Appellant Soliz

Appellant Soliz did not testify in his defense.

Sergeant Homes testified he directed photographs be taken of the scene of the double murder of Messrs. Skyles and Price on April 14, 1996, and that the photographs appeared to represent the scene of the murders. (Def. Exs. U-Z; Peo. Exh. 35; AA-DD; 16RT 2155-2162, 2170.) Based upon his witness

interviews, Sergeant Holmes directed photographs be taken from the respective locations from which the witnesses told him they made their observations, with the exception of failing to direct a photograph be taken from inside the window of the station. (16RT 2160-2161.)

Sergeant Holmes further testified that when he prepared the photographic lineup containing appellant Soliz's picture in position No. 2, he was aware that the suspects described by Ms. Mateo and Messrs. Robinson and Garcia ("Mora") were bald or with very short hair. (16RT 2164.) He tried to put others in the lineup card that had hair like that of appellant Soliz. (16RT 2164-2165.)[32/]

b. Appellant Gonzales

Appellant Gonzales did not testify in his defense and rested without presenting any evidence on his behalf. (16RT 2169.)

B. First Penalty Phase

1. Prosecution Evidence

Joy Ann Mitchell was the mother of victim Gary Price, who was 18 years old when he was killed. Ms. Mitchell learned of her son's death about 30 to 45 minutes after he was killed. (18RT 2441-2442.) She learned of his death from Mr. Price's father. Initially, she did not believe it. She felt like it took out a part of her life. She jumped up, screamed and said, "No. My child is not dead." She went to the gas station at Azusa and San Bernadino Road. (18RT

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32. On cross-examination, Sergeant Holmes testified he inserted in the lineup card the only photograph he had of appellant Soliz, and that it was important to him to select photographs of others that looked like the description of the suspect by eyewitnesses. (16RT 2168.)

2442.) It finally "hit home" that her son was dead when she saw the taped-off gas station and spoke to a detective at the scene. (18RT 2442-2443.)

Although two years had now passed, it was not any easier for her. Her son was a large part of her life. He was not violent, made people happy and laugh, and respected elderly people, as he was raised to do so. Ms. Mitchell and her son did many things together, went to a lot of places and joked and laughed together like brothers and sisters. Every day, Ms. Mitchell looked at a picture of her son on the wall and told him that she loved him. Every day was hard for her. (18RT 2443.) Her son was a beautiful child, and was warm and caring. (18RT 2443-2444.) Her last conversation with her son was on the day he was killed. They spoke of arrangements to go the funeral for Ms. Mitchell's aunt. (18RT 2446.)

Gary Maurice Price was Mr. Price's father, business partner and best friend. (18RT 2447.) Gary Price and his son were in the business of making peach cobblers and soul food for "J Y and Son" and then selling them to the King Hospital, Harris and Ross Mortuary, Douglas Aircraft, and to the beauty shops throughout the neighborhood. Gary Price was teaching appellant Price to cook as well as to conduct business. (Peo. Exh. P1; 18RT 2448, 2450-2451.) They worked together for six years. When he learned his son had been killed, he started drinking and using drugs to get over it. The business he had with his son had to be shut down by August of 1996 and remained closed until January of 1997. When he restarted the business, he distributed a flyer apologizing to his customers for the lack of service while he had been mourning the death of his son. (Peo. Exh. P2; 18RT 2449-2452.)

Gary Price learned his son had been killed when he was paged by his mother. He did not want to believe it, jumped in his car and drove to the Shell gas station at Azusa and San Bernadino Road. (18RT 2452.) It finally hit him that his son was dead when he saw the pictures of his son after he had been

shot. His son was pleasant and outgoing, humorous, and loved to dance and skate. Gary Price never visited his son's grave site because it was too hard for him. (18RT 2453.)

Neidra Hagan was victim Elijah Skyles' mother. Her only son was 15 years old when he was killed. (18RT 2456.) Her son was energetic, loved life, had a good heart, loved his friends and family, had a sweet spirit, and just wanted to live in peace. (18RT 2456-2457.) Her son loved his friends, and if his friends ever needed something to eat or a place to stay, he brought them to Ms. Hagen and asked if she could feed them or give them a place to stay. She did so, because she loved her son. He loved and was very close to victim Gary Price. Mr. Price was sweet and quiet. They got along well together. (18RT 2457.) Her son was active in sport, loved basketball, skateboarding, skating, and loved to entertain. When her son was born, he was asthmatic, suffered with it for 13 years and took daily medicine for it. (18RT 2458.) As of the time he was killed, her son was growing out of the asthma and would not have to take the medicine or be on the machine, although he still carried an inhaler. (18RT 2459.)

Ms. Hagen learned her son had been killed when Mr. Price's stepmother came to the door and said, "Neidra. Neidra. Eli and Gary -- Eli and Gary is dead. Eli and Gary is dead." Ms. Hagen did not initially believe it. Mr. Price's stepmother then pushed open the door and told her they had been shot on San Bernadino and Azusa. (18RT 2459.) The fact that her son had been shot seven times and twice in the head made it even more difficult for her to deal with it. (18RT 2459-2460.) Although about two years had passed since he had been killed, it had not gotten any easier for Ms. Hagen to deal with it because he had been her only son. She continued to have nightmares about the night he had been killed. (18RT 2461.) When her son was killed, he had a two-year-old sister. Due to the impact on her of her son's murder, Ms. Hagen took her

daughter to the Pomona Child Care for the eight months following his death. (18RT 2461-2462.) Ms. Hagen was so distraught that she contemplated suicide. (18RT 2462.)

Betty Eaton had been married to victim Lester Eaton since 1953. They had four children together and nine grandchildren: one was born after Mr. Eaton was killed. (18RT 2463-2464.) Mr. and Ms. Eaton began running the Hillgrove Market in 1952. (18RT 2464.) The Hillgrove Market was Mr. Eaton's life. For the two years after Mr. Eaton's death, Ms. Eaton tried to keep the business going while also trying to sell it. (18RT 2465.) This was difficult, as it required her to work in the same spot her husband been murdered. She thought of her husband every time she opened and locked the doors. Ms. Eaton dreaded holidays, birthdays and anniversaries, as she felt they had all been taken away from her when her husband was killed. The pain had not lessened in the two years since his murder. Mr. Eaton was 67 years old when he was killed. (18RT 2466.)

Mr. Eaton loved the outdoors; loved to fish; and loved to hunt. (18RT 2466-2467.) Mr. Eaton was in excellent health and still hunted and fished at the time he was killed. (18RT 2467.) The year Mr. Eaton was killed, Mr. And Mrs. Eaton had planned to sell the business, retire, and spend as much time as they could in their home in the Sierras. (18RT 2467-2468.) Mr. Eaton liked to spend time with his grandchildren, two of whom basically lived with Mr. and Mrs. Eaton. Thomas, one of the two grandchildren living with the Eatons, was 12 years old when Mr. Eaton was killed. Mr. Eaton was more a father than grandfather to Thomas. After Mr. Eaton's death, Thomas became very angry. (18RT 2468.) Mr. Eaton's death impacted Thomas to such an extent that Ms. Eaton had to send him to live with his father in another state. (18RT 2468-2469.) The Hillgrove Market was the last small neighborhood market. If anyone in the community and neighborhood had a problem, they brought it to

Mr. Eaton, and if they could not pay for an item, he let them pay for it later. Mr. Eaton kept a box of cash register receipts that permitted customers to sign their name and pay when they could. (18RT 2469.)

Betty Woodbury had known and been friends with the Eatons for 36 years. She first met them when they first moved into the neighborhood and started the Hillgrove Market. Ms. Woodbury still shopped there. (18RT 2471.) Ms. Woodbury several times observed that when homeless people came to the Hillgrove Market, Mr. Eaton made them a sandwich and gave them a carton of milk and some fruit. (18RT 2471-2472.) When any children from the neighborhood came into the market, they would sometimes want more pieces of penny candy than they could afford. Mr. Eaton let them take it and told them to pay whenever they felt like it. (18RT 2472.) Mr. Eaton extended credit to those in the neighborhood, allowing customers to take items by signing the back of the bill. (18RT 2472-2473.) The Hillgrove Market was a unique place, for a small grocery store, because everyone knew everyone. (18RT 2473.)

Diane Hacker, Mr. Eaton's daughter, worked in the grocery business, which she learned from her father. (18RT 2475.) She started working at the Hillgrove Market when she was 14 or 15, and continued working there until she was 18. Her experience working at the market gave her credit at her next job, and thus she started as a "Fourth Apprentice" rather than a box person or "First Apprentice." (18RT 2475.) She was given many responsibilities at her new job, and she owed her abilities to take on such tasks to her father. Her father was a patient and quiet man, who never raised his voice. Her father gave money to homeless people. (18RT 2476.) Her father never got upset with his children, and if there was a problem, they would talk it out while he cleaned produce. (18RT 2476-2477.) When Ms. Hacker walked into the back room of the market, she still expected to see her father there. She thought of him every day, and it took her about three weeks to go back to work after he died. When

she smelled coffee, she thought of him. Two years had passed and it was still not easy for her. She has two children. (18RT 2477.) Her father let them help stock the store. (18RT 2477-2488.)

Ms. Hacker learned her father had been killed from her brother when he called and said, "Dad's been shot" and then hung up. Ms. Hacker then called her older brother and her aunt to find out what had happened. (18RT 2478.) Ms. Hacker then received a call indicating her father had been shot, but was still alive. She called a neighbor to watch her children, dropped the phone and screamed. Ms. Hacker's husband asked what was wrong, and she said, "I gotta go. I gotta go. I gotta go." (18RT 2478-2479.) Ms. Hacker and her husband left their children with the neighbor and then drove to the market. It took them 45 minutes to get there, and there was no place to park as the area was full of police and emergency cars and people. She jumped out of the car, saw her younger brother and called out to him, "Rene." Someone yelled, "Grab her." Someone grabbed her and said, "He's gone." Ms. Hacker collapsed, her knees buckled and she could not stop crying. (18RT 2479.) Ms. Hacker's husband held onto her and said, "Now take a deep breath. You have to be strong. We have got to find your mother. And she needs us now." (18RT 2479-2480.) They went around the store and saw her mother, sitting at the front of the store with police officers. (18RT 2480.)

Kenneth Eaton, Lester Eaton's son, was 42 years old. Kenneth and his father did quite a bit of hunting, fishing and shooting together. His father was in excellent health at the time he was killed. They had hunted and fished together all of their lives. Kenneth learned his father had been killed through a phone call from his brother. Kenneth was in shock. His father's death had quite a bit of an impact on the family and left a big void. The day after his father was killed, Kenneth helped the police find some of his father's property. (18RT 2481-2483.) It was tough on him to see his father's things scattered up

and down the roadway. He thought of his father every day, and it had not gotten any easier in the two years since his death. Kenneth had worked in the Hillgrove Market from ages 12 or 13 to age 18. (18RT 2483.)

His father had a real close relationship with the children and young people in the neighborhood. His father was not an angry or violent person. His father was kind and never turned anybody away. His father would never say no, and whenever someone needed help, he was there. Kenneth had a 12-year-old son who loved being with Mr. Eaton, and loved running around the store. (18RT 2484.) Kenneth missed everything about his father, including talking, fishing and hunting with him. (18RT 2485.)

A Department of Corrections certified package showed that appellant Soliz was convicted on January 7, 1992, of a felony charge of unlawful driving or taking of a vehicle. (Peo. Exh. P-P3; 18RT 2485-2486.) Another Department of Corrections certified package showed that appellant Gonzales was convicted on August 6, 1996, of a felony charge of possession of methamphetamine. (18RT 2486.) The parties stipulated that appellant Gonzales pleaded guilty on October 5, 1995, to possession of methamphetamine, in violation of Health and Safety Code section 11377, subdivision (a). (19RT 2597.)

2. Defense Evidence

a. Appellant Gonzales

Appellant Gonzales did not testify.

Edna Gonzales was appellant Gonzales' mother. Appellant Gonzales was born on May 24, 1976, and his full name, which appeared on his birth and baptismal certificates, is "John Anthony Speedy Gonzales." (Def. Exhs. D-PA, D-PB; 18RT 2490-2492, 2568.) When appellant Gonzales was growing up, Ms. Gonzales worked two hours a day, during lunchtime, for the La Puente

School District. (18RT 2491-2492.) Appellant Gonzales did well in school until he went to junior high school in 1987 and 1988. (Def. Exh. D-PC; 18RT 2492-2493, 2568.) Appellant Gonzales' father would not see appellant Gonzales while he was in jail. (18RT 2493.) On the day before appellant Gonzales' 14th birthday, he was shot in the kidney while in front of his house. (18RT 2497-2498.) It was a gang shooting. He had to spend a week in the hospital, and then spent two or three weeks at home recuperating. (18RT 2498.)

Frank Richard Gil was friends with appellant Gonzales and had known him for about nine years. They "hung out" together and played basketball and football. (18RT 2502-2503.) At some point, Mr. Gil learned appellant Gonzales had "jumped into a gang." From the time appellant Gonzales was 12 years old, up until a couple of years before 1998, Mr. Gil would take his three-year-old son when he visited appellant Gonzales at his house. (18RT 2503.) Appellant Gonzales was very playful with Mr. Gil's son. Appellant Gonzales did not really talk about gang life and gang activities, and did not tell him he should join a gang. Many times appellant Gonzales told Mr. Gil to stay away from gangs, and told him to keep his life going, work and take care of his family. Mr. Gil worked full-time in a warehouse. (18RT 2504.) Mr. Gil opined that his son would benefit by appellant Gonzales explaining what he should not do. Mr. Gil was surprised when he heard of appellant Gonzales' "situation." Since appellant Gonzales was in custody, Mr. Gil had spoken to him a few times, and he was friendly. (18RT 2505.) Appellant Gonzales asked Mr. Gil about his son, about his family, and about how his parents were doing. (18RT 2506.)

Sam Ortega, Jr. was appellant Gonzales' first cousin. Appellant Gonzales "kind of grew up" in the company of Mr. Ortega's family. Mr. Ortega lived in Palm Springs. (18RT 2508.) While appellant Gonzales was

growing up, he sometimes spent weekends or even a couple of weeks with Mr. Ortega's family. Appellant Gonzales was very close to Mr. Ortega's son, who was five years older. Appellant Gonzales hiked and hunted in the desert with Mr. Ortega's son. (18RT 2509.) When appellant Gonzales became a gang member, he became more withdrawn and did not visit with Mr. Ortega's family as much. He still treated Mr. Ortega with a lot of respect and still helped him do chores and clean the pool. A few years before 1998, Mr. Ortega's daughter got married. (18RT 2510.) Appellant Gonzales went to the wedding and was respectful. (18RT 2510-2512.) Appellant Gonzales did not talk much about gangs to Mr. Ortega, but did talk about them to his son. (18RT 2511.)

Kristina Monique Clavijo was Mr. Ortega's 23-year-old daughter. She was married in 1996. She was very close to appellant Gonzales' sister. When they walked to the store to get something for her aunt, appellant Gonzales always went with them. She was "pretty close" with appellant Gonzales. (18RT 2514.) Appellant Gonzales was respectful towards her, never gave any indication he was involved in a gang, and never spoke about his gang. (18RT 2515.) Ms. Clavijo had one conversation with appellant Gonzales while he was incarcerated. He asked her if she had any girlfriends that could write to him. He spoke to her in a friendly manner and was respectful towards her and her father. (18RT 2516.)

William Marmolejo had known appellant Gonzales since he was born. (18RT 2518.) He was "more of a big brother" to appellant Gonzales. Mr. Marmolejo had a "special sister," and he was a volunteer coach for the Special Olympics. (18RT 2519.) When appellant Gonzales was a little younger than 16 years old, he went with Mr. Marmolejo to the Special Olympics, and helped take the athletes to the different venues. (18RT 2519-2520.) Appellant Gonzales received a participation award given to all the athletes, and the area director also gave him an award. (18RT 2520.)

Fernando was Mr. Marmolejo's middle brother. Fernando was eight years older than appellant Gonzales. Appellant Gonzales looked up to Fernando and to Mr. Marmolejo. Fernando was in the marines and while on leave he spent time with appellant Gonzales. (18RT 2521.) When Fernando was discharged from the marines, he came home and became involved in the Perth Street gang. Fernando took appellant Gonzales "under his wing." (18RT 2522.) With Fernando's help, appellant Gonzales joined the gang. At that time, appellant Gonzales "more or less" stopped "hanging out" with Mr. Marmolejo and started spending more time with Fernando. Appellant Gonzales still came over and was friendly and talked to Mr. Marmolejo's sister. (18RT 2523.) Appellant Gonzales never tried to get him into the gang. (18RT 2524.)

Valerie Gonzales, appellant Gonzales' 26-year-old sister, had a close relationship with him. (18RT 2527.) After appellant Gonzales joined the gang, he never tried to get her involved with his gang friends. Appellant continued to play with Valerie's three or four-year-old daughter, and he picked her up from school. (18RT 2528-2529.) Every time she saw appellant Gonzales, Valerie told him to stay out of trouble and be good. Valerie believed appellant Gonzales should be given a sentence of life without parole because he was still a part of the family and the family needed him. (18RT 2529.) Appellant Gonzales told his nieces and nephews to stay in school, do good, and not to end up like him. (18RT 2530.)

Frances Ontiveros, appellant Gonzales' 23-year-old sister, had a daughter with Down's Syndrome. (18RT 2531, 2533.) After she was born, appellant Gonzales helped Ms. Ontiveros take care of her. He took them to the bus, picked them up, gave her baths and made sure she was fed. Appellant Gonzales was a good uncle. (18RT 2532.) Appellant Gonzales brought fellow gang members around Ms. Ontiveros' children, but they were always respectful, and were not drunk or intoxicated. (18RT 2532-2533.) Ms.

Ontiveros had a close relationship with appellant Gonzales. He was never mean to her. (18RT 2533.) Appellant Gonzales was a good person, kind hearted and always tried to help out other people. (18RT 2534.)

David Jose Gonzales was appellant Gonzales' older brother. When growing up, appellant Gonzales looked up to David. (18RT 2536.) David never joined a gang because he did not think it was worth it. In 1989, David was convicted of a robbery and was incarcerated for it. Appellant Gonzales was 13 years old at that time. (18RT 2537.) This was about the same time appellant Gonzales joined a gang. David did not try to talk him out of joining as he was not around at the time. David was having financial problems. He had four children. (18RT 2538.) Appellant Gonzales went out with David, his wife and children. Appellant Gonzales had a close relationship with David, who told appellant Gonzales to stay in school, get good grades and stay out of trouble. David and his friend Tony took appellant Gonzales with them a couple of times. (18RT 2539.) Tony was not a gang member. (18RT 2539-2540.)

On one occasion, police officers pulled over David, Tony and appellant Gonzales while they drove by a church. It was a case of mistaken identity. The officers pointed their guns at them and said, "Keep your hands up." (18RT 2540.) Appellant Gonzales was always respectful of David and his wife. Appellant Gonzales lived with David and his wife in 1988 for a couple of months. Appellant Gonzales spoke to and had a relationship with all of David's children. (18RT 2541.) Appellant Gonzales had a very close relationship with "Junior," David's eight-year-old son. Appellant Gonzales told Junior to stay in school and not to get into gangs. David believed the jury should give appellant Gonzales a sentence of life so the family could talk to him, and he could talk to all of the children. (18RT 2542-2543.)

Junior[33] was in the third grade. Appellant Gonzales was his "Nino." (18RT 2557, 2559.) Appellant Gonzales played with him and talked to him. (18RT 2559.) Appellant Gonzales told Junior to stay out of trouble and do his school work. While appellant Gonzales was incarcerated, he still told Junior these same things when they spoke on the phone. Junior was going to listen to appellant Gonzales and do well in school because he did not want to get into trouble. (18RT 2560-2561.)

Kimberly Gonzales had known appellant Gonzales for almost ten years. Appellant Gonzales was her brother-in-law and good friend. Appellant Gonzales was helpful to Kimberly and her children. (18RT 2562.) In 1989, appellant Gonzales was always there to help her, and never said "No" anytime she asked. (18RT 2563.) At one point, when appellant Gonzales needed help from Kimberly, she was unable to provide it due to problems she was having with her husband. This was when appellant Gonzales joined the gang. (18RT 2563-2564.) Even after joining, appellant Gonzales remained a good friend and was someone Kimberly could depend upon. Since appellant Gonzales was in custody, he still called her all the time and spoke to her children. (18RT 2564.) Kimberly believed the jury should sentence appellant Gonzales to life in state prison without the possibility of parole, rather than death, because then he would be there to help her, and to help her when she had problems with her sons. (18RT 2567.)

Michael Keith was the Program Coordinator for the Dropout Recovery Clinic in the Hacienda/La Puente School District. (19RT 2632.) Appellant Gonzales was at the clinic sometime between 1989 and 1991. Appellant Gonzales was a smart and intelligent man, a very reasonable person, teachable, listened with cordiality, admitted his faults, and had a "very likable quality abut

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33. To avoid confusion, and because this witness is a minor, respondent refers to him as "Junior."

him." (19RT 2633-2634.) Appellant Gonzales would learn if put in a structured environment. (19RT 2634-2635.)

b. Appellant Soliz

Appellant Soliz did not testify.

Irena Arzola was appellant Soliz's mother. Edward Huddleston was appellant's father. Appellant Soliz was born on December 27, 1973. (18RT 2570, 2572.) Appellant Soliz was their fifth child. (18RT 2572.) Adrianna was appellant Soliz's three-year-old daughter; Isaac was his son. (18RT 2571-2572.) When appellant Soliz was born, appellant's father continued to live with the family for about a year. After he left there was no father figure in the home. (18RT 2572.) Although sometimes appellant's father contributed money to help support the family, his last contact with appellant Soliz was when he was 12 or 13 years old. (18RT 2572-2573.) Appellant Soliz was close to his mother. He liked aquariums, skateboarding, riding his bike, and swimming in the pool. He liked to draw, was very quiet and kept to himself a lot. (18RT 2573.) Appellant Soliz was closest to his brother Anthony, who was four-and-one-half years older, and to his sister Melinda. (18RT 2574.) When appellant Soliz got home from school, his mother was working so he was watched by Anthony until Anthony got married. After that, appellant Soliz was home by himself and became lonely. Appellant Soliz had lots of pets, including dogs, cats and a chicken. (18RT 2574-2575.) One night, when appellant Soliz was 16 or 17 years old, Ms. Arzola saw that appellant had a gang tattoo. Appellant Soliz was close to his daughter Adrianna, but did not have any contact with his son Isaac because Isaac's mother's family did not want him to. (18RT 2576.)

Appellant Soliz was a loving father to Adrianna. When appellant Soliz worked, he supported her. Appellant Soliz never consumed alcohol or drugs around Ms. Arzola. Ms. Arzola visited appellant Soliz a few times while he

was in prison. Appellant Soliz was very quiet and kept things to himself. Appellant Soliz was spoiled by the love he was given from his family. Appellant Soliz never stopped loving his family. Ms. Arzola believed the jury should sentence appellant Soliz to life because no one was unredeemable, God has a plan for everyone, and appellant Soliz could be changed. (18RT 2577-2579.)

Anthony Diaz, Jr. was appellant Soliz's half-brother, although they were raised to think of themselves as full brothers. (18RT 2584-2585.) Mr. Diaz was a full-time machinist, an ordained minister at the Christ Chapel Christian Fellowship in East Los Angeles, and had been married for nearly eight years. He had two children, and his wife was pregnant with their third child. (18RT 2585.) When appellant Soliz was between the ages of two and four, he was the closest to Mr. Diaz amongst the other siblings. They played together, although both appellant Soliz and Mr. Diaz tended to play by themselves most of the time. When appellant Soliz was between the ages of 8 and 11, he was not doing well in school because he was not smart and was an introvert. Appellant Soliz was not a "big trouble maker" in school. (18RT 2586.) Mr. Diaz and some in the neighborhood ridiculed and put down appellant Soliz in order to be funny. (18RT 2587.) When appellant Soliz was 11 or 12 years old, he started "reaching out" for answers. Mr. Diaz was 16 or 17 years old and did not know how to respond. Appellant Soliz started going to church. Mr. Diaz at that time planned to be an atheist. Appellant Soliz encouraged Mr. Diaz to take him to church, and to go to church himself. (18RT 2588.) When Mr. Diaz turned 17 years old, he "accepted Christ." He owed a lot to appellant Soliz. Mr. Diaz believed appellant Soliz should be sentenced to life without parole because everyone was redeemable, appellant Soliz was still "teachable," and he had learned and could help others. (18RT 2590-2591; 19RT 2629-2631.)

Steve Lara, appellant Soliz's cousin, testified they were very close when they were growing up together. (19RT 2598, 2600.) Appellant Soliz was a year or two older than Mr. Lara. Mr. Lara looked up to appellant Soliz. Appellant Soliz took care of Mr. Lara, was always there for him, and helped Mr. Lara achieve a lot of his goals. (19RT 2599.) Appellant Soliz was a very artistic and creative person, and Mr. Lara believed the jury should sentence him to life in prison because there was no limit to what appellant Soliz could accomplish if he was given the opportunity. (19RT 2600-2601

Daniel Lara was appellant Soliz's cousin. They were very close as they grew up. Daniel had never seen appellant Soliz do anything that would lead him to believe appellant Soliz would do something like that which he had been convicted of. Daniel had never seen appellant Soliz drink alcohol, carry a weapon or initiate any violent activities. Daniel was not previously aware that appellant Soliz had been convicted for stealing a car, but this did not change Daniel's opinion that appellant Soliz had some value as a person if he were to be sentenced to state prison. (19RT 2610-2612.)

Bart Soliz was six years older than his brother appellant Soliz. Bart brought appellant Soliz up and took care of him. Bart never saw appellant Soliz's gang activity. Bart believed appellant Soliz should be sentenced to life in prison rather than death because he loved appellant Soliz and believed he was a great, lovely person, always had a good nature, was young and could still do better. (19RT 2613-2618.)

Michael E. Landerman met appellant Soliz when they were both working for Sunset Wire and Steel. Mr. Landerman still worked there. Appellant Soliz worked there for a year and a half. Appellant Soliz was an extremely hard worker and was very smart and knowledgeable. He taught Mr. Landerman things that he knew how to do. Appellant Soliz was easy going, got along well with people, did not argue or engage in violence, and did not abuse

alcohol or drugs. Appellant Soliz was very kind-hearted, big-hearted, honest and respectful, and would be helpful to others in prison. (19RT 2621-2625.)

Luz Jauregui, appellant Soliz's fiancé, had been his girlfriend for three years. Whether the jury sentenced appellant Soliz to prison or death, it would not make her dreams come true. If appellant Soliz was sentenced to prison for life, it would be hard for her, but she did not want to see him dead. (19RT 2627-2628.)

C. Second Penalty Phase[34/]

1. Prosecution Evidence

a. The Murder Of Lester Eaton

(i) Crime And Crime Scene Evidence

On Saturday evening, January 27, 1996, Dorine Ramos began walking from her apartment in a complex in West Covina to the store. (28RT 3513-3515.) Ms. Ramos did not own a car, but was looking to purchase a van because she had children. (28RT 3519.) Ms. Ramos' friend Rosemary, who lived in the same complex, offered to give her a ride to the store. (28RT 3515-3516.) Ms. Ramos went back to her apartment to get more money, because she could now take more groceries home. After she returned from her apartment to the car, she saw Rosemary in the passenger seat of a car being driven by Randy Irigoyen, who was known as "Bird." Mr. Irigoyen was Rosemary's boyfriend. (Peo. Exh. 121; 28RT 3516-3517; 32RT 4141.) Ms. Ramos entered the car and sat in the backseat, and they drove to Mr. Irigoyen's friend's house,

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34. After the first penalty phase, the jurors indicated they were deadlocked concerning penalty as to count I for appellant Gonzales, and concerning the penalty as to counts I, IV and V for appellant Soliz. (19RT 2757-2759, 2765-2768.) The court declared a mistrial as to these counts. (19RT 2768-2769.)

near La Puente Park, at the intersection of Hacienda and Temple in La Puente. (Peo. Exh. 111; 28RT 3517-3520; 32RT 4141.) It was sometime around 5:00 p.m., and just starting to get dark. Mr. Irigoyen showed Ms. Ramos a blue Monte Carlo parked near a house on the street. (28RT 3520.) Ms. Ramos did not want to buy the Monte Carlo because it had bullet holes in it. (28RT 3521.)

They next drove up the street, where Mr. Irigoyen showed her a blue Chevy Astro van and offered to sell it to her for $500. Ms. Ramos was not interested in it because it did not have the type of doors she wanted, and because the price made her suspicious. (Peo. Exh. 109; 28RT 3521-3525; 32RT 4141.) They looked at the van for about five minutes before they left. (28RT 3524.) The blue Chevy Astro van had been reported stolen the previous day (January 26, 1996). (28RT 3488.)

They next drove to a house, possibly two blocks up the street. (28RT 3525.) Mr. Irigoyen parked in front of the driveway, exited the car and entered the house. Rosemary moved into the driver's seat, and Ms. Ramos sat in the front passenger seat. Another car arrived, and appellants exited from it.[35/] Appellants were Hispanic males, one in his late teen to his early twenties, and the other in his mid-twenties. Both had "baldy" hairstyles, which was not quite completely shaved. Appellant Gonzales was about five feet five inches tall and was slightly thin, while appellant Soliz was approximately five feet eleven inches tall and had a medium build. Appellant Soliz had a tattoo on his neck. Appellant Gonzales wore a black Raider's jacket with a Raider's symbol on the back. Appellants entered the house. After about five minutes, Mr. Irigoyen and appellants exited the house with five to seven other males, all of similar age and with similar hairstyles. (Peo. Exhs. 122, 123; 28RT 3526-3529, 3532-3536, 3552-3553; 32RT 4141.) When she saw appellant Gonzales' Raider's jacket,

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35. Ms. Ramos identified appellants at trial. (Peo. Exhs. 122, 123; 28RT 3533-3536; 32RT 4141.)

Ms. Ramos said, "It's all about the Cowboys," because she rooted for the Cowboys, who were playing in the Super Bowl the next day. Appellant Gonzales laughed. (28RT 3553.)

Mr. Irigoyen and appellants stood about 18 feet from Ms. Ramos' side of the car. (28RT 3529-3530.) Ms. Ramos' window was down, and she overheard some of the conversation between Mr. Irigoyen and appellants. They spoke about doing a "jale," which was Spanish slang for a "job." (28RT 3530-3531.) Ms. Ramos initially believed Mr. Irigoyen and appellants were discussing a real job, but then heard appellants say they were going to do a jale and needed a "cuete." "Cuete" was Spanish slang for a gun. (28RT 3530-3532, 3536.) Appellant Soliz, who was referred to by the name "Casper," was "more vocal, joking around about it more than the other." (28RT 3536-3537.) Appellants spoke together about doing a "jale" and getting "cuetes" for approximately 20 minutes, until Mr. Irigoyen and a couple of the other males sent Rosemary and Ms. Ramos to a nearby AM/PM market to get hamburgers. (28RT 3537.)

Rosemary and Ms. Ramos went to the AM/PM market and returned five or ten minutes later. When they returned, appellants were in the front yard. (28RT 3538.) When a Honda Prelude arrived, Mr. Irigoyen walked up to it and spoke to the driver about going to get a van and guns. (28RT 3538, 3541.) The Honda Prelude then left, and Mr. Irigoyen walked to appellants and told them that he would be back because they were going to go get the van and cuetes. (28RT 3542-3543.) Appellant Gonzales nodded, and neither appellant expressed surprise or acted as if they did not know what Mr. Irigoyen was talking about. (28RT 3543.) Mr. Irigoyen went inside the house and came back outside with dark black or blue bandanas and gave them to appellants. (28RT 3544.) Appellants put the bandanas around their face so that all you could see were their eyes. (28RT 3544-3545.) Mr. Irigoyen handed appellant

Soliz a gun. (28RT 3545.) Appellants carried black beanie-style knit caps in their back pockets. (28RT 3545-3546.) The Honda Prelude returned with its driver and passenger after about five minutes and parked across the street. (28RT 3543, 3546.) Appellant Soliz entered and sat in the front passenger seat of the Honda Prelude. Appellant Gonzales entered and sat in the backseat behind the passenger. At about 6:00 or 6:30 p.m., the Honda Prelude drove away. (28RT 3540, 3546-3547.)

Ms. Ramos, Rosemary and Mr. Irigoyen stayed at the house for about five minutes, took Mr. Irigoyen to his wife's house and then drove back to the apartment complex. (28RT 3547-3548.) On their way, they passed the same street where they had earlier seen the stolen blue Chevy Astro van parked, but it was no longer there. (28RT 3548.)

Shortly before 7:30 p.m., Betty Eaton was inside the small, family run and owned Hillgrove Market with her husband of 43 years, Lester Eaton, and their son Rene Eaton. Rene left to pick up a pizza that he had ordered. (27RT 3336-3337.) They had owned the Hillgrove Market on Clark Avenue in Hacienda Heights for 43 or 44 years. (Peo. Exh. 104; 27RT 3336, 3365; 32RT 4141.) Mr. Eaton's day at the market typically began when he arrived sometime around 4:00 a.m. and ended sometime between 7:00 and 10:00 p.m. Ms. Eaton worked in the store as a cashier and did some bookkeeping. (27RT 3365.) They worked in the market seven days a week. (27RT 3365-3366.) Mr. Eaton was a workaholic and loved what he did. They did not consider the market to be just a money-making business. (27RT 3367.) If people in the neighborhood were short of cash or unable to make payments on things they bought in the market, they were permitted to sign a slip and pay later when they could afford it. This had been the practice for as long as Ms. Eaton could remember. Many times they never got repaid for the items bought on credit, and there were boxes of such receipts at their home. Mr. Eaton never refused credit to anyone that

came into the market because they could not pay or had previously received items on credit and still had not paid. (27RT 3368.) The Hillgrove Market sponsored neighborhood Little League and football teams, paid for their uniforms, and helped finance the costs of fielding a team. Mr. and Ms. Eaton also financially supported the Los Altos High School band. (27RT 3369.)

Mr. and Ms. Eaton had four children (Kenny, Diane, Leslie and Rene) and nine grandchildren. (27RT 3369-3370.) Mr. Eaton considered his grandchildren his "pride and joy." One grandson, 14-year-old Thomas, and his mother, Leslie, lived with Mr. and Ms. Eaton. Mr. Eaton was like a father to Thomas. (27RT 3370-3371.)

Mr. and Mrs. Eaton planned to retire, and they were selling property across the street, which was in the process of being developed and was in escrow. They planned to move north, out of Los Angeles, to a mountainous part of the state where Mr. Eaton could fish, hunt and be outdoors. (27RT 3366-3367.)

At about 7:35 p.m., Ms. Eaton heard a voice ask something to the effect of "Where is your money?" Ms. Eaton stood against the butcher block. Mr. Eaton was speaking on the telephone in the meat cutting room. (Peo. Exh. 105; 27RT 3337-3341; 32RT 4141.) Ms. Eaton was startled as the person who said it was crouching behind the swinging wooden gate, between the entrance to the meat department and the checkstand. (27RT 3340-3341.) The lower half of his face was covered by a bandana, and he pointed a big, dark-colored gun at Ms. Eaton. (27RT 3342.) The man appeared to be in his late teens, approximately five feet six inches and five feet eight inches tall, and appeared to have a close-fitting cap covering the top of his head. (27RT 3343.) Ms. Eaton put her hands up, tried to make eye contact with her husband, and said his name, "Les." A second male, five feet and ten or eleven inches tall and heavier than the first male, then came from behind the first male. (27RT 3344, 3347, 3353.) The

second male went through the swinging gate into the meat department, and held a gun on Mr. Eaton. (27RT 3344.) Mr. Eaton carried a pistol in a holster. (27RT 3358.) A shotgun was also kept in the meat cutting room. (27RT 3358.) Ms. Eaton never saw her husband reach for his gun or resist. The second male told Mr. Eaton, "Put that thing down before someone gets hurt." (27RT 3346.) The second male "pressed" Mr. Eaton against the sink and "cracked" Mr. Eaton over the head. Ms. Eaton saw blood coming down the side of her husband's head. (27RT 3345, 3347.) Ms. Eaton considered pressing one of the alarm buttons, one of which was by the telephone in the meat cutting room, and the other was at the cash register. Ms. Eaton moved from being in front of the butcher block to a position facing the microwave. (Peo. Exh. 105; 27RT 3348-3349; 32RT 4141.) The next thing she could recall, she was facing the front door and against the microwave. While in this position, she turned to look at was going on, heard two gunshots, and then saw her husband in the fetal position on the floor in front of the butcher block. (Peo. Exh. 105; 27RT 3349-3350.)

Ms. Eaton ran out of the market and saw a blue van, with the lights on and the motor running, parked in front. (27RT 3351-3352.) Ms. Eaton turned left and when she reached the corner of the building she heard tires squeal and believed the suspects may have been coming around the building after her. Ms. Eaton went inside the hedge of a house, entered the house and called 911. Ms. Eaton then returned to the market. (27RT 3352.) The van she had earlier seen was gone. (27RT 3355.) Ms. Eaton waited for the police to arrive. She was not permitted inside the market. (27RT 3352.)

At about 7:40 p.m., Deputies Jerome Ryan and Phillip Johnson of the Los Angeles County Sheriff's Department were in uniform in a marked patrol car when they were dispatched by the Industry Station in regards to a robbery at the Hillgrove Market at 1502 Clark Avenue in Hacienda Heights. (27RT

3245-3247; 28RT 3397-3398.) The Hillgrove Market was a "small, mom and pop grocery store" on the corner of Clark and Ninth Streets. (Peo. Exhs. 101, 111; 27RT 3272-3273, 3291-3292, 3318-3319; 32RT 4141.) Turnbull Canyon Road was the major cross street intersecting Clark Avenue to the east of the Hillgrove Market. Clark Avenue was primarily a commercial street, with residential streets south of Clark. (27RT 3273.)

While Deputies Ryan and Johnson were en route, the radio dispatch was changed to report a robbery in which shots had been fired and the proprietor's husband had been shot. (27RT 3247-3248, 3398-3399.) It took them three to five minutes to drive to the location, and they arrived at 7:43 p.m. Deputy Pacheco's patrol car was already there, and Deputy Pacheco was initiating a crime broadcast. Deputy Pacheco spoke to Rene Eaton, son of victim Lester Eaton. (27RT 3248-3249; 28RT 3399-3400.) Upon their arrival, Deputies Ryan and Johnson made a preliminary check of the interior of the Hillgrove Market. (27RT 3249-3250, 3399.) Deputy Ryan did a cursory check of Mr. Eaton and found no vital signs. Deputy Ryan next checked for suspects and physical evidence in the adjacent room. (Peo. Exhs. 103, 104; 27RT 3251, 3261-3262, 3264-3266.) Deputy Ryan did not see any expended shell casings. (27RT 3252.)

Mr. Eaton was on the floor, covered by a blanket, behind the meat counter. There was blood on his face, a large pool of blood under his head and right shoulder, and what appeared to be a gunshot wound to his head. His left front pant pocket was pulled out and exposed. (Peo. Exhs. 103, 105, 106; 27RT 3276-3277, 3284-3285, 3295-3296, 3302-3303; 32RT 4141.) A trail of blood went around his body and back to the meat cutting area of the store. Mr. Eaton had an empty pistol holster on his belt. (Peo. Exhs. 105, 106; 27RT 3277, 3286-3287, 3302; 32RT 4141.) A pair of blood-stained eyeglasses, with one of the lenses missing, was on the wooden floor next to Mr. Eaton's head.

He was on his stomach and his face was turned towards the back of the store. There appeared to be some type of gunshot wound to his back or side and a large pool of blood near his head. (Peo. Exhs. 103, 105; 27RT 3278, 3285, 3290-3291, 3296; 32RT 4141.)

The missing lens was on the floor in the meat cutting room, directly behind the meat counter area. An open cash register appeared to have been knocked to the floor and was turned on its side. The cash register tray was missing. Several coins, cigarette packages and lighters and other miscellaneous grocery store type items were on the floor. (Peo. Exhs. 102, 104, 105; 27RT 3250-3251, 3256-3258, 3279-3280, 3282-3286, 3291, 3294, 3297-3299; 32RT 4141.) The cash register had previously sat on the checkstand, and it had contained a plastic divided drawer with maybe a $100 in currency and a few food stamps. (Peo. Exh. 105; 27RT 3280-3281, 3356-3357, 3359; 32RT 4141.) The telephone on the east wall off the meat cutting room was off of the hook, with the receiver dangling from the wall towards the floor. (27RT 3286.) No expended shell casings were observed at the scene. (27RT 3305, 3307.) This was consistent with Mr. Eaton having been shot with a revolver. (27RT 3307.) The eyeglasses and missing lens were recovered and booked into evidence. (Peo. Exhs. 107, 108; 27RT 3302-3305; 32RT 4141.)

Deputies Ryan and Johnson secured the building and the immediate parking lot in front by marking it with yellow tape and precluding entrance into the market. (Peo. Exh. 101; RT 3252, 32555, 3399.) Paramedics arrived within five minutes. (27RT 3252-3253, 3399.) Deputy Ryan escorted them inside. The paramedics tilted Mr. Eaton's body towards his right side and examined him for signs of life. The paramedics told Deputy Ryan the victim was dead and then covered Mr. Eaton with a blanket. (Peo. Exh. 103; 27RT 3253, 3262-3263, 3400.) After the paramedics left, Deputy Ryan again secured the scene until the arrival of the assigned homicide investigators. (27RT 3254.)

Detectives Lynn W. Reeder and Woodrow T. West of the Los Angeles County Sheriff's Department received a call directing them to the scene. When they arrived, the market and parking lot had been secured with yellow tape. (27RT 3271, 3412.)

Criminalist Martin Mutac of the Los Angeles County Sheriff's Department arrived and took photographs of the scene. (Peo. Exhs. 101, 106; 27RT 3281, 3291, 3329, 3333; 32RT 4141.) Criminalist Mutac took a photograph of the victim's back with a bullet on it. Criminalist Mutac recovered a bullet, which was on the floor, under Mr. Eaton's body. (Peo. Exhs. 105, 106, 112; 27RT 3330-3334; 32RT 4141.)

At about 7:40 p.m., Deputy Marc Verlich of the Los Angeles County Sheriff's Department was on patrol with his partner, Deputy Jiminez, on Turnbull Canyon Road when they received a radio broadcast concerning a robbery at the Hillgrove Market, which was about a mile and a half away. (Peo. Exh. 111; 28RT 3433-3435; 32RT 4141.) The broadcast stated a dark blue van may have been involved in the crime. Less than two minutes after receiving the broadcast, Deputy Verlich turned left on Clark Avenue on their way to the scene and observed a dark blue van, license plate number 3DFH725, parked in a small business complex on the southwest corner of Clark Avenue and Turnbull Canyon, a couple of blocks from the Hillgrove Market. (Peo. Exhs. 109, 111; 27RT 3307-3308, 3318-3319; 28RT 3436-3437, 3441-3443; 32RT 4141.) The businesses in the complex were closed. (28RT 3436.)

Deputies Verlich and Jiminez pulled behind the dark blue van, exited and went to examine it by illuminating the inside with their flashlights and opening the driver's side door. They did not enter it. (28RT 3436-3437.) The van's engine was still warm; the passenger door window had been smashed; and there was body damage on the left side panel. Shattered glass was inside the van. (Peo. Exh. 109; 27RT 3308; 28RT 3438, 3442-3443; 32RT 4141.)

An insurance policy form in the name of "Enrique Huerta" was on the front passenger's seat. (Peo. Exhs. 109, 117; 28RT 3439, 3443, 3498-3500; 32RT 4141.) A black Raider's jacket was on the back passenger bench seat. The cash register tray from the Hillgrove Market was on the floorboard between the seats. A live, unfired nine-millimeter bullet was on the floorboard, between the cash register tray and a hairbrush, behind the driver's seat. (Peo. Exh. 109; 27RT 3308-3310; 28RT 3313-3314, 3439-3440, 3442, 3446-3447, 3492-3494; 32RT 4141.)

Deputies Verlich and Jiminez secured the van by putting yellow tape around the entire business complex, so as to not let anyone into the area pending the arrival of the homicide investigators. (28RT 3440.) Detectives Reeder and West arrived sometime thereafter and also examined the van without entering it. (27RT 3307; 28RT 3414.) Detective Reeder directed that the van be impounded and towed to the Industry Sheriff's Station so that it could be further examined. (27RT 3310.)

The blue Chevy Astro van was impounded and taken to the Industry Station. (28RT 3440.) At about 11:45 a.m. the next morning, Forensic Identification Specialist II Donald Keir of the Los Angeles County Sheriff's Department, Scientific Services Bureau, went to the Industry Station to do a follow-up investigation of the impounded blue Chevy Astro van. (28RT 3491.) The van was in the same condition as when Detective Reeder had last seen it. (Peo. Exh. 109; 27RT 3311-3314; 32RT 4141.) Specialist Keir took photographs of it. (Peo. Exh. 109; 28RT 3491-3492.) He recovered and booked into evidence the live round, cash register tray and insurance policy form. (Peo. Exhs. 109, 113, 116, 117; 28RT 3493-3500; 32RT 4141.) A piece of paper and a cash register receipt were recovered and booked into evidence. (Peo. Exhs. 109; 117; 28RT 3500; 32RT 4141.) No fingerprints were recoverable from the live round. (28RT 3504.) Fingerprints were recovered

from the piece of paper recovered (Peo. Exh. 119) and from the insurance policy form (Peo. Exh. 118). (28RT 3505-3507; 32RT 4141.) Appellant Gonzales' right thumb print was lifted off of the piece of paper, and his right middle and right ring fingerprints were lifted off of the insurance policy form. (Peo. Exhs. 120; 28RT 3509-3510; 32RT 4141.) The fingerprint lifted from the cash register tray was not identified to appellants. (28RT 3510-3511.)

Deputy Johnson spoke with Ms. Eaton sometime less than 30 minutes after their arrival at the scene. Ms. Eaton was visibly upset and shaken, but was not hysterical. She was clear in her mind and gave rational answers to his questions. (28RT 3400-3401.) Ms. Eaton said two men she believed were Hispanics had entered the store. (28RT 3401.) One wore a dark bandanna covering his face and a dark knit cap covering his head, while the other wore a tan-colored bandanna covering his face and either a jacket hood or some type of dark hat covering his head. (28RT 3402.) Ms. Eaton said she saw the male with the dark bandanna approach her husband and strike him in the forehead with his gun. Ms. Eaton believed she had heard two shots as she was running out of the store. (28RT 3403.)

That same evening, Ms. Eaton was interviewed by Detectives Reeder and West at the Industry Sheriff's Station. (27RT 3353-3354, 3359; 28RT 3414.) On the way to the station, the detectives drove her past the corner of Turnbull Canyon and Clark Avenue, where she saw the same blue van she had earlier seen stopped in front of the market. (Peo. Exh. 109; 27RT 3359-3360; 32RT 4141.) When they got to the station, the detectives asked Ms. Eaton about what had happened that evening. (27RT 3354; 28RT 3414.) Ms. Eaton appeared to have been traumatized, but was not hysterical or incoherent. She was quiet and sobbed on occasion, and gave rational and responsive answers to the questions asked. (28RT 3414-3415.) Ms. Eaton said that two males who appeared to be Hispanic entered the store. (28RT 3415-3416.) The males were

in their late teens, and both appeared to be approximately five feet seven inches tall, but one had a medium build and the other was a little bit lighter. (28RT 3416.) Ms. Eaton said the one with the lighter build had a lighter-colored bandanna across his face, and that this male hit her husband in the head with a gun while he was talking on the telephone. The other suspect had a darker-colored bandanna across his face. Both suspects wore knit caps on their heads, and both had guns. (28RT 3417-3418.) Ms. Eaton said she heard two shots as she ran out of the front door of the market. (28RT 3418-3420.)

Later that same evening, Ms. Ramos was watching the news and saw a report of the robbery and a man being shot at the Hillgrove Market. At the end of the report, she saw the blue Chevy Astro van that Mr. Irigoyen had tried to sell her earlier that same evening. (28RT 3549-3550.) Ms. Ramos waited three or four days before she called and reported this to the police because she was concerned about Mr. Irigoyen learning from Rosemary that Ms. Ramos had called the police. Ms. Ramos subsequently spoke to Detective West and told him what she had seen. (27RT 3550-3552.)

Probably the next day, Ms. Eaton returned to the market. (27RT 3357.) She does not believe there was any cash left inside the store. Her husband's gun was missing. (27RT 3358.) Two or three weeks after the murder, Ms. Eaton found a bullet from the area where her husband had been laying on the floor. She put it in an envelope. (27RT 3363.) In July of 1996, Detective Reeder met Ms. Eaton at the Hillgrove Market. She gave him a white envelope which had an expended bullet in it. (Peo. Exh. 110; 27RT 3315-3317, 3363-3364; 32RT 4141.)

At trial, Ms. Eaton looked at a photograph of the inside of the blue van and identified what appeared to be the drawer from the cash register in the market. (Peo. Exh. 109; 27RT 3359-3360.) She was shown a cash register drawer, some Department of Agriculture food stamps, and some handwritten

receipts, all of which she identified as having come from the inside of the cash register in the market. (Peo. Exhs. 113, 113A; 27RT 3360-3362.)

After the murder of Mr. Eaton, his grandson Thomas changed. Ms. Eaton could no longer handle raising Thomas, and so he was sent back to live with his father in Georgia. (27RT 3371-3372.) Ms. Eaton tried to keep the Hillgrove Market running until she could sell it. She had not been able to make any money at the market since her husband's death. It was a "nightmare" for her to try to work in the market every day. (27RT 3372.) Ms. Eaton thought of her husband every day. His birthday was June 17; the date of their wedding anniversary was August 29. These days were especially hard for Ms. Eaton. It was "impossible" for Ms. Eaton to think of her husband without thinking of the way he was killed. It totally devastated her memories of their life together and wiped away a lifetime of memories in a few seconds, destroying everything they had worked for. (27RT 3373.)

(ii) The Autopsy Of Mr. Eaton

On January 30, 1996, Deputy Medical Examiner Lee Bockhacker with the Los Angeles County Coroner's Office performed an autopsy on Mr. Eaton's body. (28RT 3413, 3450.) Mr. Eaton was six feet three inches tall. He suffered a total of five gunshot wounds: two to his head, and three to his chest. (Peo. Exh. 114; 28RT 3451-3452; 32RT 4141.) Dr. Bockhacker identified the gunshot wounds with arbitrary numbers, which did not indicate the order the wounds had been received. (28RT 3452.)

Gunshot Wound No. 1 was a wound to the back of Mr. Eaton's head, below the crown and on the left side, downward at a very steep 80 degree angle. (Peo. Exh. 114; 28RT 3452-3457; 32RT 4141.) There was no exit wound. (28RT 3453.) The medium caliber bullet went through the skull and brain. A deformed medium caliber bullet was recovered at the base of his skull. (Peo.

Exh. 115C; 28RT 3454-3455, 3477, 3480; 32RT 4141.) Fragments of the bullet were also recovered just under Mr. Eaton's scalp. (Peo. Exh. 115B; RT 3455, 3477-3478, 3480; 32RT 4141.) The bullet and fragments were each placed in separate envelopes. (28RT 3478.) Stippling on the scalp indicated the bullet had been fired from a distance considerably less than 12 to 18 inches, and was probably shot from six inches. (28RT 3457-3459.) The wound was consistent with Mr. Eaton sitting or kneeling on the floor, and the shooter standing behind him and firing into the top of Mr. Eaton's head from a distance of less than 12 inches. (28RT 3459.) Gunshot Wound No. 1 was a fatal wound because it passed through a part of the brain very vital for breathing and maintaining a heart rate. Death would have occurred very rapidly and almost instantaneously. (28RT 3459-3460.)

Gunshot Wound No. 2 was to the front of Mr. Eaton's face, on the right temporal scalp, and followed a very steep downward 70 degree trajectory. (Peo. Exh. 114; 28RT 3460-3463; 32RT 4141.) The bullet exited the right side of Mr. Eaton's upper neck. (28RT 3461.) The bullet went through his scalp, into his face and into the back of his throat. A portion of this bullet likely broke off when it grazed his skull, and it became embedded in Mr. Eaton's tongue. It was recovered and placed in an envelope. The other portion of the bullet exited through his neck. (Peo. Exh. P115A; 28RT 3478-3480, 3461-3464; 32RT 4141.) There was soot and stippling on Mr. Eaton's skin at the entrance wound, indicating the barrel of the gun was very close to or in contact with his skin when it was fired. (28RT 3462-3464.) The bullet trajectory was consistent with Mr. Eaton kneeling or sitting on the floor, and the shooter standing behind and over him, and then firing into the top of Mr. Eaton's head from a range of less than one inch. The wound was very likely fatal in the absence of medical attention. (28RT 3465.)

Gunshot Wound No. 3 was on the left lateral inferior chest. The bullet went through Mr. Eaton's diaphragm, spleen and left lung, and then exited on the back of the left chest. No bullet was recovered. The absence of sooting or stippling indicated the gun was fired at a distance of greater than 12 to 18 inches. (Peo. Exh. 114; 28RT 3466-3467; 32RT 4141.) This was a fatal wound. (28RT 3467.) The large amount of blood in Mr. Eaton's body cavity resulting from Gunshot Wound No. 3 indicated that it had occurred before Gunshot Wound No. 1. (28RT 3472-3474.) The injuries caused by Gunshot Wound No. 3 would have caused significant incapacitation. (28RT 3475-3476.)

Gunshot Wound No. 4 was on the right side of Mr. Eaton's mid chest. This was a superficial wound which did not enter the chest and just scraped his skin. No bullet was recovered. There was no sooting or stippling, indicating that it was inflicted at a distance greater than 12 to 18 inches. (28RT 3468.) This was a nonfatal grazing wound, back to front. (28RT 3469, 3471.)

Gunshot Wound No. 5 was on the right side of the front of Mr. Eaton's chest. (Peo. Exh. 114; 28RT 3469; 32RT 4141.) This was a nonfatal, superficial grazing wound, front to back. (28RT 3469-3471.) There was no sooting or stippling, indicating the gun was fired from a distance greater than 12 to 18 inches. No bullet was recovered. (28RT 3471.)

Gunshot Wounds Nos. 4 and 5 could have occurred before or after Gunshot Wound No. 1. There was nothing that would have been inconsistent with Gunshot Wounds Nos. 4 and 5 having occurred before Gunshot Wound No. 1. (28RT 3474-3475.)

There was a one and one-quarter inch laceration on Mr. Eaton's forehead, to the front of his scalp. It was caused by a blunt instrument striking Mr. Eaton's head, and was consistent with having been caused by being struck by the barrel of a pistol or handgun. (28RT 3476-3477.) The bullet holes in

Mr. Eaton's clothing were consistent with the gunshot wounds to his body. (28RT 3477.)

(iii) Appellant Soliz's Conversation With Luz Jauregui

The parties stipulated that on October 19, 1996, an article was published in the San Gabriel Valley Tribune about the robbery/murder of Mr. Eaton; that it specifically referenced that appellant Gonzales had been charged and arraigned; and that it quoted the then-assigned Deputy District Attorney Thomas Falls as stating that in addition to appellant Gonzales, there were two more suspects outstanding. (28RT 3567.)

The parties stipulated that a tape marked at trial as People's Exhibit 124 was a tape recording of a conversation that occurred on December 15, 1996, between Luz Jauregui and appellant Soliz at the Los Angeles County Jail, and that the conversation was surreptitiously recorded without the knowledge of either appellant Soliz or Ms. Jauregui. (28RT 3568-3569.)[36] Appellant Soliz told Ms. Jauregui that he was letting his moustache grow "'Cause they said these fools are young. That did this shit. I got some glasses. I'm gonna let my hair grow a little. Comb it when I start to court. Put on a suit and tie." (Peo. Exh. 125.) When referring to a newspaper article, appellant Soliz told Mr. Jauregui, "It says -- 'cause -- what does it say on Rebs? They got two more suspects. They haven't found 'em yet? Damn, they got one of 'em right here. 'But your honor, I'm a changed man.'" (Peo. Exh. 125.)

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36. The tape recording was played for the jury but was not transcribed by the court reporter. (28RT 3569-3570.) Transcripts of the recording were marked as People's Exhibit 125, distributed to the jury, and admitted into evidence. (28RT 3570.)

b. The Murders Of Elijah Skyles And Gary Price

(i) Crime And Crime Scene Evidence

On April 14, 1996, Judith Mejorado was sitting between the driver's seat and the front passenger seat in her brother Agustin Mejorado's gold four-door Honda Accord. Agustin sat in the front passenger seat. (Peo. Exhs. 140, 145; 30RT 3809-3810, 3811-3812, 3821-3822; 32RT 4141.) The car was driven by Michael Gonzales ("Clumsy"). Michael claimed membership in the Puente gang. (Peo. Exh. 144; 30RT 3807-3809, 3821; 32RT 4141.) Perth Street was a clique or subset of the Puente 13 street gang. (30RT 3810.) Appellants sat in the backseat. Appellant Gonzales was known as "Speedy," and appellant Gonzales was known as "Jasper." (Peo. Exhs. 122, 123; 30RT 3807-3808, 3822; 32RT 4141.) Appellants claimed membership in the Puente gang. (30RT 3810-3811.) They were driving north on Azusa Street and passed the Shell gas station. (30RT 3823-3826.)

At sometime between 12:30 and 12:40 a.m., Vondell D. McGee, victim Gary Price's cousin and victim Elijah Skyles' friend, had just gotten off work at the Chuck E. Cheese restaurant on the corner of San Bernadino Road and Azusa in Covina, across the street from the Shell gas station at 871 West San Bernadino Road. (29RT 3672-3674.) Mr. Price was 18 years old, and Mr. Skyles was 15 or 16 years old. (29RT 3673.) Mr. Skyles wore something red and a white and black-checked shirt. (29RT 3677.) Mr. Price wore a blue windbreaker. (29RT 3677-3678.) Mr. McGee met with Messrs. Price and Skyles to give them a ride home. They stopped at the Shell gas station and spoke to each other for five to ten minutes while standing on the sidewalk on San Bernadino Road, close to Azusa Street. (29RT 3674-3677.)

While speaking to Messrs. Price and Skyles, Mr. McGee observed a tan-colored four-door Honda Accord containing a "big crowd of people," either Hispanic or White, driving north on Azusa. (Peo. Exh. 140; 29RT 3678-3680,

3688-3689; 32RT 4141.) Two occupants of the Honda Accord appeared to be females because they had long hair. The rest appeared to be males. (29RT 3682.) From inside the Honda Accord, Ms. Mejorado saw three Black males talking together as they stood near the corner. (30RT 3823-3826.) Michael drove the Honda Accord into the gas station, and through the parking lot, exiting onto San Bernadino Road. (29RT 3680-3681; 30RT 3827-3829.) Shortly thereafter, Mr. McGee departed on a bike, and gave either Messrs. Skyles or Price his pager and some change for the pay phone. (29RT 3678, 3682.)

Michael then drove the Honda Accord in a U-turn and returned to the gas station parking lot, parking not far from the two Black males by the phone booth. (30RT 3827-3831.) Both of the back doors of the Honda Accord were opened, and appellants exited and walked towards the phone booth. (30RT 3832-3834.) Ms. Mejorado heard appellants' voices as they loudly spoke to the two Black males near the rear part of the Honda Accord. (30RT 3834-3838.) Ms. Mejorado next heard multiple gunshots coming from the rear of the car. Ms. Mejorado saw appellant Soliz's hand holding a gun, and the flash of fire coming from it. (30RT 3840-3847.)

Carol Mateo was in her car with her husband Jose and her brother Jeremy Robinson, driving east on San Bernadino Road, approaching the intersection at Azusa Avenue. (29RT 3723-3724, 3762-3763.) Ms. Mateo drove; Mr. Robinson sat in the front passenger seat; Jose sat in the backseat. (29RT 3724.) Ms. Mateo heard six to twelve loud "popping sounds." (29RT 3724.) Ms. Mateo slowed down but continued to drive eastbound on San Bernadino Road and through the intersection at Azusa. (29RT 3725.) As they passed the Shell gas station on their left, Mr. Robinson screamed, "Oh shit. Look over there. That guy's shooting those guys." (29RT 3725-3726.)

While she drove her car no more than ten miles per hour, Ms. Mateo looked in the direction to which Mr. Robinson pointed, which was toward the lottery sign at the gas station. (Peo. Exh. 126; 29RT 3726-3727; 32RT 4141.) Ms. Mateo saw two young Black males standing next to a fence, being shot by a Hispanic male, who was about five feet seven or eight inches tall, medium build, with very short hair, and in his early twenties. (29RT 3728.) Mr. Robinson saw two Black males standing next to the wall at the gas station being shot by a Hispanic male, in his early 20s, bald, of regular size and about six feet tall. (Peo. Exhs. 126, 127; 29RT 3763-3766; 32RT 4141.) Ms. Mateo identified the shooter as appellant Soliz. (29RT 3728-3730.) Appellant Soliz held a gun in his hand, pointed in the direction of the two Black male victims. (29RT 3731.) The fence was near a pay telephone, in the vicinity of the lottery sign. The Black male victim that wore a black and white checkered shirt was the first to fall to the ground, by the fence. The second Black male, who wore black and blue, fell right next to the first male. (29RT 3727-3728, 3730.) When the Black male victim who wore blue tried to crawl and pull himself up from the ground, appellant Soliz walked to him and shot him once or twice more. (29RT 3731-3732.) Appellant Soliz then looked in Ms. Mateo's direction. She looked at his face for three to five seconds. Appellant Soliz then turned around went to and entered the beige four-door Honda, parked between the office and the restroom and pointed northwest, away from San Bernadino Road. (Peo. Exhs. 126, 140; 29RT 3733-3734, 3766-3766; 32RT 4141.) Ms. Mateo saw a second Hispanic male, wearing "pretty short hair," about five feet six or seven inches tall, with a smaller build than appellant Soliz, standing to the rear of the Honda. (29RT 3735.) The second Hispanic male was appellant Gonzales. (29RT 3735-3736.) Ms. Mateo was afraid and looked away to see if she could drive down San Bernadino Road. (29RT 3736.)

Mr. McGee rode the bike across San Bernadino Road and south through the parking lot across the street. (29RT 3683.) While riding the bike in the parking lot, 30 to 60 seconds after he left Messrs. Skyles and Price, Mr. McGee heard eight to ten gunshots coming from the Shell gas station. (29RT 3683-3684.) Mr. McGee "went for cover" and then eventually rode home and immediately went to the phone to page Mr. Price. (29RT 3685.)

Alejandro Garcia[37] was working inside the office at the Shell gas station. (Peo. Exh. 126; 29RT 3696-3698; 32RT 4141.) The glass office windows allowed him to overlook the south and east sides of the building, which included the gas island and the southern third of the restroom area. (Peo. Exh. 126; 29RT 3698-3700; 32RT 4141.) Mr. Garcia heard six gunshots from the restroom side of the station, where the pay phone and trash shed were located. (Peo. Exh. 126; 29RT 3700-3701; 32RT 4141.) Mr. Garcia peered through the side window and saw a small gray, four-door Honda parked in the area off of the eastern gas island, between the island and the restroom area. The car was pointed north and away from San Bernadino Road. Mr. Garcia saw one person run to and enter the Honda, and another run to and enter the other side. (Peo. Exh. 140; 29RT 3701-3704, 3713; 32RT 4141.) They both got into the back of the car. (29RT 3708.) The person that got into the left-hand side of the car looked to be a slim built Hispanic male, bald with a moustache, and about five feet five inches tall. (29RT 3704-3705.) This male held a small black item in his hands, about the size of a billfold, which fit in the palm of his hand. (29RT 3706.) Mr. Garcia could not tell the race or ethnicity of the other male, but observed that he had a little more hair than the first male. (29RT 3706-3707.)

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37. Mr. Garcia testified through a Spanish interpreter. (29RT 3695-3696.) At the guilt phase, Mr. Garcia testified he also went by the name "Alejandro Mora," because "Mora" was his mother's maiden name. (13RT 1607.)

At about the same time, the shooter, appellant Soliz, entered the driver's side of the Honda Accord, and appellant Gonzales entered the passenger side. (30RT 3845-3847.) Appellants said, "Take off." (30RT 3848.) The Honda Accord exited the station parking lot and drove onto Azusa. When Ms. Mejorado looked back, she saw the two Black males were on the ground near the phone. (29RT 3707; 30RT 3849-3850.)

Ms. Mateo looked back and saw that the doors of the Honda were closed. (29RT 3737.) She drove away down San Bernadino Road. (29RT 3737.) When she realized she was driving down a "pitch black street," she made a U-turn, turned right on Azusa, and into the Chuck E. Cheese parking lot, where she knew there was a pay telephone for her to call 911. While Ms. Mateo called 911, she saw the same Honda enter the driveway, make a U-turn, and then drive back out. (29RT 3737-3738, 3767-3768.)

At 12:46 a.m., Detective John Curley of the Covina Police Department was on duty as a patrol officer when he was dispatched to a Shell gas station at 871 West San Bernadino Road, which was on the northeast corner of the intersection of San Bernadino Road and Azusa Avenue in Covina. (Peo. Exhs. 126, 139; 29RT 3575-3578, 3661-3662; 32RT 4141.) Detective Curley arrived at the location approximately 30 seconds later. (29RT 3576-3577.) There area was very well lit. (Peo. Exhs. 126, 139; 29RT 3578, 3592-3593, 3662-3665; 32RT 4141.) Detective Curley drove through the intersection eastbound on San Bernadino Road and parked his car in the lot just east of the station. (Peo. Exh. 126; 29RT 3578; 32RT 4141.) He exited and walked to the station. Two Black males, who appeared to be between the ages of 15 and 17 years old, were lying on the concrete on curb at the east side of the station, directly underneath a lottery sign on a wooden fence. One victim was on his right side facing northbound; the other was on his right side and faced southbound. There appeared to be multiple gunshot wounds to both victims' faces. Blood was

coming out of the bullet holes on their faces. (Peo. Exhs. 126, 127, 139; 29RT 3579, 3582-3585, 3596-3597, 3662-3663; 32RT 4141.) The male victim in the black and white checked jacket, laying on the ground and facing northbound, was identified as Elijah Skyles. The male victim in the blue pants, laying on the ground and facing southbound, was identified as Gary Price. (29RT 3597-3598.) The victims were five to ten feet from a phone booth. (Peo. Exhs. 126, 127; 29RT 3582-3584, 3598-3599.) Mr. Skyles wore red pants and a red belt with a "P" on the buckle, which stood for "Piru." Mr. Skyles' clothing was consistent with clothing worn by members of the Bloods street gang. Mr. Price wore a black belt with a chrome belt buckle with the letter "P" on it. Mr. Price's clothing was consistent with clothing worn by members of the Crips street gang. (29RT 3601-3603, 3640-3641.) Detective Curley checked the victims and found no vital signs. He saw three to four empty shell casings within three to four feet of the victims. (29RT 3580.)

Mr. McGee paged Mr. Price a few times. When he received no call-back from Mr. Price, Mr. McGee returned to the Shell gas station and saw the bodies of Messrs. Skyles and Price, side by side close to the pay phones. (Peo. Exh. 126; 29RT 3686-3687; 32RT 4141.) Mr. McGee saw the paramedics arrive at the scene. (29RT 3688.)

Paramedic Kidder arrived six to seven minutes after Detective Curley. Detective Curley escorted Paramedic Kidder to the victims. Paramedic Kidder checked the victims for vital signs. To do so, he moved one of the victims very slightly. Detective Curley and Paramedic Kidder pronounced the victims dead. Detective Curley and Officers Rochford and Bobkiewicz of the Covina Police Department closed off and secured the scene with yellow crime-scene tape so that no pedestrians or cars could enter the location. (29RT 3581-3582, 3585.)

At 1:48 a.m., Sergeant Joe Holmes of the Los Angeles County Sheriff's Department and his partner, Deputy David Castillo arrived at the Shell gas

station. (29RT 3585-3586, 3595.) At that time the scene had already been secured with yellow crime-scene tape so that no one could enter or exit. The station was open and well-lit. (29RT 3596, 3600.) Sergeant Holmes observed six nine-millimeter shell casings on the ground around the victims' bodies. Four nine-millimeter shell casings were observed when Mr. Price's body was removed, and one nine-millimeter shell casing was found in Mr. Skyles left shirt sleeve. (Peo. Exhs. 127, 128, 129; 29RT 3604-3605, 3607-3609, 3614-3617; 32RT 4141.) Projectile strike marks were in the asphalt and in the fence, and a bullet hole was observed on a sign. (Peo. Exhs. 128, 129; 29RT 3605-3606, 3610-3613, 3615; 32RT 4141.) One nine-millimeter expended shell casing was next to a cement pad, another was found next to a curb, and another was found northwest of the victim's bodies, just west of the curb. (Peo. Exh. 129, 130; 29RT 3618-3620, 3622-3623; 32RT 4141.) After Mr. Skyles' body was removed by the coroner's investigator, Sergeant Holmes observed two small projectile fragments, two projectiles, and two projectile strike marks in the asphalt. A nine-millimeter expended shell casing was recovered under Mr. Price's right wrist. (Peo. Exhs. 129, 130; 29RT 3622-3627; 32RT 4141.) Four nine-millimeter shell casings were recovered after Mr. Prices' body was removed. (Peo. Exh. 129; 29RT 3627-3629; 32RT 4141.) Sergeant Holmes found no weapons on or near Messrs. Skyles and Price. (29RT 3665-3666.) Sergeant Holmes interviewed Mr. McGee (29RT 3688), Mr. Garcia (29RT 3709), Ms. Mateo (29RT 3738) and Mr. Robinson (29RT 3768).

(ii) Motive Evidence

The following evidence of the murder of Billy Gallegos, a member of appellants' gang, by a rival gang member, committed two weeks before the murders of Messrs. Skyles and Price, was admitted to show appellants' motive.

On March 31, 1996, at about 6:00 p.m., Detectives Keith Wall and Dwight Miley of the Los Angeles County Sheriff's Department were directed to the intersection of Sunset Avenue and Ector Street in La Puente regarding a shooting. (30RT 3946-3947.) On their arrival, Detective Wall observed a burgundy Honda Accord over the west curb of Sunset Avenue at the intersection of Ector, wedged between a tree and a brick wall. (Peo. Exh. 151; 30RT 3947, 3949; 32RT 4141.) There were three occupants in the car: driver Billy Gallegos, rear seat passenger Gabriel Urena, and front seat passenger Raymond Flores. (Peo. Exh. 150; 30RT 3938-3939, 3944, 3947-3950; 32RT 4141.) Mr. Gallegos had been shot in the left side of his head. His head was on Mr. Flores' lap, his body laid across the front seat, and his feet were underneath the dashboard. Mr. Gallegos was transported to the Queen of the Valley Hospital in West Covina, where he was pronounced dead a day or two later. (30RT 3948-3949) Mr. Flores had been shot and the paramedics worked on him. (30RT 3949.)

Detectives Wall and Miley interviewed Mr. Urena that evening. Mr. Urena told them that they had been traveling southbound on Sunset Avenue in the number two lane when a white car passed them, got in front of them, and then slowed down, causing them to slow down as well. At that time, another red car with two Black male occupants pulled up alongside of them. (30RT 3950-3951.) The Black male sitting in the right front passenger seat wore a gray University of California shirt or jersey over a white T-shirt. He yelled out, "Where are you from?" (30RT 3951.) The men in Mr. Gallegos' car yelled back, "Puente." The Black male in the right front passenger seat of the red car replied, "Neighborhood," and both Black males flashed gang signals indicating membership in the Neighborhood Crips street gang, whose territory was slightly north of this area. (30RT 3952.) The Black male in the right front passenger seat of the red car produced a handgun and shot at them. Mr. Urena lay down

across the backseat when he heard the shots. Mr. Gallegos lost control of their car as it careened up and over the sidewalk and came to rest. (30RT 3953.)

(iii) Autopsy Evidence

On April 16, 1996, Dr. Stephen Scholtz, a deputy medical examiner with the Los Angeles County Coroner's Office, performed the autopsy on Mr. Price, and Dr. Scheinin performed the autopsy on Mr. Skyles. Sergeant Holmes was present during both autopsies. (29RT 3629-3630, 3902-3903.)

There were seven gunshot wounds on Mr. Price's body. (Peo. Exh. 146, 149; 30RT 3905-3906; 32RT 4141.) The cause of Mr. Price's death was two gunshot wounds, which were arbitrarily labeled Gunshot Wound "A" and Gunshot Wound "B," and in the absence of those wounds, Gunshot Wound "E" would have also been fatal. (30RT 3915.)

Gunshot Wound "A" was a through-and-through gunshot wound to Mr. Price's brain, traveling from the left side of Mr. Price's head to the right and slightly downward. This was a fatal wound and was at least one of the causes of Mr. Price's death. (30RT 3907-3908, 3910.)

Gunshot Wound "B" was a second through-and-through gunshot wound to Mr. Price's head, also in a left to right direction. This was another fatal wound and a cause of Mr. Price's death. (30RT 3908.)

Gunshot Wound "C" was a through-and-through wound in which the bullet entered near the center of Mr. Price's back, passed left to right and upward, through the soft tissues of the back. This was a non-fatal wound. No bullets or projectiles were recovered from Gunshot Wounds "A," "B," or "C." (30RT 3908-3909.)

Gunshot Wound "D" was a wound to the upper front part of Mr. Price's right arm, towards the shoulder, traveling front to back and upward, through the

soft tissues of the arm, and exiting toward the rear part of the arm. This was a nonfatal wound. (Peo. Exh. 147; 30RT 3910-3911; 32RT 4141.)

Gunshot Wound "E" was a wound at the inner aspect of Mr. Price's right buttock, passing through the fleshy tissue, through the bone of the pelvis and through the abdominal cavity, striking the large bowel and coming to rest in the anterior abdominal wall. The wound path was back to front and upward, having been fired from someone standing behind Mr. Price. (30RT 3912.) This was a fatal wound and one of the causes of Mr. Price's death as it hit vital structures and caused a substantial amount of bleeding inside the abdominal cavity. (30RT 3912-3913.) Dr. Scholtz removed the bullet and placed it in an envelope which was given to Sergeant Holmes. (Peo. Exh. 133; 29RT 3630-3631; 30RT 3912, 3927-3928; 32RT 4141.)

Gunshot Wound "F" was a non-fatal grazing wound to Mr. Price's lower left thigh. (30RT 3913-3914.)

Gunshot Wound "G"was an injury to the skin on Mr. Price's right hip area. This was an impact wound from a fragment of a bullet that had first struck something else and then broken apart, consistent with having struck the pavement and then breaking into pieces, with part entering Mr. Price's hip. This was a non-fatal injury. (30RT 3914.) A fragment of this bullet was recovered from Mr. Price's clothing. (30RT 3914-3915.)

There were nine gunshot wounds to Mr. Skyles' body, with the wounds arbitrarily labeled by the coroner. (Peo. Exh. 149; 30RT 3916, 3934-3936; 32RT 4141.) The primary cause of Mr. Skyles' death was Gunshot Wound No. 1. (30RT 3926-3927.)

Gunshot Wound No. 1 was a wound in which the bullet entered in the back of Mr. Skyles' shoulder blade, passed back to front and downward across the body left to right, striking the left lung, the heart, liver, into the anterior area of the abdomen and the anterior abdominal wall, through the tissues and into

the upper outer portion of the right thigh, where the bullet was recovered underneath the skin. (30RT 3916-3917.) The trajectory of this bullet indicated that when the wound was inflicted, Mr. Skyles' right leg or thigh was raised up, which was consistent with Mr. Skyles having been shot from behind while he knelt on the ground, such that his legs or knees were upright in relationship to his torso, and he was hunched slightly forward at his torso. (30RT 3918-3919.) This was a fatal wound. (30RT 3919.)

Gunshot Wound No. 2 was a wound at Mr. Skyles' left upper arm in the bicep area in which the bullet entered on the outside of the arm and exited on the inside of the arm, in a direction that was somewhat downward and somewhat toward the front. No projectile was recovered. (30RT 3920.)

Gunshot Wound No. 3 was a wound which entered the upper outer area of Mr. Skyles' left thigh, through the fleshy tissues and into and then exiting the buttock. The path was left to right and toward the rear and upward. No projectile was recovered. This was a non-fatal wound. (30RT 3920-3921.)

Gunshot Wound No. 4 was a wound that entered on the front surface of Mr. Skyles' mid-left thigh area, into the tissues of the thigh, and stopped under the skin on the inner aspect of the left thigh. The path of this bullet was front to back, somewhat left to right. The projectile was recovered. This was a non-fatal wound. (30RT 3921.)

Gunshot Wound No. 5 was a wound that entered on the outside of Mr. Skyles' right lower leg, toward the ankle, and was caused by a fragmented bullet. The fragments were two pieces that had passed into the leg in a right to left, upward and slightly forward direction, striking no vital structures, and was recovered in the soft tissues beneath the skin on the inner aspect of the right lower leg. This wound was consistent with the bullet having first struck something hard, like pavement, and then breaking into pieces. (30RT 3921-3922.)

Gunshot Wound No. 6 was a wound in which the bullet entered in the area of the left knee, just above the kneecap, traveling in a rearward direction toward the back of the leg and somewhat downward and somewhat left to right towards the inner aspect off the leg. The bullet entered the thigh bone and was recovered in the knee joint. This was a non-fatal wound. (30RT 3923.)

Gunshot Wound No. 7 was bullet wound which entered the top of Mr. Skyles' right hand, near his first knuckle, passed through the hand toward the heel of the hand, fractured the bones, and then exited. This was a non-fatal wound. (30RT 3924.)

Gunshot Wound No. 8 was a grazing wound to the outer aspect of Mr. Skyles' right thigh, toward the front. This was a non-fatal wound. (30RT 3924-3925.)

Gunshot Wound No. 9 was a perforating wound to Mr. Skyles' left cheek area, entering near his mouth, and through the angle of the jaw, in front of the ear lobe. No projectile was recovered. This was a nonfatal wound. (30RT 3925.)

Dr. Scheinin put all of the recovered bullets in an envelope, which was given to Sergeant Holmes. (29RT 3630-3631; 30RT 3926, 3928-3929.) Sergeant Holmes took the shell casings, bullets and bullet fragments recovered from the scene and given to him during the autopsies to the Sheriff's Scientific Services Bureau and submitted them for analysis. (Peo. Exh. 132, 133; 29RT 3632-3640; 30RT 3927-3929; 32RT 4141.)

(iv) Identification Evidence

Sergeant Holmes put together the six-pack photographic lineup cards to show witnesses. (Peo. Exhs. 134, 135, 136, 137, 138; 29RT 3641-3643; 30RT 3782; 32RT 4141.) As individual suspects were eliminated, Sergeant Holmes eliminated those six-packs from further viewing by witnesses. (29RT 3643.)

In People's Exhibit 134, a photograph of appellant Soliz was in the number two position. (29RT 3643-3644; 32RT 4141.)

On April 18, 1996, Sergeant Holmes admonished Ms. Mateo and showed her a six-pack photographic lineup card. Appellants did not appear in this lineup card. Ms. Mateo did not recognize anyone in the lineup. (Peo. Exh. 136; 29RT 3738-3739, 3786; 32RT 4141.) On May 14, 1996, Sergeant Holmes admonished Ms. Mateo and showed her two other six-pack photographic lineup cards. In one of the cards, Ms. Mateo instantaneously identified a photograph of appellant Soliz in the number two position as the shooter. (Peo. Exhs. 134, 135, 142; 29RT 3739-3741; 30RT 3786-3788; 32RT 4141.) She wrote: "The mug shot of picture number 2 folder C looks identical to the man I saw with the gun. I believe that this was the man who shot the two men [Messrs. Skyles and Price]." (29RT 3740-3741; 30RT 3787-3788.)

On July 3, 1996, Sergeant Holmes admonished Mr. Garcia and then showed him four six-pack photographic lineup cards. On one of the cards, Mr. Garcia immediately and without hesitation identified appellant Soliz's photograph. (Peo. Exhs. 134, 135, 136, 137, 141; 29RT 3709-3714; 30RT 3782-3786; 32RT 4141.) In the photograph in the lineup card, appellant Soliz's hair was longer than the person Mr. Garcia had seen. (29RT 3720.)

Sometime in April, 1996, Sergeant Holmes admonished Mr. Robinson and showed him a six-pack photographic lineup card. Mr. Robinson could not identify anyone in the lineup. (Peo. Exh. 136; 30RT 3788-3789; 32RT 4141.) On July 3, 1996, Sergeant Holmes admonished Mr. Robinson and then showed him two six-pack photographic lineup cards. (29RT 3768-3769; 30RT 3788-3790.) Mr. Robinson looked at them, quickly identified the person in the number two position, and wrote: "He looks like the one that was shooting the person." (Peo. Exhs. 134, 135, 143; 29RT 3769-3771; 30RT 3789-3790; 32RT 4141.)

On March 4, 1997, the day before the preliminary hearing, Sergeant Holmes scheduled a live lineup of appellants, to be conducted at the Los Angeles County Men's Central Jail. Ms. Mateo, Jose and Mr. Robinson went to the Los Angeles County Jail to participate in viewing a live lineup. (29RT 3741-3742, 3775; 30RT 3791-3794.) Appellants refused to stand in the live lineup. (29RT 3742, 3775; 30RT 3793-3794.) On March 6, 1997, Ms. Mateo testified at the preliminary hearing and identified appellant Soliz as the shooter. (29RT 3742-3743.)

At trial, Mr. Garcia was shown the booking photograph of appellant Soliz. (Peo. Exh. 122; 29RT 3720; 32RT 4141.) Mr. Garcia testified that appellant Soliz's hair was like that of the person he had seen enter the Honda Accord at the Shell gas station. (29RT 3720.) Mr. Garcia also testified that appellant Soliz's booking photograph "more or less" looked like the man he saw get into the car that night. (29RT 3721.)

At trial, Ms. Mateo identified appellant Soliz as the person she saw shooting the two Black male victims at the Shell gas station. She testified there was no doubt he was the person she saw shooting the two Black male victims, and that there was no doubt in her mind when she picked him out of the lineup card, identified him at the preliminary hearing, and identified him at the previous trial. (29RT 3729, 3760.) She further testified that at trial, appellant Soliz hair was much longer than it had been, and his moustache had not been as full or shaped in the same way. (29RT 3729.) Ms. Mateo testified appellant Soliz's booking photograph looked "pretty much the same" as he had looked on the night she saw him shoot the victims. (29RT 3729-3730.) Ms. Mateo also identified appellant Gonzales as the Hispanic male she saw standing at the rear of the Honda. (29RT 3735-3736.)

At trial, Mr. Robinson identified appellant Soliz as looking like the person he saw shoot the two Black male victims at the gas station. (29RT 3765.)

(v) Statements From Judith Mejorado

On November 7, 1996, Sergeant Holmes and Deputy David Castillo went to interview Ms. Mejorado at her house. They told her they needed to talk to her about their investigation in which two Black males had been killed, and they had information that she had been in her brother Agustin's car with the suspects at the time the murders had occurred. (30RT 3872-3873, 3885.) Sergeant Holmes and Deputy Castillo never threatened Ms. Mejorado or any member of her family, and never threatened to put Agustin in jail. (30RT 3885-3886.) Ms. Mejorado told the officers that she did not want to take her baby with her to the station. Ms. Mejorado went across the street and the neighbor agreed to watch the baby. Ms. Mejorado got into the officer's car and went with them to the Industry Sheriff's Station. (30RT 3873.) While they drove to her to the station, the officers told Ms. Mejorado that it was important for her to be "very truthful" as to what had happened. Ms. Mejorado was "somewhat depressed" about having to talk to the officers, and they again told her that it was "very important that she tell us the truth about what occurred." (30RT 3874-3875.) When they got to the station, the officers took Ms. Mejorado to the office trailer at the rear of the station. (30RT 3875.) Ms. Mejorado was initially hesitant. (30RT 3875.) The officers did not tell her any information about the murders, except that they knew she had been inside the car. (30RT 3876.)

Ms. Mejorado told the officers that she had been home that evening when she received a call from her brother Agustin, who had been at a party with appellants ("Speedy" and "Jasper") and Michael Gonzales ("Clumsy"). Agustin

appeared to be intoxicated while he spoke to Ms. Mejorado. Agustin asked if she wanted to go to a party. She agreed to go with them because she did not want Agustin to be driving while intoxicated. (Peo. Exh. 144; 30RT 3876-3878, 3885; 32RT 4141.) Michael drove; Ms. Mejorado sat in the middle of the front seat; Agustin sat in the front passenger seat; appellant Soliz sat in the backseat behind the driver; and appellant Gonzales sat behind the front passenger seat. They drove past a Shell gas station on Azusa Avenue. (30RT 3878.) As they passed the station, Ms. Mejorado saw three Black males walking across the street towards the station. The Black males made some type of comment to them as they passed. (30RT 3879.) Michael drove the car into the northwest driveway of the station, drove around the rear of the station, and then out of the driveway onto San Bernadino Road. Appellants said that they knew the Black males and told Michael to turn the car around and drive back to the station. Michael made a U-turn on San Bernadino Road, drove back into the station through the southeast parking lot driveway and parked just past the telephone booths, near the restrooms. (30RT 3879-3881.) Two Black males were in the vicinity of the telephone booths. Appellants exited the rear doors and walked to the two Black males, who were now on the telephone. Appellant Soliz walked along the driver's rear passenger area toward the rear bumper area and then toward the two Black males. Appellant Gonzales exited the right rear passenger door and stopped at the right rear bumper area. (30RT 3881-3882.)

Ms. Mejorado heard one of the young Black males say, "I'm sorry. I didn't mean to," or something to that effect. Appellant Soliz said, "No. Yes you did," followed by some gunshots. (30RT 3882-3883.) Ms. Mejorado turned and saw a flash of light coming from the gun in appellant Soliz's hand. Appellants returned to and entered the car at about the same time. Appellant Soliz put the gun in his pocket, entered the driver's side rear door, and sat behind the driver. Appellant Gonzales entered, sat behind the front passenger

seat, and closed the door. (30RT 3883-3884.) Appellants told Ms. Mejorado that she did not see anything. (30RT 3884.) Michael drove out of the station, westbound on some residential streets, and then drove to a residence. Appellants and Michael exited; Ms. Mejorado and Agustin drove home. (30RT 3884-3885.) Agustin had been extremely drunk and had not really known what was going on when they had been att the station. Agustin became very upset at what appellants had done in front of Ms. Mejorado. (30RT 3885.)

c. Appellant Gonzales' Conversation With Salvador Berber

Salvador Berber, a member of the East Side Puente clique of the Puente Trece or Puente 13 street gang, used the names "Psycho" and "Cyclone. (31RT 3986-3988.) Perth Street, Ballista and Dial were the names of three other cliques in the same street gang. (31RT 3988-3989.) Mr. Berber had known appellant Gonzales for about 12 years. Appellant Gonzales used the monikers "Speedy" and "Rebel," and was also a member of the Perth Street clique of Puente 13. (31RT 3989-3990.) Mr. Berber had known appellant Soliz for about eight years. Appellant Soliz used the moniker "Jasper," and was also a member of the Perth Street clique. (31RT 3990-3991.) Mr. Berber had known Randy Irigoyen ("Bird") for about 12 years. Mr. Irigoyen was also a member of the Perth Street clique. (Peo. Exh. 121; 31RT 3991; 32RT 4141.) Mr. Berber had known Michael Gonzales ("Clumsy") for three or four years. Michael was a member of the Perth Street clique. (Peo. Exh. 144; 31RT 3991-3992; 32RT 4141.) Mr. Berber had known Agustin Mejorado ("Listo") for two or three years. Agustin was also a member of the Perth Street Clique. (Peo. Exh. 145; 31RT 3992; 32RT 4141.) Mr. Berber knew Richard Alvarez ("Richie Rich") as someone who "hangs around" with appellant Gonzales, and who was a friend of appellant Gonzales' family. (31RT 3993.)

Sometime in September of 2006, Mr. Berber spoke to appellant Gonzales while sitting in a car. Mr. Berber wanted to buy one of appellant Gonzales' .38 caliber guns. (31RT 3994-3995.) Appellant Gonzales told Mr. Berber he had one .38 caliber gun that had belonged to a murder victim (Lester Eaton), and another gun he had used to murder the "the old man" victim. (31RT 3995-3996.) Appellant Gonzales told Mr. Berber he had committed the robbery/murder with appellant Soliz. Appellant Gonzales also said that Michael Gonzales and Richard Alvarez had also been there, but that Mr. Alvarez "didn't know what the heck he was doing." (31RT 3996.) When Mr. Berber was arrested later that same month and charged with robbery, he contacted the police and told them what he knew, hoping he would get sentenced to less time. Initially, the officers did not believe him. (31RT 3997.)

Mr. Berber was eventually arraigned and housed at the Men's Central Jail. While there, Mr. Berber met and spoke with appellant Gonzales. Appellant Gonzales talked about the murder of the "old man" at the market. (31RT 3998.) Mr. Berber later told Detectives West and Reeder about his conversation with appellant Gonzales. (31RT 3998-3999.) The detectives made no promises to Mr. Berber and told him they had no control over what happened in the courtroom. Mr. Berber agreed to speak to appellant Gonzales in a van while their conversation was taped. (31RT 3999.)

On September 25, 1996, Mr. Berber rode with appellant Gonzales in the back of a sheriff's van that had been wired with a tape recorder. (31RT 3999-4000.) The van was taking them from the Los Angeles County Jail to the Pomona courthouse. When they arrived at the courthouse, the deputies left appellant Gonzales and Mr. Berber alone in the van for a period of time. And, after they left court, appellant Gonzales and Mr. Berber were again left alone in the van for a period of time before the deputies returned and drove them back to the jail. While in the van, appellant Gonzales spoke to Mr. Berber about the

murder of the "old man" at the market. Appellant Gonzales told Mr. Berber that appellant Soliz had gone inside the market with him. (31RT 4001.) The van they used was driven by Michael Gonzales. (31RT 4001-4002.) After they "ditched" the van, they fled from the scene in Mr. Alvarez's car. Appellant Gonzales also told Mr. Berber about his involvement in the murder of two Black youths (Messrs. Skyles and Price) by a phone booth at a gas station. Appellant Gonzales told Mr. Berber he shot the two Black youths, and that appellant Soliz, and Agustin were also there. Appellant Gonzales told Mr. Berber he used a nine-millimeter gun. (31RT 4002.)

Appellant Gonzales' conversation with Mr. Berber while they were in the van was tape recorded, and an accurate transcription was made. (Peo. Exhs. 156, 157; 31RT 4003-4004, 4016-4017.) The recording was edited to include only the part of their conversations about the Hillgrove Market robbery/murder and the murder of Messrs. Skyles and Price. The tape and transcript were accurate. There were parts of the tape where you could not understand what was being said because the van was too loud. (31RT 4004-4005, 4009.) The edited tape recording was played, but not transcribed by the court reporter, and the transcript was distributed to the jury. (31RT 4005, 4008, 4010, 4012, 4014-4015.)[38/]

While in the van, appellant Gonzales told Mr. Berber that he "killed the old man" in the Hillgrove Market robbery murder. (Peo. Exh. 157; 31RT 4003-4004, 4016-4017.) He also said that appellant Soliz and Mr. Alvarez (Richie Rich) had been there with him. (Peo. Exh. 157, at 2-4; 31RT 4003-4004, 4016-4017.) Michael Gonzales (Clumsy) had driven them to the location. (Peo. Exhs. 157, at 2; 31RT 4003-4004, 4016-4017)

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38. The parties agreed that an unedited recording and transcript would also be marked and admitted into evidence. (Def. Exhs. MM, NN; 31RT 4006-4007, 4020-4021.)

Appellant Gonzales also discussed the double murder of two young Black males at a gas station in Covina. Appellant Gonzales told Mr. Berber he had shot the two men near the telephones, using a nine-millimeter gun. Agustin ("Listo") Mejardo and his sister Judith and appellant Soliz were in the car with him. (Peo. Exh. 157 at 2-4; 31RT 4003-4004, 4016-4017.)

Mr. Berber told appellant Gonzales, "I hope I go to a firme joint." This meant that Mr. Berber hoped he was going to a decent prison. (Peo. Exh. 157 at 1; 31RT 4003-4004, 4009, 4016-4017.) Mr. Berber asked appellant Gonzales if he thought appellant Soliz's fingerprints were on the van, and appellant Gonzales replied, "Oh no, they're trying to get him on the terrones. We used, uhm, Listo's, Listo's car." (Peo. Exh. 157, at 2; 31RT 4003-4004, 4016-4017.) "Terrones" was Spanish slang for a Black person. (31RT 4009-4010.) Mr. Berber asked: "So you guys used Listo's car for that one?" and whether Listo (Agustin Mejardo) had been driving, appellant Gonzales replied: "Yeah. Listo and his sister in the front seat, and me, Jasper (appellant Soliz) -- Clumsy (Michael Gonzales) -- and me and Jasper. See and they said that Jasper's fingerprints on the door and everything. They don't got shit." (Peo. Exh. 157, at 2.) When Mr. Berber asked what door appellant Gonzales was talking about, appellant Gonzales replied: "I mean not on the door, on the, on the, uhm, pole." (*Ibid.*) Mr. Berber asked: "Where you guys got off?" and appellant Gonzales replied, "By the telephone, telephone pole. Yeah, I got off. I ran up on 'em. Cause the tintos was right there by the phone. They were right here by the phone and we were here. I got out the car and I went like that. And I ran up on 'em. They were like, "'No, no, no.' I let the motherfuckers have it." "Tintos" was Spanish slang for a Black person. (Peo. Exh. 157, at 2; 31RT 4003-4004, 4010, 4016-4017.) Appellant Gonzales told Mr. Berber that one of the victims tried to run away, that appellant Gonzales was close and then "boom, boom, boom." (Peo. Exh. 157, at 3; 31RT 4003-4004, 4016-4017.)

Mr. Berber asked appellant Gonzales, "Listo's *** cause his carnala was there," and appellant Gonzales replied, "*** I guess cause he was kind of drunk and shit," and after Mr. Berber laughed, appellant Gonzales said, "When he gets drunk, he's stupid." "Carnala was slang for "sister." (Peo. Exh. 157, at 3; 31RT 4003-4004, 4010, 4016-4017.) Mr. Berber said, "They said they got his fingerprints on the --" and appellant Gonzales interjected, "On the telephone pole or one of these --" and Mr. Berber replied: "Oh they, they can't prove that though. I mean, shit, how many people use that phone?" Appellant Gonzales replied: "He, but he -- he didn't get out. . . . He didn't get out. It was just me -- the only one that got out." (Peo. Exh. 157, at 3.)

Appellant Gonzales told Mr. Berber he did not know whether they could see him, and that he did not know if he had his hood on. (Peo. Exh. 157, at 3-4; 31RT 4003-4004, 4016-4017.) Appellant Gonzales told Mr. Berber that when he got back in the car, he said, "Sorry, Judith you had to see that" and that he said, "You got him? They're, they're gone?" and he said "Yeah." (Peo. Exh. 157 at 4.) Appellant Gonzales then told Mr. Berber that Listo was upset and kicked them out of the car, and that they then "jumped in Bird's [Mr. Irigoyen's] car, I think." (Peo. Exh. 157, at 4; 31RT 4003-4004, 4011, 4016-4017.) Mr. Berber said, "Hey, them fools from Dial used to mistreat Richie Rich, huh?" "Dial" was the name of another street in La Puente, and was the name of another clique of the Puente gang. (Peo. Exh. 157, at 4; 31RT 4003-4004, 4010, 4016-4017.)

Mr. Berber and appellant Gonzales discussed when Mr. Berber had wanted to buy one of appellant Gonzales' .38 caliber guns. Appellant Gonzales referred to one of the .38 caliber guns when he said, "One got -- fools from the Varrio got busted with one. And gave Clumsy $150 for it," and that they had been "busted" at "Jimmy's pad." (Peo. Exh. 157, at 5; 31RT 4003-4004, 4016-4017.) "Varrio" referred to the "Varrio Puente," which was another clique in

the Puente gang. "Varrio" was Spanish for "neighborhood." (31RT 4012-4013.) Appellant Gonzales then said that the .38 caliber gun that "we killed the old man with" had been sold to a "Paisa." Appellant Gonzales said that the "old man's" gun had been left at "Curley's pad." The "old man's" gun had his initials on it on the side, and appellant Gonzales said: "[W]e scratched them off. It was a Colt. See, I kept getting Rossi's. See I had -- I gave one to a fuckin,' uhm -- what the fuck's his name? Uh, da, da, Scrampy, from Ballista." (Peo. Exh. 157, at 6; 31RT 4003-4004, 4016-4017.) "Paisa" was an immigrant or illegal alien from Mexico. "Ballista" was another clique of the Puente gang. (31RT 4013.)

Appellant Gonzales told Mr. Berber: "I done about three -- two niggers and that old man -- about four mother fuckers when I got out this time. Fuck that." (Peo. Exh. 157, at 7; 31RT 4003-4004, 4016-4017.)[39/] Appellant Gonzales referred to a "meat market" in Hacienda Heights "by Turnbull and Seventh." (Peo. Exh. 157, at 7; 31RT 4003-4004, 4016-4017.) Appellant Gonzales told Mr. Berber that they wore hoods and sweatshirts, and that he had worn gloves, but that his gloves had ripped, probably when he grabbed the cash register tray at the front of the store. The tray only had $200 or $300 in it. (Peo. Exh. 157, at 8; 31RT 4003-4004, 4016-4017.) On the way to the market, appellant Gonzales was worried what might happen if they were pulled over because: "I had the cuete right here. I had the shotgun with the cuete. Clumsy [Michael Gonzales] was driving and Jasper [appellant Soliz] had the, uhm, the nine right ***." "Nine" referred to a nine-millimeter gun. "Cuete" was Spanish slang for a gun. (Peo. Exh. 157, at 9; 31RT 4003-4004, 4011, 4014, 4016-4017.)

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39. On cross-examination, appellant Gonzales testified that this statement to Mr. Berber was "just boasting, bragging. That's all." (32RT 4250.)

Appellant Gonzales told Mr. Berber that he had heard that the newspapers had referred to Mr. Eaton and "tried to make him out to be, 'Oh, he's more, he's more than a butcher, more like a' -- motherfucker -- 'More than a father figure too. He wasn't only a butcher, but a father figure, too.' Says that in the paper. I don't want to hear that bullshit. ***, Smoke the motherfucker." (Peo. Exh. 157, at 9; 32RT 4252.)

Appellant Gonzales said that the "old man" had "tried to reach for his gun, that's why I hit him with -- I was trying to wrestle, I grabbed his gun, I started hitting him with the other one. It was on. I tried to shoot him but it fucking -- when I hit him, cause I was holding it like this, cracking him, bam. Fucking, uh -- I pressed the button to *** --" (Peo. Exh. 157 at 10; 31RT 4003-4004, 4016-4017.) When Mr. Berber asked, "The cylinder popped out or what?" appellant Gonzales replied, "Yeah. Popped out a little, but I didn't know and I was trying to -- blam. He was already on the ground already and I had already got his cuete. Boom, boom, boom." Mr. Berber then asked if appellant Gonzales had shot the "old man" in the "mas cara," and appellant Gonzales replied, "Like right here. Straight open face, all the shots hit him." (Peo. Exh. 157, at 11; 31RT 4003-4004, 4016-4017.) "Mas cara" meant "face." (31RT 4016.)

Appellant Gonzales told Mr. Berber that if the "jaina" had not been there and run away, they "could have looked for a safe or something. But she broke running to a house." Appellant Gonzales also said, "I said we're going out. If the fuckin' juras pull us over, we're fucking letting them have it." (Peo. Exh. 157, at 9; 31RT 4003-4004, 4016-4017.) "Jaina" was a slang term for a girl, female or woman. "Juras" was Spanish slang for "cops." (31RT 4013-4015.) Appellant Gonzales said that the "jaina" had "just took off screaming, running," and that "the newspaper said that her son had just left to get some pizza. He was on his way back. But he didn't make it." (Peo. Exh. 157, at 9; 31RT 4003-

4004, 4016-4017.) When Mr. Berber asked if the "jaina" had seen their faces, appellant Gonzales replied, "I don't know. They probably see, see -- blew her mind though. She probably crazy now." (Peo. Exh. 157, at 10; 31RT 4003-4004, 4016-4017.)

Appellant Gonzales told Mr. Berber that when they left the market, they jumped in Michael Gonzales' getaway van, which had been parked about a half a block away, drove down the street, "hit Turnbull Canyon, parked in an empty parking lot there, took off. Jumped in Richie Rich's [Richard Alvarez] car, went all the way up Turnbull Canyon, dropped the cuetes off, and backtracked down." (Peo. Exh. 157; 31RT 4003-4004, 4016-4017.)

At the last part of their conversation tape, appellant Gonzales says, "Fuck him. See you November 12, Homes." (31RT 4015.) At that point, the police officers opened the van door, and Mr. Berber and appellant Gonzales were removed from the van and returned to jail. (31RT 4015-4016.)

Mr. Berber subsequently returned to court to deal with the robbery he had been charged with. Mr. Berber also had a prior robbery conviction. He faced 14 years in state prison. (31RT 4017.) Mr. Berber eventually pleaded guilty to robbery and was sentenced to five years in state prison, with the sentence suspended, and the prior robbery conviction was stricken. A condition of his plea was that he was required to tell the truth about his conversation in the van with appellant Gonzales. Mr. Berber was on five years probation. (31RT 4018-4019.) If Mr. Berber did not tell the truth, he could face a maximum of 14 years in state prison. (31RT 4019.)

When he testified at trial, Mr. Berber no longer lived in La Puente. If he returned to La Puente, he would be killed. (31RT 4019.)

d. Firearms Expert Testimony

Deputy Patricia Fant of the Los Angeles County Sheriff's Department, a Firearms Examiner in the Scientific Services Bureau, examined the 11 expended shell casings recovered from the scene of the murders of Messrs. Skyles and Price. (Peo. Exh. 132; 31RT 3956, 3968-3969; 32RT 4141.) All were nine-millimeter expended shell casings manufactured by Winchester that had been fired from one firearm. (31RT 3969-3971.) Deputy Fant compared the live nine-millimeter round, also manufactured by Winchester, found in the passenger compartment of the blue van used as a getaway car on the Lester Eaton robbery/murder with the shell casings recovered from the murders of Messrs. Skyles and Price. Deputy Fant opined those casings came from the same magazine of a semi-automatic pistol. (Peo. Exh. 116; 31RT 3971-3973; 32RT 4141.) Deputy Fant testified that the individual characteristics of the extractor marks on the expended shell casings matched the extractor mark on the live round, indicating they were consistent with having come from the same gun. (31RT 3973.) Deputy Fant testified it was possible for a live round to be cycled through a gun without having actually been fired such that it became an expended round. (31RT 3973-3974.)

Deputy Fant examined three bullets removed during the autopsy on Mr. Eaton (Peo. Exh. 115) and a bullet recovered by Ms. Eaton while cleaning the Hillgrove Market (Peo. Exh. 110) and determined all of them were either .38 special or .357 magnum caliber, and all were consistent with having been fired from the same weapon. (31RT 3975-3976; 32RT 4141.) The firearms capable of having fired these bullets were manufactured by Rossi, Astra and Security Industries. (31RT 3977-3978.) Colt Revolvers could not have fired these bullets. (31RT 3978.)

Sergeant Bruce Harris of the Los Angeles County Sheriff's Department was trained in firearms identification. (31RT 3979.) He examined the bullet

found by Criminalist Mutac at the Hillgrove Market and compared it with the bullets recovered from the autopsy on Mr. Eaton. (Peo. Exhs. 112, 115; 31RT 3981; 32RT 4141.) Sergeant Harris concluded that all of the bullets were either .38 special or .357 caliber, and that the bullet recovered by Mutac had been fired from the same firearm as one of the bullets recovered from Mr. Eaton's body. (31RT 3981-3982.) One of the other bullets recovered from Mr. Eaton's body could have been fired from the same firearm, but because of mutilation and distortion, he could not be positive. The third "bullet" recovered from Mr. Eaton's body was actually small lead fragments with no comparison value. The bullet recovered by Mr. Mutac had been manufactured either by Astra, F.I.E., Rossi or Security Industries. (31RT 3983.) Colt could not have been a manufacturer of the bullet recovered by Mr. Mutac. (31RT 3983-3984.)

e. Gang Evidence

Detective Scott Lusk of the Los Angeles County Sheriff's Department was a gang detective at the Industry Sheriff's Station for a little over eight years. (31RT 4042-4043.) The jurisdiction of the Industry Sheriff's Station included the City of La Puente. (31RT 4043, 4046.) Puente Trece was a street gang in the La Puente area, which included the City of La Puente and La Puente Park. "Trece" was Spanish for "13," which stood for "M," the 13th letter in the alphabet. "M" referred to "Mexico," which reflected the sentiment of some California gangs that California would one day again be a part of Mexico. (31RT 4047-4049.) The Puente 13 street gang was made up of 11 or 12 cliques, which were subgroups of the larger gang. Members of the different cliques owed allegiance to the larger gang, and committed crimes together to benefit the larger gang. (31RT 4049-4050.) The primary ethnicity of the Puente 13 street gang was Hispanic. Some cliques of the Puente Trece street

gang included Perth Street, Ballista, Dial and Varrio Puente. (31RT 4050-4051.)

The concept of "respect" was important amongst Puente 13 gang members. Most gang members joined to get respect and to be admired and feared. Lack of perceived respect can result in fights, assaults and even murder. To gain respect, gang members commit crimes. (31RT 4051-4052.) The term "Vato Loco" meant "crazy person," "crazy dude" and "crazy gang member," and was a term of respect and fear. A gang member became a "Vato Loco" by committing violent crimes. (31RT 4053.) When a gang member asked "Where are you from?" it was a challenge, as he was asking for the responder's gang membership. There is no right answer to the question, as the gang member asking the question has already decided that the person asked is to be the victim of whatever is planned. The wrong answer could get the responder assaulted or possibly killed. (31RT 4054.)

Detective Lusk had known appellant Gonzales since 1990 or 1991, and since that time had numerous contacts with him. Detective Lusk opined that appellant Gonzales was a member of the Perth clique of the Puente 13 street gang. Appellant Gonzales had tattoos indicating this membership, including "PST" which stood for "Perth Street," on his right shin, and underneath that another tattoo which read "P13" which stood for "Puente Trece." (31RT 4055-4056.) Appellant Gonzales also had a tattoo on his left shin which spelled out "Puente." (31RT 4056.)

Detective Lusk had known appellant Soliz since 1992 or possibly sometime shortly thereafter. Detective Lusk opined appellant Soliz was a member of the Puente gang based upon his admission to being in the gang, and upon his tattoos. (31RT 4056.)

Randy ("Bird") Irigoyen, Michael ("Clumsy") Gonzales and Agustin ("Listo") Mejorado were all members of the Perth Street clique of the Puente gang. (Peo. Exhs. 121, 144, 145; 31RT 4056-4058.) Detective Lusk had

previously investigated a case in which Agustin and Caesar Montiveros, known as "Cartoon," another Puente gang member, committed about five robberies in one night. (31RT 4058.)

Most crimes committed by gang members were committed by groups, rather than individuals, so as to intimidate the intended victims, to provide back-up to help defend themselves, to commit crimes, and to provide verification to other members that a crime had been committed. (31RT 4058-4060.) Gang members were usually uncooperative with law enforcement officials, even when the member was a victim of a crime, as the "rule or law of the streets" was "Don't cooperate with the police, we'll take care of our own troubles." It was also not uncommon for civilian victims living in the area to be uncooperative as they are "literally scared to death of these people." (31RT 4060.)

On March 31, 1996, near Sunset and Ector in La Puente, Billy ("Weasel") Gallegos was an admitted member of the Puente gang who was shot to death in an area claimed by the Puente gang. (31RT 4060-4062.) Raymond ("Ducky" or "Little Ducky") Flores, another member of the Puente gang, was also shot. (Peo. Exh. 150; 31RT 4061-4062.) The shooters were identified as being two Black males, one wearing a North Carolina jersey. The North Carolina jersey was worn by members of the "Neighborhood Crips," with "North Carolina" standing for "NC" or "Neighborhood Crips." Before the shooting occurred, the occupants of the suspect vehicle flashed or "threw" a hand gang sign for the Neighborhood Crips. (31RT 4063.) One occupant of the car, possibly sitting in the right front passenger seat, asked the occupants of Mr. Gallegos' car what gang they were from. (31RT 4063-4065.)

The murders of Messrs. Price and Skyles occurred approximately two weeks after the shooting of Mr. Gallegos. Messrs. Skyles and Price were Black teenagers. In the period between July of 1995 to June of 1996, there was a race

war between Puente and Black street gangs. During that time there were nine murders and 17 felony assaults primarily between Black and Hispanic gang members in the Industry Station area. (31RT 4065.) Detective Lusk opined that the murders of Messrs. Skyles and Price were in retaliation for the murder of Mr. Gallegos, and it did not matter whether Messrs. Skyles and Price were actually members of a Black street gang, as they had been targeted whether or not they were actually gang members. (31RT 4066-4067.) Either Mr. Price or Mr. Skyles had been wearing red pants and a red belt with a "P" belt buckle, which meant he was possibly a member of the Piru clique of the Bloods street gang. Dark blue jackets and pants was a color claimed by members of the Crips street gang. (31RT 4067-4068.)

f. Other Crimes Evidence Presented As To Appellant Gonzales [40]

On March 11, 1990, at about 10:00 p.m., Martin Espinoza and Alfred Dennis were working inside the office, counting the money in the till, at the Shell gas station at 801 South Glendora Avenue in West Covina. (31RT 4083-4084.) The door to the office was closed and unlocked. (31RT 4084-4085.) At that time, two young males, both darker complected, entered. The older male, who was probably 16 years old, carried a gun. The other male was Hispanic, probably 13 years old, and carried a knife. (31RT 4085-4086.) The older male said, "Give me the money." Mr. Espinoza and Mr. Dennis backed away with their hands up. The younger male took the money, and the two males left the station and ran away. (31RT 4086-4087, 4089.) Mr. Dennis

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40. The jury was instructed that the testimony from witnesses Martin Espinoza, Officer Cruz Garcia, Jr., and Deputy Arnolufo Esquivel was "directed to [appellant Gonzales] only and is not to be used by you in your consideration of a verdict as to the other defendant." (31RT 4097, 4114.)

called the police, and Messrs. Dennis and Espinoza told them what had happened. (31RT 4087.)

Officer Cruz Garcia, Jr. of the West Covina Police Department investigated the robbery. (31RT 4091-4092.) He interviewed appellant Gonzales after first advising him of his *Miranda*[41] rights. Appellant Gonzales indicated he understood and waived his rights. Appellant Gonzales also answered a series of questions from a *Gladys R.*[42] form, and his answers demonstrated he understood the difference between right and wrong. Appellant Gonzales was 13 years old. (Peo. Exh. 158; 31RT 4092-4094.) Appellant Gonzales told Officer Garcia that he and his cousin went to the Shell gas station to rob it; that his cousin was armed with a handgun; they robbed the gas station; his share from the robbery was $50; and that he spent it on food and videos. Appellant Gonzales was taken into custody for the offense and fingerprinted. (Peo. Exh. 159; 31RT 4095-4098.)

It was stipulated that Detective James Lee O'Brien of the West Covina Police Department was an expert in fingerprint comparison. (31RT 4100-4101.) Detective O'Brien obtained fingerprints from appellant Gonzales. (Peo. Exh. 160; 31RT 4101-4102.) He compared these fingerprints with those taken by Officer Garcia from the crime scene and opined they were made by the same person. (31RT 4103-4104.)

On January 4, 1998, at about 8:45 a.m., Deputy Arnolufo Esquivel of the Los Angeles County Sheriff's Department was searching the 1700 module of the Men's Central Jail. The 1700 Module was a row of 26 single-man cells in a row, each of which housed "high security, keep-away inmates," including appellant Gonzales. (31RT 4106.) When Deputy Esquivel searched appellant

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41. *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

42. *In re Gladys R.* (1970) 1 Cal.3d 855.

Gonzales'cell, he found a sharpened metal shank inside an envelope addressed to appellant Gonzales. It appeared to have been made from the bottom sole portion of dress shoes. (Peo. Exh. 161; 31RT 4106-4109.) It was illegal for inmates to have shanks inside the jail. (31RT 4108.)

It was stipulated that appellant Gonzales had a prior felony conviction on October 5, 1995, for possession of a controlled substance in violation of Health and Safety Code section 11377. (31RT 4137-4138.)

g. Other Crimes Evidence Presented As To Appellant Soliz

On October 16, 1997, at approximately 1:45 a.m., Deputy Glen Eads[43] of the Los Angeles County Sheriff's Department was called to "B" Row of Module 3100 in the Men's Central Jail concerning a "fire on the row." (31RT 4114-4116.) The "B" Row consisted of 24 single-man cells. (31RT 4116.) The fire was fueled by a burning newspaper and a smouldering mattress in the back part of the row, and it had spread to approximately four cells. (31RT 4117-4118.) The inmates assigned to cells 22 to 26 threw paper onto the fire to keep it going. Appellant Soliz was one of these inmates throwing paper onto the fire. (31RT 4118.) Deputy Eads opened the back security door, and removed a fire extinguisher. When he then returned to the row, the inmates, including appellant Soliz, threw apples, oranges and full milk cartons at him. Deputy Eads shielded himself using a door and continued to try to put the flames out. When Deputy Eads re-entered the row with a fire hose, the same inmates again hit him with apples, oranges and milk cartons. Deputy Eads was later able to put the fire out using a fire hose, with the assistance of Deputy Walidas. (31RT 4119-4121.)

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43. The jury was instructed that the testimony from witness Deputy Glen Eads was limited to appellant Soliz. (31RT 4114.)

On January 10, 1998, at about 6:30 p.m., Deputy Forrest Anderson of the Los Angeles County Sheriff's Department was in Module 31 of the Men's Central Jail. All of the cells in that area are single-man cells. Deputy Anderson searched appellant Soliz's cell and recovered five razors, one altered razor and an aluminum food tray. (31RT 4123-4125.) The altered razor was a razor blade removed from the plastic handle. Such blades are typically fashioned into slashing and stabbing devices. Inmates in that part of the jail are not allowed to have any kind of metal in their cells, and are advised of this prior to being placed in their cells. Inmates have access to such razors during a 30-minute period in which they are permitted to use them to shave, following which they must return the razors. Inmates also receive such razors when smuggled to them by trusties. (31RT 4125-4127.) Such materials are considered contraband. (31RT 4126.)

On July 31, 1998, at about 7:45 a.m., Deputy Richard Torres of the Los Angeles County Sheriff's Department searched Cell No. 25 in Module 3100 of the Men's Central Jail. (31RT 4131.) This was appellant Soliz's single-man cell. From his search, Deputy Torres recovered two altered razors, five disposable razors, and an unsharpened flat metal object. (31RT 4132-4134.) The altered razors were capable of being fastened to a toothbrush, pencil or any type of plastic and used as a slashing device. (31RT 4133.) The unsharpened flat metal object could have been transformed into a stabbing device. (31RT 4134-4135.) Inmates are advised that they are not allowed to have such items in their cells. (31RT 4133-4135.)

It was stipulated that appellant Soliz had a prior felony conviction on November 10, 1992, for unlawful driving or taking of a vehicle, in violation of Vehicle Code section 10851. (Peo. Exh. 162; 31RT 4138.)

2. Defense Evidence

a. Appellant Soliz

Appellant Soliz did not testify on his behalf.[44/]

Irene Arzola, appellant Soliz's mother, testified as follows: appellant Soliz was a few years younger than his two brothers and two sisters and was the closest to her; he liked to fish, ride a bike, swim, draw, color and listen to music; he was artistic; he was very good with his pet cats, dogs, fish and chicken; he was raised without a father in the La Puenta, Basset area; when she had to go to work, his brothers had to watch him when they got home from school; and he did not complete his schooling. (32RT 4146-4148.)

Ms. Arzola further testified that it took a while for her to learn that appellant Soliz got involved with a gang. At that time, it was not like joining a gang today. (32RT 4148.) She became aware he had joined a gang when he was 15 years old and not doing well in high school. Although at first they were very close, when she had to work, appellant Soliz was left alone a lot. Ms. Arzola drank and partied until she became a "born-again Christian" when appellant Soliz was 13 or 14 years old. (32RT 4149.) After Ms. Arzola got married, everything went downhill. Appellant Soliz stayed with them for about a week and then left. When she saw appellant Soliz again, it was more evident that he was involved with a gang. (32RT 4150.) Ms. Arzola asked appellant Soliz about his gang involvement, but he told her nothing. Appellant Soliz always treated her well. Ms. Arzola loved her son, prayed for him daily, and wanted him to live rather than be executed. She saw a side of appellant Soliz that showed him to be good and compassionate person that helped people. Appellant Soliz did a lot of reading and finished high school while in prison.

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44. Outside the presence of the jury, the trial court had a colloquy with appellant Soliz and found that he knowingly and understandingly waived his right to testify and elected to stand on his right to remain silent. (32RT 4386.)

(32RT 4151-4152.) Appellant Soliz had a three-year old daughter, Adrienne, and he visited her frequently when he was out of custody. Appellant Soliz also had a four-year old son, Isaac. (32RT 4157.)

Danny Lara, appellant Soliz's cousin, was 26 years old. Appellant Soliz was a year older. They had a lot in common and were very close when growing up. They spent a lot of time together from the time they were babies until they were about 17 years old. After that, they always kept in contact, but only saw each other "here and there" because Mr. Lara moved and was in and out of the neighborhood a lot. (32RT 4159-4160.) Appellant Soliz was not a bad or violent person. (32RT 4160-4161.) When appellant Soliz got involved with gangs, his hair got shorter, and his style of clothing changed, but in Mr. Lara's presence, he never seemed to be aggressive, violent or disrespectful. (32RT 4161.) Appellant Soliz was a good person, could be of value while in prison, and Mr. Lara hoped his life was spared. (32RT 4162.)

Steve Lara, Danny's younger brother, was appellant Soliz's 23 year old cousin. He was very close to appellant Soliz, looked up to him, and considered him a mentor when they were growing up. (32RT 4166.) Appellant Soliz was instrumental in keeping Steve out of a gang. (32RT 4166-4167.) Steve believed appellant Soliz did not want to join a gang, and did not enjoy being in one, but that he did so because his friends had done so. Appellant Soliz was an average human being, with a heart and soul. He made mistakes, but was overall a good person. (32RT 4166-4167.) Steve believed that appellant Soliz's gang life was only a small part of his life, and that if he were allowed to live, he could do good for people. (32RT 4169.)

Tony Diaz, appellant Soliz's half-brother, was four and one-half years older than appellant Soliz. (32RT 4174-4175.) Mr. Diaz worked a minimum of nine hours a day as a machinist, and was also an ordained minister. (32RT 4174-4175.) When appellant Soliz was about 12 years old, he sought out the

church. Mr. Diaz was at that time an atheist. Appellant Soliz influenced Mr. Diaz, tried to help get him into a church, and "played a major role in bringing me to Christ." Later, Mr. Diaz had many conversations with appellant Soliz concerning his involvement in gangs. Mr. Diaz felt guilty for being a poor influence on appellant Soliz. He tried to encourage appellant Soliz to "bring him back to the Lord." (32RT 4176-4177.) He believed the "seed of the Lord" was in appellant Soliz's heart, and that appellant Soliz was capable of showing loyalty and love, was teachable and changeable, and could learn from his experience and help many others in prison. (32RT 4177-4178.)

Michael Landerman was a machine operator who knew appellant Soliz when the two worked together for two to three years at Sunset Wire and Steel. (32RT 4182-4183.) They were friends. Without being asked, appellant Soliz was very helpful. He helped train Mr. Landerman. Mr. Landerman was a better person because of the way appellant Soliz's helped and treated Mr. Landerman. He believed appellant Soliz would be helpful to others in prison. (32RT 4183-4185.)

Luz Jauregui was appellant Soliz's fiancé and had known him for about seven years. She was 21 years old, and they had been boyfriend and girlfriend for over three years. She still planned to marry appellant Soliz even if he was given a sentence of life without the possibility of parole. (32RT 4195-4197.) Appellant Soliz was an understanding, caring, loving and supporting person to Ms. Jauregui. (32RT 4197.) When appellant Soliz was with Ms. Jauregui, he was not involved with gang activities, and he never brought such activities around her. She made efforts to get him away from involvement with the gang. Ms. Jauregui never saw him become violent toward her or anyone else. Appellant Soliz was an angel to her. (32RT 4198.)

Dr. Nancy Cowardin, a psychologist, examined appellant Soliz on two occasions in April of 1998. (32RT 4318-4319.) Appellant Soliz was

cooperative, friendly and gave a very good effort on all of the tests. Appellant Soliz did not have an attention deficit disability. (32RT 4320-4321.) Appellant Soliz's score on the Moral Reasoning test was just below 300, which would be considered Stage Three Reasoning, the lower of the two average American stages of reasoning, and referred to in the literature as the "Good Boy Orientation." This meant someone who "tries to adhere to the rules of being a good son or a good citizen." (32RT 4322-4323.) Appellant Soliz was given the following in a "Dilemma Interview": A man's wife was dying of cancer; there was a drug that could cure her if she took it once; and the man could not afford to purchase it despite attempts to raise the money. Appellant Soliz consistently responded with a "pro-life approach" such that the man should steal the drug to save her life "because she's human and because he loves her." (32RT 4324.) When appellant Soliz was asked whether the man should steal it if he did not love his wife, he responded he should because she was still human and deserved "the intervention." When appellant Soliz was asked whether the man should steal the drug to save the life of a stranger, he again said he should because her life took priority over property rights. When asked if the man should steal the drug to save the life of a dog, appellant Soliz responded that "perhaps it was worth a chance, taking a chance if you loved your pet enough." (32RT 4325.) Appellant Soliz's "strong conventional morality is noteworthy in that he's had little opportunity to interact with role models who share his orientation." (32RT 4329.)

Appellant Soliz "developed good academic skills, except for math, and has no disability," and thus he had "been a success in that endeavor as well." (32RT 4330.) Dr. Cowardin characterized appellant Soliz as a "22-year-old Hispanic male whose intellectual abilities can be characterized as above average," and that "in terms of cognitive functioning" appellant Soliz "exhibits adult capabilities." (32RT 4331.) Appellant Soliz knew right from wrong, but

there was no "straight across correspondence" between a person's "moral reasoning" and their "moral conduct." (32RT 4332.) There was some "element of limited alertness" in appellant Soliz such that when he "pays attention, he can be easily distracted to things that are going on and miss some of the content." (32RT 4332-4333.) Appellant Soliz had the ability to "reason pro socially" and he appreciated "pro social behavior." Appellant Soliz was "verbal, rather -- very, very pleasant, able to express himself and could have a lot to say to young people." (32RT 4334.)

Appellant Soliz was next asked to respond to a "Second Dilemma": An officer in the same hypothetical witnesses the man stealing the drug, and has to determine whether to turn him in. On this test, appellant Soliz took the "morality and conscience orientation," opting not to turn the man in, because this was the man's last resort to save her, and he felt the police officer should "weigh it out with himself to come to a conclusion to not report the desperate man." (32RT 4326-4327.)

A third dilemma was presented to appellant Soliz as follows: An American 14 year old has saved money to go to camp; he has an agreement with his dad that he can go; when the time comes to pay for the camp, the dad asks for the money for his own pleasure fishing trip. Appellant Soliz was then asked to "decide between contract, a contract between the two, and obligations to family." (32RT 4327.) Appellant Soliz opted for the "contract orientation." (32RT 4327-4328.) Appellant Soliz "'indicated that broken promises lead to sadness and hurt feelings.'" Appellant Soliz consistently believed "that promises are important and should be kept," and his comment that "there had been lots of broken promises in his life" was possibly "one reason why his orientation is strong towards keeping promises today as an adult." (32RT 4328.)

b. Appellant Gonzales

David G. was nine years old and in the fourth grade. (32RT 4200.) Appellant Gonzales was his uncle. (32RT 4202.) Appellant Gonzales spoke to David G. on the phone and told him to be good, stay out of trouble, and listen to others. David G. would miss appellant Gonzales if he could not talk to him. He loved his uncle. (32RT 4202-4203.)

Appellant Gonzales testified on his own behalf. He was 22 years old. (32RT 4204.) He joined the Perth Street clique of the Puente gang in 1989 or 1990. On May 23, 1991, he was shot. At that time he was 14 years old. He was still going to school when he joined the gang. Before joining, he played football and got a trophy for it. (32RT 4205-4206.) There were many photographs of him which showed what appeared to be a happy childhood. (32RT 4211-4213.) Appellant Gonzales had an older brother who never joined a gang, but who befriended gang members. No one tried to stop him when he joined the gang. Appellant Gonzales' father worked the night shift, and during the day sometimes he was awake and other times he slept. Appellant Gonzales' father was little help to appellant Gonzales with school work. (32RT 4213.) When appellant Gonzales needed friends to be with, he did so with friends and neighbors down the street. (32RT 4213-4214.) These friends were not gang members at that time, but some eventually joined the gang. Appellant Gonzales' father did not know when he was joining the gang, so he did not try to talk him out of it. (32RT 4214.) It would have been easy for him not to join a gang or hang around with gang members. He was not forced into it. It was his own decision. (32RT 4214–4215.)

Before appellant Gonzales went to the Hillgrove Market, he was at a friend's house on Unruh Street in La Puente. They planned to commit a robbery, and did not plan to shoot or murder anyone. (32RT 4206, 4208.) When they entered the market, appellant Gonzales had a gun, walked straight

to the back of the market and saw Mr. and Ms. Eaton. He asked Mr. Eaton, "Where's the money at?" Mr. Eaton was on the phone and told appellant Gonzales to "put that gun away before someone gets hurt." Appellant Gonzales looked away, and when he looked back he saw Mr. Eaton reaching for his gun. Appellant Gonzales wrestled with Mr. Eaton, who was a lot bigger than appellant Gonzales. (32RT 4207.) Appellant Gonzales got his gun, and Mr. Eaton got his gun, and after that, appellant Gonzales "went blank and I just kept shooting." If Mr. Eaton had not reached for his gun, the plan had been just to get the money and leave the market. After they left the market, they returned to the house on Unruh Street. (32RT 4208.)[45/]

Appellant Gonzales felt bad because of what had happened. (32RT 4208-4209.) In the tape-recorded conversation with Mr. Berber, appellant Gonzales bragged and boasted about it so he would not look like a coward in

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45. On cross-examination, appellant Gonzales testified that when they entered the Hillgrove Market, he had a .38 Rossie revolver (32RT 4218, 4236); that he took Mr. Eaton's gun away before he accidentally shot him (32RT 4239-4242); that he took Mr. Eaton's wallet (32RT 4244-4245); that he took the cash tray on the way out of the market (32RT 4242); and that he tossed the wallet and cards out of the window to get rid of it (32RT 4245). Appellant Gonzales further testified on cross-examination that he thought appellant Soliz had a gun, but did not know or could not remember (32RT 4219); that the plan was for appellant Soliz to get the money (32RT 4231); that when they returned to the van, he had his .38 caliber gun as well as Mr. Eaton's shotgun (32RT 4221-4222); that after they ran out of the market and back to the van he did not see appellant Soliz with a gun (32RT 4219); that he did not see appellant Soliz with a gun after they ditched the van (32RT 4219-4220); and that he never saw appellant Soliz with a gun (32RT 4220). On further cross-examination, appellant Gonzales testified he had given appellant Soliz the Colt 9-millimeter gun a couple of weeks or the month before the Hillgrove Market robbery murder (32RT 4269-4270); that he knew appellant Soliz had a 9-millimeter gun, and that he saw it inside the van, on the way to and from the Hillgrove Market, but that he did not know if appellant Soliz took it inside the market (32RT 4224-4225, 4237); that the 9-millimeter round found in the van came from appellant Soliz's gun (32RT 4237); and that appellant Soliz gave the 9-millimeter gun back to appellant Gonzales about a week later (32RT 4270).

front of a fellow gang member. But inside, he really felt bad and it weighed on his conscience. (32RT 4209.) Appellant Gonzales knew he had "messed up" Mrs. Eaton's life, and the lives of all of her family and friends. He felt bad about it and apologized. It would always be on his conscience. (32RT 4211.)

Appellant Gonzales testified he went to the Shell gas station on Azusa to talk to the Black males about a gang-related killing of his friend that had happened in the last couple of weeks.[46] (32RT 4209-4210.) Appellant Gonzales was the only one to get out of the car; appellant Soliz remained inside.[47] (32RT 4210, 4273, 4281-4282, 4291, 4297-4298.) Appellant Gonzales and the two Black males argued. He believed one of them was reaching for a gun, but he was quicker to get his gun, and he shot both of them. After doing so, he felt "like messed up a little bit." Now he felt bad about it. (32RT 4210.)[48]

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46. On cross-examination, appellant Gonzales testified he wanted to talk to Messrs. Skyles and Price about the murder of his friend, Mr. Gallegos. (32RT 4264-4265.) He further testified when questioned by counsel for appellant Soliz that he "knew they were gang members" (32RT 4287), that he got out of the car and asked the victims "Don't I know you from somewhere?" and one of the victims replied, "Naw" and "Cuz" (32RT 4290); that he asked, "Where are you from?" and they told him, and that when he replied where he was from, one of the victims said, "Fuck Puente" (32RT 4290-4291); and that when one of the victims moved or reacted as if he had a weapon, he started shooting (32RT 4291). He further testified that he told Mr. Berber that appellant Soliz's fingerprints could not have been found on the telephone pole, because appellant Soliz never got out of the car. (32RT 4281-4283, 4292, 4297-4298.)

47. On cross-examination, appellant Gonzales testified that when he was telling Mr. Berber about the shooting of Messrs. Skyles and Price he "put a lot of drama into it" and that it was "like telling a tall tail" to make himself look better than he was. (32RT 4253.)

48. On cross-examination, appellant Gonzales testified that: (1) Billy Gallegos was a friend and fellow gang member who he had known had been killed a few weeks before by two Black gang members (32RT 4264-4265); (2)

Since being in jail, appellant Gonzales wrote and spoke to his mother all the time. He wrote poems to her. (32RT 4215.) Appellant Gonzales felt he did not deserve to be executed. If he remained in prison, he would "rehabilitate," try to "learn things," try to help his family, and talk to his nieces and nephews and try to guide them away from his mistakes. (32RT 4216.)[49/]

Valerie Gonzales was appellant Gonzales' 27 year old sister. (33RT 4355-4356.) While growing up, Valerie and appellant Gonzales played kick ball and football together with the neighborhood children. (33RT 4356.) She was aware he joined a gang when he was about 14 years old. (33RT 4356-4357.) After joining, appellant Gonzales was still a brother to Valerie and treated their mother well, but he mostly spent time with his friends. Valerie tried to keep appellant Gonzales from joining the gang, but after he joined "there was really no point after that." When appellant Gonzales was shot, he was in the hospital for a period of time, and it was very difficult for the family.

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he thought he recognized Messrs. Skyles and Price (32RT 4264); (3) he wanted to talk to them so as to "resolve it before it escalated" (32RT 4267); (4) appellants sat in the backseats of the car driven by Michael Gonzales, Judith Mejorado sat in the middle of the front seat and Agustin was passed out drunk, sitting in the front passenger seat (32RT 4270-4272); (5) that when he saw Messrs. Skyles and Price, he told appellant Soliz "Let's go talk to them. I think I know them" (32RT 4272). On re-cross-examination, appellant Gonzales testified he shot Messrs. Skyles and Price with the same gun he had given to appellant Soliz a couple of weeks before the murder of Mr. Eaton, and that appellant Soliz gave the gun back to appellant Gonzales about a week after the murder of Mr. Eaton. (32RT 4304.)

49. On cross-examination, appellant Gonzales admitted he was one of the two men who committed the robbery of the Shell Station in 1990; that he had been the one carrying the knife; that his cousin John had carried a gun; that the two of them committed that robbery; and that he was also prosecuted and convicted for possession of drugs. (32RT 4256-4258.) He further testified on cross-examination that Deputy Esquivel lied when he testified that he found the shank in his cell, that he knew nothing about it, and that the shank had not been his. (32RT 4260-4261.)

(33RT 4357-4358.) While incarcerated, appellant Gonzales wrote a poem and sent it to his mother for Mother's Day. (Def. Exh. VVV; 33RT 4359-4360, 4383.) When appellant Gonzales spoke to Valerie's daughter, he told her to stay out of trouble and listen to her parents. (33RT 4360.)

Frances Ontiveros, appellant Gonzales' 24 year old sister, had two children, including a six year old daughter with Down's Syndrome. (33RT 4364-4365.)[50/] When Ms. Ontiveros worked, appellant Gonzales used to take care of Ms. Ontiveros' children. Ms. Ontiveros' daughter loved appellant Gonzales and visited him while he was incarcerated. (33RT 4365.) Appellant Gonzales' father worked nights and slept during the day, so he did not get to spend a lot of time with Ms. Ontiveros. Appellant Gonzales' mother worked part time, but she was home when Ms. Ontiveros got home from school in the afternoons. (33RT 4366.) Their mother had recently been in the hospital with pneumonia. (33RT 4367.) While in jail, appellant Gonzales ordered flowers to be sent to her. Ms. Ontiveros loved appellant Gonzales a lot and thought he should receive a sentence of life in prison. (33RT 4367-4368.)

William Marmolejo was a longtime neighbor of appellant Gonzales. They grew up and played football, baseball and basketball together. (33RT 4372.) Mr. Marmolejo first noticed appellant Gonzales' involvement with gangs when appellant Gonzales started hanging around Fernando, Mr. Marmolejo's younger brother. (33RT 4373.) Fernando and appellant Gonzales

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50. On cross-examination, Ms. Ontiveros testified her husband Jimmy used the nickname "Clowny" and was a member of the Puente 13 street gang. (33RT 4368.) Appellant Gonzales, Jimmy and Gabriel Martinez were arrested in Ms. Ontiveros' house on July 9, 1996. Inside the house, sheriff's deputies found a lot of Puente 13 gang paraphernalia, including a baseball bat with Puente 13 graffiti on it. (33RT 4369.) The garage of their apartment had a lot of gang graffiti spray painted on the walls. Appellant Soliz was one of appellant Gonzales' best friends in the gang, and was considered appellant Gonzales' "homeboy." (33RT 4370.)

"jumped" into the Perth Street clique when appellant Gonzales was 12 or 13 years old. Fernando was like an older brother to appellant Gonzales. (33RT 4374-4375.) Mr. Marmolejo tried to convince appellant Gonzales not to join the gang. When Mr. Marmolejo started working longer hours, he saw less of appellant Gonzales. Appellant Gonzales started getting in and out of trouble. Over the last couple of years, Mr. Marmolejo spoke to appellant Gonzales, who always treated Mr. Marmolejo with a lot of respect. (33RT 4375.) Mr. Marmolejo believed appellant Gonzales should get a sentence of life without parole because appellant Gonzales was "pushed" into doing the bad things he had done. Mr. Marmolejo coached Special Olympics, and took appellant Gonzales with him. Mr. Marmolejo had a "special sister" that appellant Gonzales sometimes watched. (33RT 4376.)

Edna Gonzales was appellant Gonzales' mother. Appellant Gonzales was a "good son" and was always "attached" and "real close" to his mother. He had good grades in school until he "started going down in junior high." At that time, she worked in the cafeteria for the La Puente Unified School District. (33RT 4379.) Many kids in the neighborhood joined gangs even earlier than appellant Gonzales. Appellant Gonzales always loved and respected his parents and siblings. (33RT 4380.) Since appellant Gonzales was in custody, Mrs. Gonzales saw him every week. He never disrespected her, and he always sent her cards and letters, including a poem. (33RT 4381.) Mrs. Gonzales believed appellant Gonzales should be punished for what he did, but felt it should be life without parole. Appellant Gonzales loved his nieces and nephews, and never brought his gang activities into the family home. Appellant Gonzales always told his nieces and nephews to "do good in school and be good to their mom and dad." Mrs. Gonzales loved her son. (33RT 4382.)

ARGUMENT

PRE-TRIAL ISSUES

I.

THE COURT PROPERLY DENIED MOTIONS TO SEVER COUNTS I, II AND III FROM COUNTS IV AND V

Appellants argue the court erred when it denied their motions to sever the case of the robbery and murder of Lester Eaton (counts I, II and III) from that of the case concerning the murders of Elijah Skyles and Gary Price (counts IV and V). (GAOB 82-121; SAOB 40-53.) Appellants argue the two cases were "entirely separate from one another," that the crimes were not cross-admissible, and that the denial of severance was an abuse of discretion and a "gross unfairness" that denied due process. (GAOB 82-121; SAOB 40-53.) Respondent disagrees and submits the trial court did not abuse its discretion when it denied the severance motions because: (1) evidence as to counts I, II and III was cross-admissible with the evidence as to counts IV and V; (2) the evidence of appellants guilt of the murder and robbery of Mr. Eaton was not "much stronger" than the evidence of their guilt of the murders of Messrs. Skyles and Price; and (3) one case was not "significantly more inflammatory" than the other. Finally, even assuming the cases should have been severed, any error was clearly harmless.

A. Procedural Background

Appellant Gonzales filed a "Motion for Separate Trials/Severance,"[51] arguing the crimes were not cross-admissible as they were "totally different in time, acts, and allegations;" that the acts of appellant Soliz in the murders of Messrs. Skyles and Price did not involve him; that it would be unfair and unduly prejudicial if they were joined to the offenses against Mr. Eaton; and that his statements to Salvador Berber should not come into trial pursuant to *People v. Aranda* (1965) 63 Cal.2d 518, 530-531. (3CT 398-404.)

Appellant Soliz filed a motion for separate trials, arguing his belief that appellant Gonzales would offer exculpatory testimony as to counts IV and V. (3CT 457-462.) Appellant Soliz filed a separate motion for severance, arguing severance was required because the prosecution intended to introduce at trial appellant Gonzales' statements which inculpated appellant Soliz, in violation of *People v. Aranda*, *supra*, 63 Cal.2d at pp. 530-531, and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476]. (3CT 463-475.) Appellant Soliz filed a separate motion for severance, arguing counts I, II and III (charging the robbery and murder of Mr. Eaton) should be severed from counts IV and IV (charging the murders of Messrs. Skyles and Price) because the crimes were not cross-admissible; the crimes were inflammatory; it joined the weak case against appellant Soliz as to counts I, II and III with stronger evidence as to counts IV and V; and three out of the five counts charged against appellant Soliz carried the death penalty. (3CT 476-484.)

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51. Appellant Gonzales correctly characterizes his severance motion as "poorly drafted" because it only implied, rather than directly stated, that he sought not only a separate trial from appellant Soliz, but also severance of counts I, II III (the robbery and murder of Mr. Eaton) from counts IV and V (the murders of Messrs. Skyles and Price). (GAOB 82, fn. 6.) Appellants do not claim on appeal that the trial court erred by denying them separate trials.

Appellants' severance motions were denied. (3CT 537-538.) Appellant Soliz waived his right to a separate jury. (4CT 594-595.) After the first penalty phase, appellants again waived their right to separate juries for a second penalty phase. (3CT 871-872; 24RT 2861-2862.)

B. The Applicable Authority And Standard Of Review

"'The law prefers consolidation of charges.'" (*People v. Manriquez* (2005) 37 Cal.4th 547, 573; *People v. Ochoa* (2001) 26 Cal.4th 398, 423.)

> The benefits to the state of joinder [are] significant. Foremost among these benefits is the conservation of judicial resources and public funds. A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process.

(*People v. Bea* (1988) 46 Cal.3d 919, 939.)

Penal Code section 954, which governs joinder of counts in a single trial, provides in relevant part: "An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts. . . ." Additionally, section 954.1[52] provides as follows:

> In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading . . . evidence concerning one offense or offenses need not be

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52. "The voters adopted this statute in Proposition 115, which took effect on June 6, 1990. Section 954.1 applies to trials held after its enactment[.] Section 954.1 codified existing case law, and did not materially change the rules of severance." (*People v. Stitely* (2005) 35 Cal.4th 514, 533, fn. 9, citations omitted.)

admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact.

Here, all of the counts alleged "assaultive" crimes against the person and involved common elements, and thus joinder was permissible in the first instance under the threshold requirements for joinder under section 954. (See *People v. Sapp* (2003) 31 Cal.4th 240, 257; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120; *People v. Bradford* (1997) 15 Cal.4th 1229, 1315 [murder offenses belong to the same class of crimes]; *People v. Poggi* (1988) 45 Cal.3d 306, 320; *People v. Lucky* (1988) 45 Cal.3d 259, 276.)

"Severance may nevertheless be constitutionally required if joinder of the offenses would be so prejudicial that it would deny a defendant a fair trial." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243.) If charges are properly joined under section 954, a "'defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying defendant's severance motion. [Citations.]'" (*People v. Valdez* (2004) 32 Cal.4th 73, 119; see also *People v. Sapp*, *supra*, 31 Cal.4th at p. 258.)

"The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People v. Carter* (2005) 36 Cal.4th 1114, 1153-1154, internal quotations and citations omitted.) The denial of a motion to sever is reviewed under an abuse-of-discretion standard, "that is, whether the denial fell '"outside the bounds of reason."'" (*People v. Manriquez, supra,* 37 Cal.4th at p. 573, citation omitted.) The trial court's discretion is assessed,

> "in light of the showings then made and the facts then known. [Citations.]" In *Williams v. Superior Court*, *supra*, 36 Cal.3d at pages 452-454, 204 Cal.Rptr. 700, 683 P.2d 699, we described in detail the factors through which the trial court's exercise of discretion is channeled: whether evidence of the crimes to be tried jointly would or

would not be cross-admissible; whether some of the charges are unusually likely to inflame the jury against the defendant; whether the prosecution has joined a weak case with a strong case (or with another weak case), so that a "spillover" effect from the aggregate evidence on the combined charges might alter the outcome as to one; and whether any of the joined charges carries the death penalty. The burden of demonstrating an abuse of discretion rests with the party seeking severance--here defendant--who must "'clearly establish'" a "'substantial danger of prejudice requiring that the charges be separately tried.'"

(*People v. Musselwhite*, *supra*,17 Cal.4th at p. 1243, citations omitted; see also *People v. Manriquez, supra,* 37 Cal.4th at p. 573; *People v. Valdez*, *supra*, 32 Cal.4th at p. 120.)

Finally, "[e]ven if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162; accord *People v. Valdez, supra*, 32 Cal.4th at pp. 120-121.)

C. The Court Properly Denied Appellants Severance Motions

Respondent submits the trial court properly denied appellants severance motions.

First, evidence as to counts I, II and III was cross-admissible with the evidence as to counts IV and V. Appellants belonged to a common gang; they were identified by multiple witnesses in both groups of offenses; each group of offenses (as the jury found) was committed by appellants for the benefit of their gang; and ballistics evidence connected the live round found in the getaway van used in the Hillgrove Market robbery/murder (counts I, II and III) to the

expended shell casings found at the murders of Messrs. Skyles and Price (counts IV and V). Indeed, it was determined that the 11 nine-millimeter expended shell casings found at the murder scene of Messrs. Skyles and Price (Peo. Exh. 38) and the live nine-millimeter round found in the get-away van at the murder-robbery of Mr. Eaton (Peo. Exh. 26), had all been fired or come from the same magazine. (16RT 2027-2032, 2145-2146, 2153-2154.) Moreover, all nine-millimeter rounds were from the same manufacturer. (Peo. Exhs. 26, 38; 16RT 2035-2036, 2145-2146, 2153-2154.)

Thus, the same two defendants from the same gang arrived and left together and used the same gun in the two groups of offenses. Thus, the question "is not cross-admissibility of the charged offenses" but rather "the interplay of evidence between the two occurrences." (*People v. Johnson* (1988) 47 Cal.3d 576, 589-590.) As noted by this Court in *People v. Carpenter* (1997) 15 Cal.4th 312,

> Evidence of both incidents would have been admissible at separate trials of each. The ballistics evidence showed that the same gun was used each time, strongly indicating that the same person committed each crime. Thus, evidence that defendant was the gunman in one incident was evidence that he was the gunman in the other. The evidence of identity was strong for both incidents.

(*Id.* at 361, citing *People v. Medina* (1995) 11 Cal.4th 694, 748-749 ["[T]he ballistic evidence alone probably would have been sufficient to justify admission of the 'other crimes' evidence."]; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 985 ["Because complete cross-admissibility is not necessary to justify the joinder of counts [citation], in the present case the cross-admissible evidence concerning the gun would justify such joinder."].)

Because evidence of the charged offenses would have been cross-admissible in separate trials, then "'any inference of prejudice is

dispelled.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 721; see also *People v. Gray* (2005) 37 Cal.4th 168, 222; *People v. Carter*, *supra*, 36 Cal.4th at p. 1154.) "For that reason alone, no abuse of discretion would have occurred in denying severance" (*People v. Maury* (2003) 30 Cal.4th 342, 393), and "we need not analyze the other factors described above." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1317; see also *People v. Gray*, *supra*, 37 Cal.4th at p. 222 ["Having concluded evidence of the crimes was cross-admissible, we need not address defendant's other contentions concerning the trial court's denial of his severance motion, for he could not have been prejudiced by the court's denial. "].)

Moreover, even if the evidence was not cross-admissible, the four-part test is stated in the conjunctive, and pursuant to section 954.1, any lack of cross-admissibility is not, by itself, sufficient to show prejudice and bar joinder. (§ 954.1; *People v. Stitely, supra*, 35 Cal.4th at p. 533 ["[A]ny lack of cross-admissibility is not, by itself, sufficient to show prejudice and bar joinder."]; *People v. Manriquez, supra,* 37 Cal.4th at p. 573.) Indeed, "[c]ross-admissibility suffices to negate prejudice, but it is not essential for that purpose." (*People v. Carter*, *supra*, 36 Cal.4th at p. 1154; see also *People v. Mendoza, supra*, 24 Cal.4th at p. 161 ["'Although cross-admissibility ordinarily dispels any inference of prejudice [citation], the absence of cross-admissibility does not by itself demonstrate prejudice.' [Citation.]"].)

> [T]o establish prejudice defendant must show more than the absence of cross-admissibility of evidence. He must show also, for example, that evidence of guilt was significantly weaker as to one group of offenses, or that one group of offenses was significantly more inflammatory than the other.

(*People v. Mayfield*, *supra*,14 Cal.4th at p. 721.)

Appellant Gonzales argues specifically that while the evidence of his guilt in the murder of Mr. Eaton was "much stronger," the evidence of his guilt of the murders of Messrs. Skyles and Price was weak because eyewitnesses identified appellant Soliz as the shooter, and that his only act was "mere presence at the scene of the shooting." (GAOB 105-106.) Appellant Soliz, on the other hand, argues the evidence relating to his involvement in the murder of Mr. Eaton was "circumstantial and weak." (SAOB 45-46.)

Respondent disagrees with both contentions and submits the evidence supporting both groups of offenses was strong and overwhelming, as set forth more fully below, and thus, this was not "a situation where a weak case was joined with a strong one in order to produce a spillover effect that unfairly strengthened or bootstrapped the weak case." (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1121.)

Appellant Soliz additionally argues the gang evidence and "the alleged racial motive relating to the Skyles/Price counts" made counts IV and V "significantly more inflammatory" than the counts involving the robbery/murder of Mr. Eaton (counts I, II and III). (SAOB 44-45.) Appellant Gonzales similarly argues that in addition to the "'risk of racial prejudice infecting' the trial," the "execution-style slaying" of Messrs. Skyles and Price also made the counts more inflammatory. (GAOB 107.)

As stated above, the gang evidence was cross-admissible as to both groups of offenses to support the gang allegation pursuant to Penal Code section 186.22, subdivision (b), that the offenses were committed -- as the jury subsequently found -- for the benefit of a street gang. Appellant Gonzales nevertheless argues that the "brief testimony" concerning the inflammatory gang allegation "could have easily been presented twice" and could have been "proven separately in each murder case without relying upon the facts on the other case." (GAOB 109-110.) Appellant Gonzales cites *Calderon v. Superior*

Court (2001) 87 Cal.App.4th 933, 940-941, where the Court of Appeal ordered severance, noting the street gang enhancement could be proven separately. (GAOB 111-112.) *Calderon* bears no resemblance to the instant case. *Calderon* arose in the context of a pretrial motion, and unlike the instant case, involved two incidents, one in which defendant Calderon was not implicated, and in which the prosecution was prepared to stipulate that he was not involved in the separate offense. (Id. at pp. 939-940.)

In any event, respondent disagrees that one group of offenses was necessarily "significantly more inflammatory" than the other. As accurately articulated by the People below, counts I, II and III involved the brutal, unprovoked "pistol-whipping and murder of a defenseless, elderly shopkeeper," shot repeatedly in the head while kneeling on the ground, while counts IV and V involved "the cold-blooded execution of two teenagers." (3CT 9.) "[N]o particular killing was 'significantly more egregious' than any other (contrary to [appellants'] assertion otherwise), and therefore none were 'unusually likely to inflame the jury against [appellants].'" (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 574.)

Nor was discretion abused by denying severance of the counts because the joined charges carried the death penalty. Here, the People sought the death penalty for both the murder of Mr. Eaton and the murders of Messrs. Skyles and Price, and the death penalty was going to be sought in both trials even if severance were to have been granted. (3CT 517.) Thus, this was not a case in which a "capital offense has been linked with a noncapital offense, and most particularly whether the linkage '"turns the matter into a capital case."'" (*People v. Sapp*, *supra*, 31 Cal.4th at p. 258; see also *People v. Gutierrez, supra,* 28 Cal.4th at p. 1121 ["this is not a situation in which convictions of both murders had to be secured in order to qualify defendant for the death penalty."].) "[B]ecause each one of the murders by itself formed the basis for

capital charges to be brought against the perpetrator[s], joinder did not lead to one set of crimes being 'elevated' to capital status." (*People v. Carter*, *supra*, 36 Cal.4th at p. 1154.)

Appellants nevertheless argue that "[b]ecause the death penalty is involved in this case, the court must apply a higher degree of scrutiny," citing *Williams v. Superior Court* (1984) 36 Cal.3d 441, 454. (GAOB 108; SAOB 46.) However, "[e]ven where the People present capital charges, joinder is proper so long as evidence of each charge is so strong that consolidation is unlikely to affect the verdict." (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 574; see also *People v. Ochoa, supra*, 26 Cal.4th at p. 423.)

Moreover, even where a multiple-murder special circumstance converts the case into a capital case, "as a practical matter joinder had a minimal effect, because the evidence as to each homicide indicated that [appellants] intentionally killed with premeditation and deliberation, providing a compelling basis for four convictions of first degree murder and a true finding as to multiple murder even if [appellants] had been tried separately for each homicide." (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 575.) And "separate trials would have given the prosecution multiple opportunities in which to convince a jury to impose the death penalty upon [appellants]." (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 576.)

"In sum, [appellants] fail[] to establish that [they] made 'a clear showing of potential prejudice,' and [] review of the trial court's denial of [appellants'] severance motion[s] indicates that it was not '"'outside the bounds of reason.'"'" (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 576.)

Finally, appellant Soliz complains the court's "cursory statement" denying severance offered only a "simplistic and incomplete analysis" and "ignored the substantial risk of prejudice to [appellant Soliz] by joining the counts." (SAOB 40.) Respondent disagrees and submits the court's ruling

sufficiently articulated an appropriate basis for denying severance. In any event, a court's "failure to articulate its reasoning does not invalidate its ruling or undermine the correctness of that denial." (*People v. Carter*, *supra*, 36 Cal.4th at p. 1155.)

Appellants "fail[] to demonstrate that the denial of severance involved the abuse of discretion or caused gross unfairness" at their trial. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 533.) There was no abuse of discretion, denial of due process, or other error in the court's ruling denying severance.

D. Any Error In Denying The Severance Motions Was Harmless

Finally, any error in denying the severance motions was clearly harmless as the evidence of appellants guilt of both sets of offenses was overwhelming.

1. The Evidence Of Appellants' Guilt Of The Robbery And Murder Of Mr. Eaton Was Overwhelming

The evidence of appellants guilt as to the robbery and murder of Lester Eaton in counts I, II and III was overwhelming, and is summarized as follows: On January 27, 1996, witness Dorine Ramos was taken by Randy Irigoyen ("Bird"), a member of the Perth Street clique of the Puente gang to see if she wanted to buy a 1985 blue Chevy Astro van, which had been reported stolen the prior day. Ramos declined. (Peo. Exhs. 11, 14, 15; 10RT 1047-1051, 1055-1056, 1061-1064, 15RT 1909.)

They next drove her to a house, where appellants, fellow members of the same clique and same gang, arrived and spoke to Mr. Irigoyen about their need for guns to commit a crime. (Peo. Exhs.16, 17, 49; 10RT 1154-1155; 10RT 1067-1078, 1083-1088, 1101, 1155-1156; 11RT 1233-1235, 1244; 13RT 1660, 1664-1665; 14RT 1675; 15RT 1885-1886, 1888-1890, 1909, 1912; 16RT 2072-2076; 16RT 2076-2078.) Appellant Gonzales had a Raider's jacket on

his arm. (Peo. Exh. 11; 10RT 1094-1095.) Mr. Irigoyen gave appellants bandanas to cover their faces. (10RT 1089-1090.) Appellants and fellow gang member Michael Gonzales ("Clumsy") departed at about 6:20 or 6:30 p.m. Witness Ramos left the area, and on her way home she saw that the 1985 blue Chevy Astro van she had earlier seen was no longer there. (10RT 1093-1094; 16RT 2078-2081.)

Sometime between 6:00 and 7:00 p.m, appellant Gonzales called their friend Richard Alvarez ("Richie Rich") saying he needed to be picked up at Jennifer's house. (Peo. Exhs. 18, 56; 10RT 1088-1093, 1157-1160, 1170, 1186-1187; 11RT 1235, 1244, 1253-1254; 13RT 1673; 14RT 1676.) Mr. Alvarez drove to Jennifer's house, and appellants and Michael Gonzales followed him in the stolen blue van to a closed business at Turnbull Canyon, not far from the Hillgrove Market. (Peo. Exh. 18; 10RT 1157-1160; 11RT 1253-1255; 13RT 1673; 14RT 1676.)

Alvarez remained with his car at the closed business, while Michael Gonzales drove appellants in the stolen blue van to the Hillgrove Market. Once there, Michael Gonzales remained with the blue van when appellants entered the Hillgrove Market at about 7:30 p.m. At that time, Lester and Betty Eaton were alone inside the market. Mr. Eaton usually wore a small Colt revolver in a hip holster and kept a shotgun on a rack behind the work room. Mr. Eaton stood in the meat counter area, speaking on the phone and possibly holding his eyeglasses in his hands. (Peo. Exh. 11; 9RT 949-954, 974, 978; 1147; 11RT 1252-1256.)

Two male Hispanics (appellants) entered the market, both carrying guns. One wore a dark bandana over his face and a dark knit cap on his head; that the other a tan or light-colored bandana over his face and a dark cap or dark hooded-jacket type hood. The heavier built Hispanic male (appellant Soliz) pointed his gun at Mrs. Eaton and said, "Where do you keep your money?" or

something to that effect, and she put her hands up, pointed to the cash register and said the money was in the register. Mr. Eaton was on the phone, and Mrs. Eaton said his name to try to get his attention. The lighter built Hispanic male (appellant Gonzales) entered the back room, pointed a gun at Mr. Eaton and told him to put down the phone "before somebody gets hurt." Appellant Gonzales pinned Mr. Eaton against the sink and hit him in the forehead with his gun, causing blood to run over his forehead. Mr. Eaton fell to the ground, in the fetal position. (Peo. Exh. 13; 9RT 954-962, 966-968, 972, 994-996, 982, 1002-1007, 1013-1015; 10RT 1083-1084, 1101.)

Mrs. Eaton next heard two gunshots and fled out of the market. On her way out, she saw the stolen blue van with its taillights on, parked in front of the market. Michael Gonzales drove appellants in the stolen blue van back to the closed business at Turnbull Canyon, where Mr. Alvarez waited. Michael Gonzales and appellants exited the blue van and entered Mr. Alvarez's car. Mr. Alvarez drove them back to Jennifer's house. On their way, appellants tossed out of the car window Mr. Eaton's wallet, business cards, and group membership cards, fishing and hunting licenses, and family photographs, and of which were subsequently found strewn about the area. (Peo. Exh. 12; 10RT 1139-1152.) Appellants returned with Mr. Alvarez to Jennifer's house, where they partied the rest of the night. After she spoke to the 911 operator, Mrs. Eaton returned to the market and saw the 1985 blue Chevy Astro van was gone. (Peo. Ex 11; 9RT 962-966, 979; 11RT 1255-1256.)

Mr. Eaton died on the wooden floor boards behind the meat counter. He had a large pool of blood around his shoulder and head; his shirt was blood-soaked; his gun holster was empty; his blood-stained eyeglasses were next to him; the left front pocket of his shirt had been pulled inside out; and drops of his blood went from Mr. Eaton's body to the meat cutting room. (Peo. Exhs. 1, 2, 3, 6, 8, 9, 22; 9RT 852, 856-858, 867-871, 874-876, 883-889, 890-893, 925,

932-934; 11RT 1249-1250.) He suffered five gunshot wounds, including two fatal gunshot wounds to his head, both shots from as close as one-half an inch away, and from a steep downward angle consistent with Mr. Eaton sitting on the floor, with the perpetrator standing behind and shooting him. (Peo. Exh. 22; 10RT 1192-1203, 1200-1204, 1208, 1211.) A third fatal gunshot wound was to Mr. Eaton's chest, the angle of which was consistent with Mr. Eaton lying on the floor on his back, and the shooter standing over to the left near Mr. Eaton's head, and then firing into his chest. (Peo. Exh. 22; 10RT 1204-1208.) Mr. Eaton also had a laceration on his head caused by blunt force trauma, consistent with being struck by the barrel of a gun. (Peo. Exh. 22; 10RT 1209-1211.) Mr. Eaton's wallet, shotgun and revolver were missing. The cash register was overturned on the floor, and the cash tray was missing. (Peo. Exhs. 1, 3, 4, 5, 13; 9RT 853, 871-874, 878, 881-882, 884, 974-978, 980.)

The stolen blue van, with the engine still warm, was secured by the officers. The passenger's door window was shattered; glass and papers were on the passenger seat; appellant Gonzales' black Raider's jacket was on the backseat; the Hillgrove Market cash register tray was on the floor, and a live, unfired nine-millimeter bullet were on the floorboard, behind the driver's seat. (Peo. Exhs. 11, 12, 13, 26, 27; 9RT 898-899, 900-901, 905-910, 924, 973, 979-982; 10RT 1023, 1024-1028, 1032-1036, 1041-1044, 1095-1098; 11RT 1274-1281.) Appellant Gonzales' fingerprints were recovered from papers found inside the stolen blue van. (Peo. Exhs. 28, 29, 30; 11RT 1288-1293.)

Sometime after the crimes, appellant met with fellow-gang member Salvador Berber. Mr. Berber wanted to buy a gun, and appellant Gonzales told him he had two .38 caliber guns: one that he had used to murder a man during a robbery at the Hillgrove Market; and the other the gun they had taken from the man who had been murdered. (15RT 1888, 1890-1892.) He told Mr. Berber that appellant Soliz had been with him when he committed the crimes.

(15RT 1888, 1890-1892.) When Mr. Berber was later being transported with appellant Gonzales in a sheriff's van, their conversation was tape recorded. Appellant Gonzales told Mr. Berber he and appellant Soliz had been driven to the Hillgrove Market by Michael Gonzales. Appellant Gonzales had a gun, and appellant Soliz had a nine-millimeter gun. Appellant Gonzales said that when Mr. Eaton tried to reach for his gun, appellant Gonzales hit him with his gun, grabbed Mr. Eaton's gun, and then when Mr. Eaton was on the floor, he shot him in the head. Appellant Gonzales told Mr. Berber they wore hoods, sweatshirts and gloves, and that he took the cash register tray as they departed the market. Mrs. Eaton ran away to a house. Appellant Gonzales told Mr. Berber that they left the market, jumped in the getaway van parked about a half a block away, drove down the street, parked in an empty parking lot at Turnbull Canyon, and then left in Mr. Alvarez's car. Appellant Gonzales told Mr. Berber that the gun that had been used to kill Mr. Eaton had been sold to an undocumented immigrant, and that they had scratched Mr. Eaton's initials off of his gun, and that it had been left at another gang member's house. (Peo. Exh. 58, at 5-11; 15RT 1897-1899, 1911–1916.)

While incarcerated, appellant Soliz met with his fiancé and told her he was letting his hair grow, growing a moustache and getting some eyeglasses so as to change his appearance, because he knew the suspects in the Hillgrove market had been identified as being young. (Peo. Exh. 24; 11RT 1268.) At trial, appellants both looked different than they did on January 27, 1996. (Peo. Exhs. 16, 17; 10RT 1100-1101; 11RT 1234-1236.)

2. The Overwhelming Evidence Of Appellants' Guilt Of The Double Murder Of Mrs. Skyles and Price

In the late evening of April 14, 1996, appellants were sitting in the backseat of Agustin Mejorado's tan Honda, which was being driven by Michael

Gonzales. Judith Mejorado sat in the middle of the front seat, and Agustin was intoxicated and sat in the right front passenger seat. (14RT 1793-1795.) When they slowly drove past the Shell gas station on Azusa Avenue, they observed three Black males standing on the sidewalk. Appellants announced that they knew the Black males. (14RT 1795-1797.) Victims Gary Price and Elijah Skyles stood on the sidewalk next to the station, speaking to Vondell McGee, Mr. Price's cousin and Mr. Skyles' friend. (12RT 1435-1437.) Mr. McGee and Alejandro Garcia, who was working inside the office at the Shell gas station, saw the Honda slowly pass by the front of the station. The tan Honda slowly passed by on the street and entered the driveway, and the occupants looked at Messrs. McGee, Skyles and Price for a minute before driving onto San Bernadino Road. (Peo. Exh. 45, 50; 12RT 1438-1443; 13RT 1607-1610, 1617-1620, 1670-1671; 14RT 1676, 1680, 1795-1797, 1802-1803.) Mr. McGee rode his bicycle across the road, got change for appellants to use the pay phones at the station, gave it to them along with one of his pagers, and then departed south towards his house. (12RT 1443-1445.)

The tan Honda returned to the Shell gas station, stopped and parked by the pay phones. (14RT 1798-1799.) Appellants exited the car from the backseat and walked to the rear passenger side of the car. The pay phones were in close proximity to the car. (14RT 1798-1799.) At that time, Carol Mateo was driving in her Ford Fiesta past the station. Her husband Jose Mateo sat in the backseat, and her brother Jeremy Robinson sat in the front passenger seat. (Peo. Exh. 34; 12RT 1456-1459; 13RT 1568-1570.) Appellant Soliz approached the two Black males while appellant Gonzales stayed closer to the Honda. Appellants argued with the two Black males. (14RT 1799.) One of the Black males said, "No. I didn't mean to do you that way. I'm sorry. I didn't mean to do you that way." Appellant Soliz replied: "No. No." and made some other statements. (14RT 1799-1800.)

Mr. Garcia, Mr. Robinson and Ms. Mateo heard 5 to 12 loud, continuous gunshots. (12RT 1458-1461, 1485-1486; 13RT 1570, 1609, 1611-1612.) Ms. Mateo slowly drove past the station. Mr. Robinson and Ms. Mateo saw appellant Soliz shoot Messrs. Skyles and Price. (Peo. Exh. 34; 12RT 1460-1466; 13RT 1570-1576.) Ms. Mateo saw appellant Gonzales standing next to the tan Honda. (12RT 1472-1473.) After one victim fell to the ground, he tried to "scoot himself away." Appellant Soliz walked to and shot him again. (12RT 1466.) When appellant Soliz stopped firing, he looked in Ms. Mateo's direction for about five seconds, put his hands in his pocket, turned and ran back to the tan Honda. (Peo. Exh. 45; 12RT 1467-1469; 13RT 1576-1578, 1586-1587.)

Ms. Mejorado saw appellant Soliz firing the gun. Appellants ran back to and entered the Honda at the same time. Appellant Gonzales also had a gun. As they drove away, appellants warned Ms. Mejorado that she did not see or know anything. (Peo. Exh. 45; 13RT 1612-1613, 1617, 1619-1620; 14RT 1799-1800, 1810.) As Ms. Mateo was talking to the 911 operator, she saw appellants inside the tan Honda. (12RT 1471-1473; 13RT 1579-1580, 1587-1588, 1602.)

Appellants were pronounced dead at the scene. (12RT 1310-1311.) There were seven gunshot wounds on Mr. Price's body. (Peo. Exh. 146, 149; 30RT 3905-3906; 32RT 4141.) The cause of Mr. Price's death was two gunshot wounds to his head. (30RT 3907-3908, 3910, 3915.) A bullet was recovered from Mr. Price's body. (Peo. Exh. 133; 29RT 3630-3631; 30RT 3912, 3927-3928; 32RT 4141.) There were nine gunshot wounds to Mr. Skyles' body. (Peo. Exh. 149; 30RT 3916, 3934-3936; 32RT 4141.) The primary cause of Mr. Skyles' death was a gunshot wound to his back, which entered and went through his lung, heart and liver. (30RT 3916-3917, 3926-3927.)

The 11 nine-millimeter expended shell casings found at the murder scene of Messrs. Skyles and Price (Peo. Exh. 38) and the live nine-millimeter round found in the getaway van at the murder/robbery of Mr. Eaton (Peo. Exh. 26), had all been fired or come from the same magazine, and all had been from the same manufacturer. (16RT 2035-2036, 2027-2032, 2145-2146, 2153-2154.)

Ms. Mateo immediately identified appellant Soliz from a photographic lineup card. (Peo. Exhs. 40, 41, 46; 12RT 1475-1479; 13RT 1502, 1650-1651.) Mr. Robinson immediately identified appellant Soliz from a photographic lineup card. (Peo. Exhs. 40, 42, 43, 47, 48; 13RT 1581-1584, 1602-1603, 1651-1652.) Mr. Garcia immediately identified appellant Soliz from a photographic lineup card. (Peo. Exh. 40, 48; 13RT 1620-1621, 1623-1625, 1652.) Appellants refused to participate in a pretrial live lineup. (Peo. Exhs. 16, 49; 12RT 1480, 1588-1589; 13RT 1641, 1644-1649, 1654.) Ms. Mateo testified and identified appellant Soliz at the preliminary hearing. (12RT 1479-1480.) Ms. Mejorado testified and identified appellants at the preliminary hearing. (14RT 1679-1732.)

While incarcerated, appellant Gonzales told Agustin Mejorado that Judith Mejorado should lie, change her story or say that she had not been there. (Peo. Exhs. 51, 52; 14RT 1837-1839.) Appellants changed their appearance at trial. (Peo. Exhs. 16, 17; 12RT 1468-1469, 1473; 13RT 1621.)

While incarcerated, appellant Gonzales spoke to Salvador Berber and discussed the murder of Messrs. Skyles and Price. Appellant Gonzales said he and appellant Soliz had been driven to the scene by Michael Gonzales in Agustin Mejorado's car. Also in the car was Judith and Agustin Mejorado. Appellant Gonzales told Mr. Berber that he shot the two victims (Messrs. Skyles and Price) by the phone booth, that when one tried to get away he shot them again, and that appellant Soliz had remained inside the car. (Peo. Exhs. 57, 58.) A gang expert testified a gang member might brag to another gang

member and take credit for a shooting, when he actually was only a backup that assisted another gang member in committing a shooting, for respect and to improve his ranking in the gang. (16RT 2098.)

Billy Gallegos, a Puente gang member, had been murdered two weeks prior. A gang expert testified Messrs. Skyles and Price were murdered in retaliation for that murder. (15RT 1977-2011; 16RT 2092-2094.)

3. Any Error In Failing To Sever The Counts Was Harmless

As set forth above, the evidence as to each count was overwhelming, such that any error was clearly harmless.

> Even if we were to assume for the sake of discussion that the trial court erred in denying defendant's motion to sever, the evidence linking defendant to each homicide was strong, and none was potentially inflammatory vis-a-vis the other; accordingly, any error would have been harmless, because it is not reasonably probable that defendant would have received a more favorable result as to any count even had he been tried separately as to each one.

(*People v. Manriquez, supra,* 37 Cal.4th at p. 576.)

Despite the overwhelming evidence, only some of which is summarized above, appellants argue they were nevertheless prejudiced because the denial of severance permitted the prosecuting attorney in his final argument to display a chart and argue that the jury could "draw impermissible inferences" by using "the Eaton evidence" to fill an "evidentiary gap in the Skyles/Price crimes" as to which appellant Gonzales shot Messrs. Skyles and Price. (SAOB 48-51; GAOB 99-101.) If appellants believed an "evidentiary gap" developed at trial necessitating severance, they were required to renew their motion to sever. (*People v. Ervin* (2000) 22 Cal.4th 48, 68.) The failure to do so waives this point on appeal. (*Ibid.*)

Likewise, if appellants believed the prosecuting attorney's argument was improper, asking the jury to "draw impermissible inferences," it was their obligation to object. "[B]y failing to interpose any objection at trial, [appellants] waived any error or misconduct emanating from the prosecutor's argument that could have been cured by a timely admonition." (*People v. Wrest* (1992) 3 Cal.4th 1088, 1105; see also *People v. Brown* (2004) 33 Cal.4th 382, 398-399.) The trial court said nothing to suggest a timely objection would have been futile.

Further, appellants mischaracterize the prosecuting attorney's rebuttal argument. The prosecuting attorney at no time argued or suggested to the jurors the existence of an "evidentiary gap" as to the murders of Messrs. Skyles and Price, nor that the jurors could fill such a "gap" by reference to the overwhelming evidence concerning the robbery/murder of Mr. Eaton. Indeed, the prosecuting attorney's rebuttal argument (and the chart used) was, in proper context, merely an argument that the jurors could and should draw proper and reasonable inferences from the evidence that appellants were members of the same clique of the same gang; that they committed crimes together; that they had already killed Mr. Eaton by the time of the murders of Messrs. Skyles and Price; that when they first passed by Messrs. Skyles and Price, they both stated that they knew them; that they both got out of the car at the same time; that they both had a common gang and retaliation motive for the murders of Messrs. Skyles and Price; that the same gun used in the Hillgrove Market robbery was used to murder Messrs. Skyles and Price; and that after the murders, appellants re-entered the car at the same time and both told witness Mejorado that she did not see anything. (17RT 2307-2312.) This argument was not error.

There was no "evidentiary gap in the Skyles/Price crimes." (SAOB 48.) Appellant Soliz recognizes the "[e]ye witnesses identified [him] as the shooter," but argues these identifications were "in circumstances hardly convincing."

(SAOB 48.) As stated above, there were multiple witnesses identifying both appellants as to both groups of offenses.

Finally, even assuming arguendo the prosecuting attorney's rebuttal argument is considered improper, it was not so egregious "that a timely admonition could not have been effective even assuming error or misconduct." (*People v. Holloway* (2004) 33 Cal.4th 96, 136.)

4. Any Alleged Error Was Not Exacerbated By The Failure To Instruct The Jury Sua Sponte With CALJIC No. 2.50

Appellant Gonzales additionally argues the trial court's failure to instruct the jury sua sponte with a cautionary instruction similar to CALJIC No. 2.50 exacerbated the alleged error in denying severance because "there was nothing to prevent the jury from using evidence of the Lester Eaton murder case as proof of [appellant Gonzales'] guilt of the Skyles and Price murders." (GAOB 104.) This claim is without merit, for several reasons.

First, as stated above, the trial court properly denied severance, for all of the reasons set forth above.

Second, a trial court has no sua sponte duty to give such an instruction. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051; see also *People v. Maury*, *supra*, 30 Cal.4th at p. 394 ["The trial court has no sua sponte duty to give a limiting instruction on cross-admissible evidence in a trial of multiple crimes."].) And while there may be a "possible exception" in "'an occasional extraordinary case in which unprotested evidence . . . is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose,'" [t]his is no such extraordinary case." (*People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1051-1052.)

And third, "the risk of a limiting instruction," suggesting to the jury that the evidence of the murder and robbery of Mr. Eaton was somehow stronger

than the evidence of the murders of Messrs. Skyles and Price, "outweighed the questionable benefits such instruction would provide." (*People v. Maury, supra,* 30 Cal.4th at p. 394; cf. *People v. Freeman* (1994) 8 Cal.4th 450, 495 [Counsel not ineffective for failing to request a limiting instruction because "[c]ounsel may well not have desired the court to emphasize the evidence, especially since it was obvious for what purpose it was being admitted."].)

II.

THE COURT PROPERLY DENIED THE MOTION TO SUPPRESS APPELLANT GONZALES' TAPED STATEMENTS TO SALVADOR BERBER

Appellant Gonzales, joined by appellant Soliz, argues the court erred when it denied the motion to suppress appellant Gonzales' extrajudicial statements to Salvador Berber because they were procured in violation of appellant Gonzales' Fifth Amendment right to remain silent and to counsel while under custodial interrogation pursuant to *Miranda v. Arizona, supra*, 384 U.S. at p. 444 [86 S.Ct. 1602, 16 L.Ed.2d 694] ("*Miranda*") and the California Constitution, Article I, Section 15. Appellant Gonzales also argues admission of these statements violated his Sixth Amendment right not to be interrogated outside counsel's presence pursuant to *Massiah v. United States* (1964) 377 U.S. 201, 205-207 [84 S.Ct. 1199, 12 L.Ed.2d 246] ("*Massiah*"). (GAOB 122-143; SAOB 308.) Respondent disagrees with both arguments.

A. Relevant Proceedings Below

Appellant Gonzales filed a pretrial motion to suppress tape-recorded statements he made to inmate Salvador Berber, arguing his statements were taken in violation of his rights under *Miranda, supra,* 384 U.S. 436. (2CT 403-408.) The People filed an opposition, assuming counsel had raised the claim under both *Miranda* and the Sixth Amendment right to counsel pursuant to *Massiah*. (2CT 485-492.) At the hearing on the motion, the parties stipulated (8RT 804) to the following facts:

> On September 25, 1996, defendant Gonzales was transported from the men's Central Jail to Pomona Superior Court in a Sheriff's van. Unbeknownst to Gonzales, the van had been wired to record conversations between him and another inmate (hereinafter 'the inmate')

[Salvador Berber] who had been placed in the van. Gonzales had previously admitted his participation in the Eaton robbery-murder and the Skyles-Price Double murder to the inmate, who advised Sheriff's detectives of the admissions. The inmate, who was pending trial in his own robbery case, had agreed to ride with Gonzales in the hope that Gonzales would repeat his admissions on tape. During the ride to and from the Pomona Superior Court, Gonzales and the inmate engaged in a conversation during which Gonzales made several incriminating statements about his participation in both the Eaton robbery-murder and the Skyles-Price double murder.

At the time of the September 25, 1996 statements, defendant Gonzales had not been charged with any offenses arising from either the January 27, 1996 robbery-murder of Lester Eaton or the April 14, 1996 double murder of Elijah Skyles and Gary Price. He was, however, a sentenced prisoner in Case No. KA032688, in which he had pleaded guilty to his July 9, 1996 possession of methamphetamine in violation of Health and Safety Code section 11377.

(2CT 486-487.)

After hearing argument, the trial court denied the motion, ruling as follows:

THE COURT: Well, gentleman, I personally have lived with this issue for a long time. I argued the case of [*Crooker v. State of California* (1958) 357 U.S. 433 [78 S.Ct. 1287, 2 L.Ed.2d 1448] before the United States Supreme Court, which was pre-*Miranda*, and at that time in that case the defendant admittedly repeatedly asked for counsel and the police officers had told him during a 14-hour interrogation you can have an attorney when we're through with you. And the confession

was allowed and that was the issue on which the Supreme Court granted certificate certiorari. This was, as I say, pre-*Miranda*.

But the whole point of *Miranda* is to forbid coercion. And that's inherent in all those cases.

And I think the controlling language, as far as the motion is concerned, is what the Court said in [*People v. Webb* (1993) 6 Cal.4th 494], which was cited by the People, where the Court said:

> "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be an ally."

And I think that's exactly the situation we have here.

And the *Webb* case, in affirming the use of the surreptitiously-recorded conversation in that case, held that it was admissible on that premise: that it wasn't a coerced situation.

And, as you listen to the tape and read the transcript of the tape here, why, obviously, although the fellow prisoner -- who was acting as an agent of the police and was certainly -- was no ally of the defendant -- was deliberately trying to coax information from him, in addition to allowing himself to volunteer a lot of information, it comes within this language, that this was a strategic deception[.]

So the motion to suppress the tape under section 1538.5 is denied. (8RT 805-807.)

B. Standard Of Review

This Court independently reviews a trial court's ruling on a motion to suppress a statement under *Miranda*, but in doing so it accepts "'the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.'" (*People v. Guerra* (2006) 37 Cal.4th

1067, 1092-1093; see also *People v. Bradford*, *supra*, 15 Cal.4th at p. 1311.) A trial court error in failing to exclude a statement on *Miranda* grounds is subject to harmless error review under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] ("*Chapman*"). (*People v. Johnson* (1993) 6 Cal.4th 1, 33.) "The beyond-a-reasonable-doubt standard of *Chapman* 'requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

C. The Admission Of Appellant Gonzales' Taped Statements To Mr. Berber Did Not Violate His *Miranda* Rights

The admission of appellant Gonzales' taped statements to Mr. Berber did not violate his Fifth Amendment rights pursuant to *Miranda* because it was a noncoercive conversation with an undercover informant.

The Fifth Amendment provides criminal defendants with a right against self-incrimination. (U.S. Const., 5th Amend. ("No person . . . shall be compelled in any criminal case to be a witness against himself."). In *Miranda, supra,* 384 U.S. 436, the United States Supreme Court held that once an individual in custody has actually invoked the Fifth Amendment right to counsel, "the interrogation must cease until an attorney is present," and the defendant must "have [counsel] present during any subsequent questioning" in the absence of a knowing and voluntary waiver of the right to counsel. (*Id.* at p. 474; *see also Davis v. United States* (1994) 512 U.S. 452, 458-459 [114 S.Ct. 2350, 129 L.Ed.2d 362]; *Edwards v. Arizona* (1981) 451 U.S. 477, 485 [101 S.Ct. 1880, 68 L.Ed.2d 378] [holding it was unconstitutional "to reinterrogate an accused in custody if he has clearly asserted his right to counsel"]; *People v. Sapp*, *supra*, 31 Cal.4th at p. 266.)

Fifth Amendment rights, unlike a defendant's Sixth Amendment rights, are not offense specific. (*Arizona v. Roberson* (1988) 486 U.S. 675, 682 [108 S.Ct. 2093, 100 L.Ed.2d 704].) However, the Fifth Amendment protection against self-incrimination does not apply to noncoercive conversations with undercover informants. In *Illinois v. Perkins* (1990) 496 U.S. 292 [110 S.Ct. 2394, 110 L.Ed.2d 243], the United States Supreme Court held an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before eliciting incriminating information. (*Id.* at pp. 296-98.) The Court in *Perkins* explained that speaking with undercover government informants while incarcerated does not create a coercive atmosphere, and thus does not implicate the Self-Incrimination Clause of the Fifth Amendment. (*Id.* at p. 298.)[53]

As this Court recently explained in *People v. Davis* (2005) 36 Cal.4th 510:

> [T]he high court's decision in *Miranda* serves to protect a defendant's Fifth Amendment privilege against self-incrimination. (*Miranda*, *supra*, 384 U.S. at pp. 444-445, 86 S.Ct. 1602.) Suspects who invoke the rights to counsel and to remain silent may not be subjected to further interrogation until counsel is made available or "'the accused himself initiates further communication.'" (*People v. Sims*, *supra*, 5 Cal.4th at p. 440, 20 Cal.Rptr.2d 537, 853 P.2d 992.) These rules apply not only when the police engage in express questioning of a suspect, but also

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53. See also *Arizona v. Fulminante* (1991) 499 U.S. 279, 305 [111 S.Ct. 1246, 113 L.Ed.2d 302] ["Since Fulminante was unaware that Sarivola was an FBI informant, there existed none of "the danger of coercion result[ing] from the interaction of custody and official interrogation." [Citation.] The fact that Sarivola was a Government informant does not by itself render Fulminante's confession involuntary, since we have consistently accepted the use of informants in the discovery of evidence of a crime as a legitimate investigatory procedure consistent with the Constitution."].

when they undertake its "functional equivalent" (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297; see also *Arizona v. Mauro* (1987) 481 U.S. 520, 526-527, 107 S.Ct. 1931, 95 L.Ed.2d 458; *People v. Sims*, *supra*, 5 Cal.4th at p. 440, 20 Cal.Rptr.2d 537, 853 P.2d 992), through "words or actions . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis*, *supra*, at p. 301, 100 S.Ct. 1682, fns. omitted; see also *Arizona v. Mauro*, *supra*, at pp. 526-527, 107 S.Ct. 1931; *People v. Sims*, *supra*, at p. 440, 20 Cal.Rptr.2d 537, 853 P.2d 992.) In deciding whether police conduct was "reasonably likely" to elicit an incriminating response from the suspect, we consider primarily the perceptions of the suspect rather than the intent of the police. (*Arizona v. Mauro*, *supra*, at p. 527, 107 S.Ct. 1931; *Rhode Island v. Innis*, *supra*, at p. 301, 100 S.Ct. 1682.) Because the dual elements of a police-dominated atmosphere and compulsion that result from the interaction of custody and official interrogation are absent when the defendant is unaware that he is speaking to a law enforcement officer, however, *Miranda* is inapplicable when the defendant does not know that the person he is talking to is an agent of the police. (See *Illinois v. Perkins* (1990) 496 U.S. 292, 296-300, 110 S.Ct. 2394, 110 L.Ed.2d 243 [*Miranda* warnings were not required when the police placed the defendant in a cell with an undercover agent who then elicited incriminating statements].)

(*Id.* at p. 554.)

Examining the statements at issue in *Davis*, the Court held:

[D]efendant, unaware that police officers were listening to and recording his statements, said to his cellmates: "The fingerprints on the Uzi is mine. I know that mother fucker [the Uzi] has been handled since I

handled it." Under the circumstances, defendant "consider[ed] himself in the company of cellmates and not officers," and the coercive atmosphere of custodial interrogation was lacking. (*Illinois v. Perkins*, *supra*, 496 U.S. at p. 296, 110 S.Ct. 2394.) Viewing the situation from defendant's perspective (see *Arizona v. Mauro*, *supra*, 481 U.S. at p. 527, 107 S.Ct. 1931; *Rhode Island v. Innis*, *supra*, 446 U.S. at p. 301, 100 S.Ct. 1682), when he made these statements to his cellmates there was no longer a coercive, police-dominated atmosphere, and no official compulsion for him to speak. Thus, the admission of defendant's incriminating statements made after Detective DeAnda left the cell did not violate his rights under *Miranda*.

(*Id.* at p. 555; see also *People v. Webb* (1993) 6 Cal.4th 494, 526 [the defendant's were "completely voluntary and compulsion-free."].)

Appellants concede that from appellant Gonzales' perspective (see *Arizona v. Mauro* (1987) 481 U.S. 520, 527 [107 S.Ct. 1931, 95 L.Ed.2d 458]; *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [100 S.Ct. 1682, 64 L.Ed.2d 297]), there was not a coercive, police-dominated atmosphere, as he was unaware he was being taped when he spoke to Mr. Berber. Thus, because the element of coercion was missing, admission of appellant Gonzales' incriminating statements did not violate his rights under *Miranda*. (See *Illinois v. Perkins, supra,* 496 U.S. at p. 297 ["*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust"]; *Webb, supra,* 6 Cal.4th at pp. 524-526 [statements made in recorded telephone conversations between the jailed defendant and his girlfriend were voluntary, even though she was secretly cooperating with the police]; see also *People v. Mayfield, supra,* 14 Cal.4th at p. 758.)

Conversations between a defendant and a jailhouse informant simply do not fit the *Miranda* doctrine. By hypothesis, the defendant does not

know that the fellow inmate with whom she is speaking is going to testify against her. If she did know it, she certainly would not speak with him. If the jailhouse informant, or some other person, should give the defendant a *Miranda* warning immediately before the informant began conversing with her, the whole purpose of the undercover operation would be destroyed. And it is well settled that such operations are lawful, so long as they do not run afoul of the Sixth Amendment right to counsel. It makes no sense to require that a jailhouse informant, whether acting as a government agent or not, warn a defendant that anything she says to him can be used against her.

(*United States v. Johnson* (8th Cir. 2003) 352 F.3d 339, 342-343.)

As the Court held in *Illinois v. Perkins*, *supra*, 496 U.S. 292, the fact that appellant Gonzales may have been lulled into believing Mr. Berber was a sympathetic friend did not affect the voluntariness of his statements. (*Id.* at pp. 298-299.) Under the circumstances, appellant Gonzales considered himself in the company of a cellmate, not an officer, "and the coercive atmosphere of custodial interrogation was lacking." (*People v. Davis, supra,* 36 Cal.4th at p. 555.) Appellant Gonzales' argument that when the United States Supreme Court decided *Perkins* in 1990, they neglected to "fully address all of the concerns raised in the *Miranda* decision" (GAOB 127) is unworthy of response.

D. The Admission Of Appellant Gonzales' Statements To Mr. Berber Did Not Violate His Sixth Amendment Rights Pursuant To *Massiah* or His Right To Counsel Under Article I, Section 15 Of The California Constitution

Appellant Gonzales also insists the interrogation violated his Sixth Amendment right to counsel under *Massiah*, *supra*, 377 U.S. 201, since, at the time of his conversation with Mr. Berber, he was represented by counsel on unrelated drug charges. (GAOB 137-138.) Appellant Gonzales suggests it was

"improper for the prosecutor's agents, the deputy sheriffs, to use a jailhouse informant to communicate directly with [appellant Gonzales] on a subject of controversy in the absence of counsel, because the prosecutor and the sheriff's deputies were on notice that [appellant Gonzales] had an attorney on the drug case." (GAOB 141.) Appellant Gonzales additionally cites Rule 2-100 of the Rules of Professional Conduct, and suggests that if the Court finds there has been no Sixth Amendment violation, the Court should nevertheless "adopt the language in *People v. Sharp* (1983) 150 Cal.App.3d 13, 18, and find as a matter of state constitutional law 'that a district attorney may not communicate with a criminal defendant he knows to be represented by counsel, even if that communication is limited to an inquiry into conduct for which the defendant has not been charged.'" (GAOB 142-143.)

Respondent first submits that because appellant Gonzales' pretrial motion to suppress appears to have only argued that his taped statements were taken in violation of his rights under *Miranda* (2CT 403-408), any *Massiah* claim appears to have been waived by the failure to specifically raise and argue it below. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 736; *People v. Jenkins* (2000) 22 Cal.4th 900, 1007.)

In any event, appellant Gonzales' *Massiah* claim is entirely without merit.

> The Sixth Amendment to the federal Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This right "attaches '"at or after the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."' [Citation.] After it both attaches and is invoked, any incriminating statement the government

deliberately elicits from a defendant in counsel's absence is inadmissible at that defendant's trial. [Citations.]"

(*People v. Slayton* (2001) 26 Cal.4th 1076, 1079.)

However, the right to counsel under both the State and federal Constitutions is "offense specific" -- i.e., it is limited in its application to a single criminal case in which adversary proceedings have commenced by way of indictment or arraignment on a criminal complaint. (See *Texas v. Cobb* (2001) 532 U.S. 162, 168-173 [121 S.Ct. 1335, 149 L.Ed.2d 321]; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 175 [111 S.Ct. 2204, 2207, 115 L.Ed.2d 158, 166-167]; *People v. Carter* (2003) 30 Cal.4th 1166, 1209-1210; *People v. Slayton, supra,* 26 Cal.4th at pp. 1081-1084.) Because of the offense-specific nature of the Sixth Amendment right to counsel, "government investigations of new criminal activity for which an accused has not yet been indicted do not violate the Sixth Amendment." (*United States v. Kidd* (4th Cir. 1993) 12 F.3d 30, 32.) Instead, it is only the "incriminating statements pertaining to pending charges [that] are inadmissible at the trial of those charges." (*Maine v. Moulton* (1985) 474 U.S. 159, 180 [106 S.Ct. 477, 88 L.Ed.2d 481].)

"Because an accused has a Sixth Amendment right to counsel only with respect to formal charges brought . . . *Massiah* requires the suppression of *only those incriminating statements made concerning such charges*." (*People v. Bradford, supra,* 15 Cal.4th at p. 1313, emphasis added; accord *People v. Slayton*, *supra*, 26 Cal.4th at pp. 1081-1082; *People v. Webb, supra,* 6 Cal.4th at p. 527; *People v. Wader* (1993) 5 Cal.4th 610, 636, 654; *In re Wilson* (1992) 3 Cal.4th 945, 950-951; *People v. Clair* (1992) 2 Cal.4th 629, 657.)

Therefore, the government generally may question a criminal defendant in harmony with the Sixth Amendment, even one who is in jail awaiting trial, provided the government is investigating new and additional criminal activity unrelated to the pending case. (See *Kidd*, *supra*, 12 F.3d at p. 33 ["[T]he

government was investigating Kidd's new criminal activity in an effort to obtain information regarding an offense for which no charge had yet been filed, and thus for which no Sixth Amendment right had been invoked."].)

Here, appellant Gonzales' Sixth Amendment right to counsel had not yet attached in the murder robbery/murder of Mr. Eaton or the double murder of Messrs. Skyles and Price, and the circumstance that appellant Gonzales had previously had counsel appointed in the wholly unrelated drug case does not compel a contrary conclusion. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1313; see *McNeil v. Wisconsin*, *supra*, 501 U.S. at p. 175 [after charged with robbery in West Allis, defendant was interrogated (and later charged and convicted) of "unrelated, uncharged" offenses--a murder, attempted murder, and robbery in Caledonia)]; *Moran v. Burbine* (1986) 475 U.S. 412, 416 [106 S.Ct. 1135, 89 L.Ed.2d 410] [after defendant was arrested in connection with a burglary in Cranton he was interrogated (and then charged) with an unrelated murder in Providence].)

Appellant Gonzales' citation to the Court of Appeal decision in *People v. Sharp, supra,* 150 Cal.App.3d 13, does not help. Indeed, this Court has already found that to the extent *Sharp* is cited for the "proposition that the Sixth Amendment right is not 'offense-specific,'" it is "no longer vital." (*People v. Clair*, *supra*, 2 Cal.4th at p. 658.)

Appellant Gonzales is also not helped by citing to Rule 2-100 of the Rules of Professional Conduct, which provides in pertinent part as follows:

> (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.
>
> . . . .
>
> (C) This rule shall not prohibit:

(3) Communications otherwise authorized by law.

(Rules Prof. Conduct, rule 2-100.)

It is not altogether clear that Rule 2-100 necessarily applies to prosecutors. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1155, fn. 5 [recognizing but not deciding the issue]; see, e.g., *United States v. Ford* (6th Cir. 1999) 176 F.3d 376, 382 ["Any other . . . interpretation . . . would place prosecutors at risk of committing an ethical violation for pursuing actions that they are required to pursue in the interest of public safety."]; *United States v. Balter* (3d Cir. 1996) 91 F.3d 427, 434-436.) And even if does apply to prosecutors, it does not appear exclusion of the evidence would necessarily be an appropriate remedy. (See, e.g., *United States v. Harrison* (9th Cir. 2000) 213 F.3d 1206, 1215, fn. 6; but see *United States v. Thompson* (2d Cir. 1994) 35 F.3d 100, 104.)

Nevertheless, even assuming it does apply, this Court expressly rejected application of Rule 2-100 in such circumstances. (See *People v. Maury*, *supra*, 30 Cal.4th at pp. 408-409 [addressing then rule 7-103 of the California Rules of Professional Conduct].) Similarly, when discussing the analogous Model Code of Professional Responsibility DR 7-104(A)(1),[54] one federal circuit court noted the defendant had "cited no authority, nor have we found any, to support his contention that the government's working with confidential informants to elicit incriminating information from a represented defendant" violated this provision. (*United States v. Cope* (6th Cir. 2002) 312 F.3d 757, 773-774.) This federal court recognized that the use of informants in this manner would clearly fall within the ambit of the "authorized by law" exception to DR 7-104. (*Ibid.*;

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54. DR 7-104 states in pertinent part: "[d]uring the course of his representation of a client a lawyer shall not . . . communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." (DR 7-104(A)(1).)

see also *United States v. Plumley* (8th Cir. 2000) 207 F.3d 1086, 1094-1095; *United States v. Ford, supra*, 176 F.3d at p. 382 ["[t]he ethical rules should not be construed to conflict with the public's vital interest in ensuring that law enforcement officers investigate uncharged criminal activity."]; *United States v. Balter, supra,* 91 F.3d at p. 436 ["pre-indictment investigation by prosecutors is precisely the type of contact exempted from the Rule as 'authorized by law.'"].) Respondent submits the use of informants in the instant case would also clearly fall within the ambit of the "authorized by law" exception of Rule 2-100(c)(3).

Finally, appellant Gonzales has cited no authority that would suggest or dictate that the right to counsel as guaranteed by Article I, Section 15 of the California Constitution should be interpreted differently under these circumstances than the right to counsel guaranteed by the Sixth Amendment to the United States Constitution.

Appellant Gonzales' *Massiah* claim is entirely without merit.

III.

THE COURT DID NOT ERR WHEN IT DENIED APPELLANT GONZALES' PRETRIAL MOTION FOR THE APPOINTMENT OF SECOND COUNSEL

Appellant Gonzales, joined by appellant Soliz, argues the court erred when it denied his pretrial motion for the appointment of second counsel. (GAOB 146-158; SAOB 308.) Respondent submits the trial court did not abuse its discretion when it denied appellant Gonzales' request.

Appellant Gonzales made a pretrial application for second counsel based solely on the assertion that there were "serious issues for the guilt and penalty phases of this trial" and that second counsel was necessary "to handle different parts of both phases of this trial." (GAOB 146; 5CT 1170.) The trial court denied the request, finding the application failed "to provide any specific or compelling reasons requiring the assistance of additional counsel." (GAOB 147; 5CT 1172.)

> The right to counsel is, of course, a bedrock constitutional right (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; see *Gideon v. Wainwright* (1963) 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799), but California's interest in ensuring that those charged with capital crimes receive adequate legal representation manifests itself in a further layer of protection: courts have the statutory discretion to appoint a second defense attorney at public expense. (*People v. Weaver* (2001) 26 Cal.4th 876, 950, 111 Cal.Rptr.2d 2, 29 P.3d 103; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 180 Cal.Rptr. 489, 640 P.2d 108 (*Keenan*); § 987, subd. (d).) But unlike the constitutional right, the statutory right to appointed second counsel is qualified. Thus, "[i]f it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on [a] request. Indeed, in general, under a showing of genuine need . . . a presumption

> arises that a second attorney is required." (*Keenan*, *supra*, at p. 434, 180 Cal.Rptr. 489, 640 P.2d 108.) "'The initial burden, however, is on the defendant to present a specific factual showing as to why the appointment of a second attorney is necessary to his defense against the capital charges.' [Citation.] An 'abstract assertion' regarding the burden on defense counsel 'cannot be used as a substitute for a showing of genuine need.'" (*People v. Staten* (2000) 24 Cal.4th 434, 447, 101 Cal.Rptr.2d 213, 11 P.3d 968.)

(*People v. Roldan, supra,* 35 Cal.4th at pp. 686-687; see also *People v. Staten* (2001) 24 Cal.4th 434, 447.)

> The decision whether to grant a request to appoint second counsel under section 987 is reviewed for abuse of discretion. The abuse of discretion standard is used in many other contexts and reflects the trial court's superior ability to consider and weigh the myriad factors that are relevant to the decision at hand. A trial court will not be found to have abused its discretion unless it "exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice."

(*Roldan*, *supra*, 35 Cal.4th at p. 688, citations omitted.)

On appeal, appellant Gonzales argues second counsel was necessary because he was charged in two separate murder investigations with three counts of murder; that 64 witnesses were ultimately called during the course of the trial; that the penalty phase was tried twice; and that there were medical experts, fingerprint experts, ballistic experts and a gang expert. (GAOB 153.) However, this basis for second counsel was not articulated in his application below. Appellant Gonzales "bore the burden of demonstrating the need for the appointment of second counsel," and he cannot now "rely on appeal on arguments not presented to the trial court." (*Roldan*, *supra*, 35 Cal.4th at p.

688, n. 13.) In *Roldan*, the defendant made a significantly more specific application for second counsel than that made by appellant Gonzales below. Nevertheless, this Court held the trial court did not abuse its discretion when it denied the application. (*Roldan, supra*, 35 Cal.4th at pp. 688-689.)

Likewise, the ruling of this Court in *People v. Staten*, *supra*, 24 Cal.4th 434, is equally apt here:

> No abuse of discretion appears. Defendant's application, consisting of little more than a bare assertion that second counsel was necessary, did not give rise to a presumption that a second attorney was required; he presented no specific, compelling reasons for such appointment.

(*Ibid.* See also *People v. Jackson* (1980) 28 Cal.3d 264, 287 [trial court did not abuse its discretion when it denied the motion for second counsel when counsel merely relied on the circumstances surrounding the case.].)

As appellant Gonzales' application for second counsel was just as general, and no more detailed or specific, than that made by counsel in both *Staten* and *Roldan*, and because the trial court was in a better position to "consider and weigh the myriad factors that are relevant to the decision at hand," there it cannot be said to have been an abuse of discretion. (*Roldan*, *supra*, 35 Cal.4th at p. 688.)

Indeed, even had appellant Gonzales articulated below precisely the same basis for second counsel he now articulates in his Opening Brief, the trial court would not have abused its discretion in denying the motion. It is correct that this Court stated in *Keenan v. Superior Court* (1982) 31 Cal.3d 424, that "in assessing the need for [a second] attorney the court must focus on the complexity of the issues involved, keeping in mind the critical role that pretrial preparation may play in the eventual outcome of the prosecution." (*Id.* at p. 432; see also *People v. Wright* (1991) 52 Cal.3d 367, 411.) However, appellant Gonzales fails to demonstrate that the issues of his case were necessarily

complex, or that his experienced trial counsel did not provide adequate representation. Under these circumstances, the trail court did not abuse its discretion when it denied appellant Gonzales' application for second counsel.

IV.

THE COURT DID NOT ERR WHEN IT DENIED APPELLANT GONZALES' PRETRIAL REQUEST FOR A SECOND INVESTIGATOR

Appellant Gonzales, joined by appellant Soliz, argues the trial court erred when it denied his request pursuant to Penal Code section 987.9[55] for funds for a "Defense Expert Examination Investigator for Penalty Phase," thereby denying him of his "state and federal constitutional rights to the effective assistance of counsel and to due process of law." (GAOB 159-166; SAOB 308.)

The trial court read, considered and denied appellant Gonzales' motion, finding: "There is no good cause why a second investigator should be appointed at twice the authorized rate or why the current investigator cannot perform the necessary work." (5CT 1184.)

Preliminarily, respondent notes that appellant Gonzales failed to argue in the trial court that the denial of a second, separate penalty phase investigator

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55. Penal Code section 987.9, subdivision (a), provides as follows:

> a) In the trial of a capital case or a case under subdivision (a) of Section 190.05 the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

amounted to a violation of his federal constitutional rights, and thus his constitutional claim is forfeited. (See *People v. Panah* (2005) 35 Cal.4th 395, 436.) In any event, this issue is without merit.

> An indigent defendant has a statutory and constitutional right to ancillary services reasonably necessary to prepare a defense. (§ 987.9, subd. (a); *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319- 320, 204 Cal.Rptr. 165, 682 P.2d 360.) The defendant has the burden of demonstrating the need for the requested services. (*Corenevsky v. Superior Court, supra*, at p. 320, 204 Cal.Rptr. 165, 682 P.2d 360.) The trial court should view a motion for assistance with considerable liberality, but it should also order the requested services only upon a showing they are reasonably necessary. (*Ibid.*) On appeal, a trial court's order on a motion for ancillary services is reviewed for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 234, 58 Cal.Rptr.2d 385, 926 P.2d 365; *Corenevsky v. Superior Court, supra*, at p. 321, 204 Cal.Rptr. 165, 682 P.2d 360.)

(*People v. Guerra, supra,* 37 Cal.4th at p. 1085.)

Appellant Gonzales relies on United States Supreme Court's opinion in *Ake v. Oklahoma* (1984) 470 U.S. 68 [105 S.Ct. 1087, 84 L.Ed.2d 53] ("*Ake*"). (GAOB 162-163.) In *Ake*, the United States Supreme Court held that when a defendant makes a "preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." (*Id.* at p. 74.) In addition, *Ake* held appointment of such an expert is required when the prosecution presents psychiatric evidence of an indigent defendant's future dangerousness in a capital sentencing proceeding. (*Id.* at pp. 82-84.) "The holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal

defendant is entitled to the minimum assistance necessary to assure him 'a fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding.'" (*Medina v. California* (1992) 505 U.S. 437, 444-45 [112 S.Ct. 2572, 120 L.Ed.2d 353].)

While it is correct that a defendant on a proper showing is entitled to "ancillary services reasonably necessary to prepare a defense" (*People v. Guerra, supra,* 37 Cal.4th at p. 1085), a trial court's erroneous ruling in this regard "must be affirmatively shown" (*People v. Beardslee* (1991) 53 Cal.3d 68, 100). The abuse-of-discretion standard of review is highly deferential, and "asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts." (*People v. Garcia* (1999) 20 Cal.4th 490, 503, citations omitted.) "Abuse may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner, but reversal of the ensuing judgment is appropriate only if the error has resulted in a manifest miscarriage of justice." (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, citations omitted, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Appellant Gonzales' motion for the appointment of a second investigator failed to articulate a reasoned basis for concluding that the investigator already appointed could not also provide the assistance necessary for the penalty phase. And the resolution of this issue begins and ends with the basis for the motion articulated below by trial counsel. (*People v. Beardslee, supra,* 53 Cal.3d at p. 100; see also *Stephens v. Kemp* (11th Cir. 1988) 846 F.2d 642, 645.) "Given that [appellant Gonzales] offered little more than undeveloped assertions that the requested assistance would be beneficial," there was "no deprivation of due process in the trial judge's decision." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 323, fn. 1.) Accordingly, appellant Gonzales has not shown error or an abuse of discretion.

Finally, any error in not granting appellant Gonzales additional funds for the appointment of a second, separate penalty phase investigator was harmless. (See, e.g., *People v. Daniels* (1991) 52 Cal.3d 815, 851.) Appellant Gonzales has not specifically set forth what additional actions or investigations this second investigator could or should have undertaken, nor has appellant Gonzales specifically identified why the investigator already assigned did not or could not have undertaken the same investigation. Nor has appellant Gonzales set forth how this additional investigation, if undertaken, would have made a difference. As a result, appellant Gonzales has failed to demonstrate how he was in any way harmed by the denial of his motion for a second investigator.

V.

THE TRIAL COURT DID NOT ERR WHEN IT INITIALLY READ FROM A PRIOR INFORMATION TO ONE PANEL OF PROSPECTIVE JURORS

Appellant Soliz, joined by appellant Gonzales, argues the trial court erred when it told one panel of prospective jurors that the instant case concerned an allegation that the murders of Messrs. Skyles and Price involved a racial motivation and then "failed to inform the prospective panel or jurors of the error in any subsequent proceedings." (SAOB 54-59; GAOB 574.)

Respondent submits that the initial misstatement by the trial court to one panel of prospective jurors was cured when the trial court at all times thereafter correctly advised both panels of prospective jurors of the charges and allegations, and in any event, it was clearly harmless as appellants have not shown that any prospective juror on the first panel ever sat as an actual juror or alternate at trial, and no argument, instructions or verdict forms were offered at trial that referred to a racial motivation for the murder of Messrs. Skyles and Price.

A. Relevant Proceedings Below

Appellants were originally charged in an information as to counts IV and V (the murders of Messrs. Skyles and Price), with a special allegation that the victims had been killed because of their race, within the meaning of Penal Code section 190.2, subdivision (a)(16). (2CT 385-386.) On June 20, 19997, appellant Soliz's motion to set aside the information pursuant to section 995 (2CT 421-430) was granted in part as to the Penal Code section 190.2, subdivision (a)(16), allegations, and the trial court ordered the allegations stricken. (2CT 537-538.)

On January 22, 1998, the trial court initially read to the first panel of prospective jurors the original information, mistakenly informing this panel of prospective jurors as to counts IV and V: "It's further alleged that the offenses were special circumstances in that they were committed -- that there were racial overtones that were the basis of the murder." (2RT 126.) After this initial panel of prospective jurors was excused to complete juror questionnaires, and before the court brought back in the prospective jurors claiming a hardship, appellants moved to excuse the entire panel due to the trial court's mistaken reading of the racial motivation allegation. (2RT 132-133.) The trial court denied the motion, stating it would be correct the error at the voir dire stage. (2RT 133.)

The next day, January 23, 1998, a second panel of prospective jurors was brought in, and the court correctly advised this panel of the charges and allegations pursuant to the applicable information, with no mention of the racial motivation allegation. (3RT 165-168.)

On February 2, 1998, the first panel of prospective jurors returned to the courtroom after counsel was given an opportunity evaluate the juror questionnaires. (4RT 221.) The court at this time correctly advised the first panel of the charges and allegations pursuant to the applicable information, with no mention of the racial motivation allegation. (4RT 223-225.)

On February 4, 1998, the second panel of prospective jurors returned to the courtroom after counsel was given an opportunity evaluate the juror questionnaires. (6RT 473.) The court at this time again correctly advised the panel of the charges and allegations pursuant to the applicable information, with no mention of the racial motivation allegation. (6RT 474-476.) The actual jury and alternates were sworn in on February 5, 1998. (7RT 774, 794.) At trial, no argument was made, nor were any instructions or verdict forms given or

offered, that referred specifically to the allegation or generally to a racial motivation for the murder of Messrs. Skyles and Price.

B. The Court's Subsequent And Repeated Reading Of The Correct Charges And Allegations Cured Any Error

Respondent first submits this claim is without merit as appellant Soliz has failed to demonstrate any sitting juror or alternate was among the initial panel of prospective jurors that heard the incorrect allegation. "[O]n appeal a judgment is presumed correct, and a party attacking the judgment, or any part of it, must affirmatively demonstrate prejudicial error." (*People v. Garza* (2005) 35 Cal.4th 866, 881.) Absent affirmative evidence, the Court should not assume any sitting jurors or alternates were "tainted" by the mistaken reading of an incorrect allegation to one panel of prospective jurors. (See, e.g., *People v. Ward* (2005) 36 Cal.4th 186, 206 ["Since the record fails to support defendant's premise that the jurors saw his leg braces, we find no error in the trial court's failure to instruct sua sponte that they should disregard the shackling in their deliberations."])

In any event, any error was clearly harmless. Even had appellant Soliz demonstrated that any deliberating juror was actually a part of that first panel, that same panel was later properly advised as to the charges and allegations. (4RT 223-225; see also 3RT 165-168; 6RT 474-476.) Further, there was no evidence, argument, instructions or verdict forms at trial that referred to the racial motivation allegation for the murder of Messrs. Skyles and Price. Appellant Soliz argues the prosecution introduced evidence "that Skyles and Price were killed because of their race," citing pages 2093 through 2094 of the Reporter's Transcript. (SAOB 58.) Appellant Soliz is incorrect. At those pages, Deputy Scott Lusk of the Los Angeles County Sheriff's Department

testified as a gang expert and opined on the gang motivation for the murder. (16RT 2092-2094.)[56]

Appellant Soliz also claims the error was further "compounded" when the prosecuting attorney argued to the jury that Messrs. Skyles and Price "were killed because they 'happened to be Black.'" (SAOB 58, citing 17RT 2235.) Of course, appellant Soliz did not object to the prosecuting attorney's argument and request an admonition, thus waiving any claim of misconduct on appeal. (See *People v. Davis, supra,* 36 Cal.4th at pp. 550-551.) In any event, appellant Soliz mischaracterizes the prosecuting attorney's argument. The prosecuting attorney was referring to the gang motivation for killing Messrs. Skyles and Price, arguing from the evidence that appellants killed the victims as "pay back for, the fact that Neighborhood Crips had killed Billy Gallegos." (17RT 2235.) The prosecuting attorney then continued:

> Mr. Price and Mr. Skyles happened to be Black. They happened to be out at the wrong time of night. They happened to be in the wrong location. And they probably happened to be wearing the wrong kind of clothes. Remember Mr. Price had on dark blue pants, which are consistent with Crip membership; Mr. Skyles had red, which is consistent with Blood.
>
> But you heard from Detective Lusk it didn't make any difference whether they were or they weren't -- whether they were or they weren't gang members. It didn't make any difference whether they were the two that had actually killed Billy Gallegos. The simple fact is they filled the general description of the people involved, and it was payback for that, and that's why it was done.

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56. Moreover, as appellant Soliz concedes (SAOB 58), he raised no objection to Detective Lusk's opinion, thus waiving on appeal any claim concerning the admission of such testimony.

(17RT 2235-2236.)

In proper and full context, the prosecuting attorney's argument to the jury was not that Messrs. Skyles and Price were killed because of their race, but that they were killed because they fit the profile rival gang members. Thus, contrary to appellant Soliz's argument, the jury never "heard the allegations and received evidence on those allegations." (SAOB 58.)

Finally, even where a sitting juror was mistakenly instructed as to an element of the charged crimes -- a situation far removed from that present here -- the error is reviewed under either the harmless-beyond-a-reasonable-doubt test of *Chapman*, *supra*, 386 U.S. 18, or the reasonable-probability test of *People v. Watson* (1956) 46 Cal.2d 818, 836 ("*Watson*"). (See, e.g., *People v. Sengpadychith* (2001) 26 Cal.4th 316, 320; *People v. Harris* (1994) 9 Cal.4th 407, 419.)

In light of fact that all of the prospective jurors were at all times thereafter properly advised of the charges and allegations, and because there was no evidence, argument, instructions or verdict forms at trial that referred to the racial motivation allegation for the murder of Messrs. Skyles and Price, any error was clearly harmless under either any standard.

VI.

THE COURT HAD JURISDICTION OVER THE PROSECUTION OF APPELLANTS FOR FIRST DEGREE MURDER

Appellant Soliz, joined by appellant Gonzales, relies on this Court's opinion in *People v. Dillon* (1983) 34 Cal.3d 441, and the Supreme Court's opinion in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], to argue that because the information charged them with murder in counts I, IV and V pursuant to Penal Code section 187, subdivision (a), rather than section 189, the trial court only had jurisdiction to try him only for second degree murder and not first degree murder. (SAOB 60-68; GAOB 574.)

Appellant Soliz acknowledges this precise issue, on the same premise, was raised to and rejected by this Court in *People v. Hughes* (2002) 27 Cal.4th 287, 368-370 ("*Hughes*"). (SAOB 63; see also *People v. Nakahara* (2003) 30 Cal.4th 705, 712.) Nevertheless, appellant Soliz complains that this Court in *Hughes* failed to adequately "explain how the reasoning of [*People v. Witt* (1915) 170 Cal. 104, 107-108] can be squared with the holding of *Dillon*," (SAOB 64)), and that in any event, under *Apprendi v. New Jersey, supra,* 530 U.S. 466, the federal Constitution now "requires more specific pleading in this context." (SAOB 66.)

Appellant Soliz arguments are without merit. In *Hughes*, the defendant was charged with murder in violation of section 187, but the lower court "instructed the jury that defendant could be convicted of murder in the first degree, without the showing of premeditation or malice aforethought required by section 187, if the jury found that the killing occurred during the commission of a robbery, burglary, or sodomy." (*Hughes*, *supra*, 27 Cal.4th at p. 367.) The defendant was convicted and sentenced to death, and on appeal he argued, precisely as does appellant Soliz in the instant case, that the trial court "lacked jurisdiction to try him for the uncharged crime of first degree felony murder"

because "the information failed to put him on notice that the prosecution planned to proceed under a first degree felony-murder theory" and "the felony-murder instructions violated his right to have all elements of the charged crime proved beyond a reasonable doubt." (*Id.* at p. 369.)

This Court in *Hughes* addressed each of these claims -- in an opinion filed two years *after* the United States Supreme Court's opinion in *Apprendi* – and expressly rejected them, holding as follows:

> All of defendant's various claims rest upon the premise that under *People v. Dillon* (1983) 34 Cal.3d 441 [194 Cal.Rptr. 390, 668 P.2d 697] (*Dillon*), felony murder and premeditated murder are separate crimes, and that *Dillon* implicitly overruled *People v. Witt* (1915) 170 Cal. 104 [148 P. 928], in which we held that a defendant may be convicted of felony murder even though the information charged only murder with malice.
>
> As the People observe, numerous appellate court decisions have rejected defendant's jurisdictional argument. (*People v. Wilkins* (1994) 26 Cal.App.4th 1089, 1097 [31 Cal.Rptr.2d 764]; *People v. Johnson* (1991) 233 Cal.App.3d 425, 453-457 [284 Cal.Rptr. 579]; *People v. Scott* (1991) 229 Cal.App.3d 707, 712-718 [280 Cal.Rptr. 274]; *People v. Watkins* (1987) 195 Cal.App.3d 258, 264-268 [240 Cal.Rptr. 626].) We have rejected defendant's argument that felony murder and murder with malice are separate offenses (*Carpenter*, *supra*, 15 Cal.4th 312, 394-395 [it is unnecessary for jurors to agree unanimously on a theory of first degree murder]; *People v. Guerra* (1985) 40 Cal.3d 377, 386 [220 Cal.Rptr. 374, 708 P.2d 1252] [same]), and, subsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the

prosecution intends to rely. Thus we implicitly have rejected the argument that felony murder and murder with malice are separate crimes that must be pleaded separately. (*E.g.*, *People v. Diaz* (1992) 3 Cal.4th 495, 557 [11 Cal.Rptr.2d 353, 834 P.2d 1171] (*Diaz*); *People v. Gallego* (1990) 52 Cal.3d 115, 188 [276 Cal.Rptr. 679, 802 P.2d 169] (*Gallego*).)

As we observed in *Diaz*, *supra*, 3 Cal.4th 495, "generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing or at the indictment proceedings." (*Id.*, at p. 557.) In the present case, defendant received adequate notice: (i) the preliminary hearing testimony made clear the prosecution's intent to establish that defendant killed during the commission of a burglary and a robbery; (ii) the information charged defendant with robbery, burglary, and sodomy, and (iii) the evidence at trial alerted defendant to the felony-murder theory. Even now, defendant does not explain in what manner he might have been prejudiced by the absence of a separate felony-murder charge. We conclude that defendant received constitutionally adequate notice of the prosecution's felony-murder theory. (*Diaz*, *supra*, 3 Cal.4th 495, 557; *Gallego*, *supra*, 52 Cal.3d 115, 188-189.)

In summary, we reject, as contrary to our case law, the premise underlying defendant's assertion that felony murder and malice murder are two separate offenses. Accordingly, we also reject defendant's various claims that because the information charged him only with murder on a malice theory, and the trial court instructed the jury pursuant to both malice and a felony-murder theory, the general verdict convicting him of first degree murder must be reversed.

(*Id.* at pp. 369-370.)

Appellant Soliz appears to be raising this claim merely to invite this Court to revisit its' holding, come to a contrary conclusion, and overrule *Hughes.* The Court should decline the invitation, as appellant Soliz has offered no persuasive reason in fact, logic or law which would suggest or dictate that *Hughes* and its' underlying reasoning was wrongly decided.

GUILT PHASE ISSUES

VII.

THE TRIAL COURT DID NOT IMPROPERLY ADMIT EVIDENCE OF THE WITNESSES' FEAR

Appellants contend the trial court committed prejudicial error by admitting evidence of "threats" against witnesses Judith Mejorado and Salvador Berber, despite the lack of any evidence connecting appellants to the threats. (SAOB 69-73; GAOB 439-452, 574.) Appellants argue the lack of a nexus between appellants and the threats rendered the evidence of the threats irrelevant, and thus the error violated their constitutional rights to a fair trial, confrontation, reliable guilt and penalty determinations and due process under the federal Constitution. (SAOB 769-73.)

Appellants' claims fail because they never objected on such grounds in the trial court. In any event, the evidence was properly admitted, and any error was clearly harmless.

A. Relevant Proceedings Below

1. Testimony From Judith Mejorado

Ms. Mejorado testified at the guilt phase of trial that she could not recall any of the events that occurred in April, 1996, that she could not recall anything she told Deputy Castillo and Sergeant Holmes when they interviewed her, and that she could not recall her testimony at the preliminary hearing. (14RT 1676-1688, 1724-1725, 1727, 1732-1737.) The trial court declared Ms. Mejorado to be a hostile witness, and, outside the presence of the jury, made a finding that she was feigning her lack of recollection and was deliberately perjuring herself. (14RT 1678, 1691, 1779, 1782.)

On cross-examination, Ms. Mejorado recalled telling the deputies that she did not know who did the shooting. (14RT 1775-1776.) She further testified on cross-examination that this "was always my position," that she told the deputies on many occasions that she did not know who did the shooting; that to her knowledge she did not know who did it; and that she had speculated that appellant Soliz had done it because she was "forced into that answer." (14RT 1776-1778.) At the conclusion of her testimony, Ms. Mejorado was remanded into custody until the trial was concluded so as to preserve her presence should her testimony be required. (14RT 1779-1780.)

The prosecution thereafter called Deputy Castillo, one of the assigned investigating officers, who testified that when he interviewed Ms. Mejorado, she told him that on the night Messrs. Skyles and Price were murdered, she had been picked up at her house by her brother, Agustin Mejorado, in her brother's car. Ms. Mejorado was concerned about her brother because he was intoxicated. Also present in the car were appellant Gonzales, appellant Soliz and Mike Gonzales "Clumsy." Ms. Mejorado told Deputy Castillo that while she sat in the car, she witnessed the shooting in the gas station. When appellants returned to and simultaneously entered the car, they told her, "You didn't see nothing. You don't know nothing." Agustin argued with appellants for "involving his sister in this particular type of incident." (14RT 1789-1803.)

Deputy Castillo further testified that after he interviewed Ms. Mejorado, they drove her back to her residence. (14RT 1829.) Near the end of Deputy Castillo's redirect testimony, he was asked if Ms. Mejorado expressed any concerns about her brother when she was returned to her home:

A We told her we were going to be interviewing her brother. And because of the people that were involved in this incident, we felt that her brother should know that she had talked to us.

Q And what did she say in that regard?

A She was concerned, and she said that she would talk to him.

Q Did she tell you why it was she was concerned -- did she indicate that she was concerned about her brother's position?

A Yes.

Q What did she say in that regard?

A That she --

MR. TYRE [counsel for appellant Gonzales]: Objection, your honor, relevance.

THE COURT: I think it could go to the totality of the witness's statement. I'll overrule it.

You may answer.

THE WITNESS: She said that she was concerned for his safety.

BY MR. SORTINO [the prosecuting attorney]:

Q From who?

A From the people involved in this incident.

(14RT 1830.)

2. Testimony From Salvador Berber

Salvador Berber testified at trial pursuant to a plea agreement. (15RT 1917–1918.) Mr. Berber testified he had faced a possible sentence of 14 years in state prison, "with maybe 80 percent." Mr. Berber was represented by a lawyer. Mr. Berber's case was resolved when the court struck one of Mr. Berber's prior strikes, and sentenced him to five years, with the sentence suspended. (15RT 1918-1919.) As of the time of the guilt phase of appellants' trial, Mr. Berber was on five years of felony probation. If he violated any term of his probation he would go to prison for five years. His plea agreement required him to tell the truth and truthfully testify about the murders. (15RT 1919.) If he did not testify truthfully, his plea agreement would be forfeited and

the case against him could be re-filed, including the prior strike. (15RT 1919-1920.) The following appears in the record during his questioning:

Q As part of your plea agreement, have you been relocated out of Los Angeles County?

A Yes, I have.

MR. TYRE: Objection, your Honor, to relevance.

THE COURT: Well, it's all part of the plea agreement, and I think it's appropriate that the jury should know all of the circumstances.

So overruled.

The answer was yes. It may stand.

BY MR. SORTINO:

Q Do you have any concerns about testifying here today, Mr. Berber?

MR. BORGES: Relevance, judge. Objection.

THE COURT: I think it's relevant but I don't know that it's appropriate at this time.

The objection is sustained.

(15RT 1920.)

At the penalty retrial, Mr. Berber testified he no longer lived in La Puente. (31RT 4019.) When asked over a defense objection (without stated grounds) what would happen if he returned to La Puente, Mr. Berber testified: "They'd kill me." (*Ibid.*)

B. Applicable Authority

"Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible." (*People v. Burgener* [(2003)] 29 Cal.4th [833], 869, 129 Cal.Rptr.2d 747, 62 P.3d 1; Evid. Code, § 780, subd. (f) [jury may

> consider the existence or nonexistence of a bias, interest, or other motive in determining a witness's credibility].) An explanation of the basis for the witness's fear is likewise relevant to the jury's assessment of his or her credibility and is well within the discretion of the trial court. (*Ibid.*) For such evidence to be admissible, there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is "directly linked" to the defendant. (*People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1588, 28 Cal.Rptr.2d 897.)

(*People v. Guerra, supra*, 37 Cal.4th at p. 1141; see also Evid. Code, § 780; *People v. Malone* (1988) 47 Cal.3d 1, 30; *People v. Green* (1980) 27 Cal.3d 1, 19-20.)

"It is not necessarily the source of the threat -- but its existence -- that is relevant to the witness's credibility." (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) Moreover, there is no requirement that the fear be corroborated before it may be "admitted to reflect on the witness's credibility." (*Id.* at p. 869.) Thus, while "evidence that a defendant is threatening witnesses implies a consciousness of guilt and thus is highly prejudicial and admissible only if adequately substantiated . . . , evidence that a witness is afraid to testify is relevant to the credibility of that witness and therefore admissible." (*People v. Warren* (1988) 45 Cal.3d 471, 481.)

As stated in *People v. Olguin* (1994) 31 Cal.App.4th 1355, a gang case:

> A witness who testifies despite fear of recrimination . . . is more credible because of his or her personal stake in the testimony. Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility [citation], the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. . . . [¶] Regardless of its source, the jury

would be entitled to evaluate the witness's testimony knowing it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear.

(*Id.* at pp. 1368-1369; italics omitted.)

Thus, in *People v. Guerra*, *supra,* 37 Cal.4th 1067, the defendant complained the trial court erred in admitting the following evidence:

De Maderos testified, over defense counsel's objections, that she was worried that"something might happen to [her]" when she returned to Guatemala after testifying because she believed defendant's family "might not take [her testimony] well." De Maderos further testified she had "heard it being said that if we came here to testify, the only pleasure we would have would be to come, but that something might happen to us when we returned." Edgar Ramirez also testified over counsel's objections that he was concerned about his family upon returning to Guatemala and worried that someone might hurt him because he was testifying in this case. He had received no direct threat nor heard any talk in his hometown in Guatemala that he would be in danger when he returned home after testifying.

(*Id.* at p. 1141.)

This Court rejected the contention, finding as follows:

Here, evidence that de Maderos feared retaliation for testifying against defendant was offered for the nonhearsay purpose of explaining inconsistencies in portions of her testimony, including her equivocal responses when asked whether she feared retaliation. Ramirez's testimony that he feared testifying was also relevant to his credibility even though he testified he had not personally received or heard of any

threat. (*See, e.g.*, *People v. Avalos* (1984) 37 Cal.3d 216, 232, 207 Cal.Rptr. 549, 689 P.2d 121 [witness's fear was caused only by the nature and gravity of her testimony].) Moreover, as the People point out, the record suggests the witnesses exhibited hesitancy in responding to questions. The jury was entitled to consider their explanations in evaluating their credibility, and the trial court instructed the jury accordingly. Importantly, the trial court further admonished the jurors that if they believed the statements were made, they must not attribute them to defendant. Accordingly, the trial court properly exercised its discretion in admitting their testimony.

(*Id.* at p. 1152.)

Similarly, in *People v. Avalos* (1984) 37 Cal.3d 216, an eyewitness was reluctant to identify the defendant in court although she had previously identified him in an in-person lineup. After a hearing, the trial court ruled the fact the witness felt fear, whether caused by specific acts of any person connected with the trial, was relevant to her credibility and that the probative value of the evidence outweighed any potential prejudice to the defendant. (*Id.* at p. 232.) This Court agreed and held the "determination that an explanation of Ms. Martinez' hesitation would be relevant to the jury's assessment of her credibility was well within the discretion of the trial court." (*Ibid.*)

C. Analysis

1. These Claims Have Been Waived By The Failure To Properly Object Below

The objection to the complained-of testimony from Mr. Berber at the penalty phase retrial stated no grounds, thereby waiving all objections. (Evid. Code, § 353.) And the only objection raised to the testimony from Ms.

Mejorado and Mr. Berber at the guilt phase was made on relevance grounds. (14RT 1829-1830; 15RT 1920.)

Appellate review is not available for questions relating to the admissibility of evidence without a *specific* and *timely* objection in the trial court *on the ground urged on appeal*. (Evid. Code, § 353, subd. (a) [finding shall not be set aside by reason of erroneous admission of evidence unless, inter alia, there appears on record an objection that was timely and specifically made]; *People v. Rowland* (1992) 4 Cal.4th 238, 275; *People v. Raley* (1992) 2 Cal.4th 870, 892; *People v. Szeto* (1981) 29 Cal.3d 20, 32 [waiver of hearsay objection resulted from failure to raise objection at trial].)

> To the extent defendant argues that admission [of the evidence] violated his federal constitutional rights to due process, a fair trial, a reliable penalty determination, freedom from cruel and unusual punishment, and his right to due process . . . we find those issues were not preserved for appeal because defendant did not object at trial on those specific grounds. "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."

(*People v. Boyette* (2003) 29 Cal.4th 381, 423, citations omitted.)

Appellants' objections failed to preserve state and federal constitutional grounds. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14 [hearsay objection does not preserve claim that the "error constituted a violation of his Sixth Amendment right to confrontation"]; *People v. Rowland, supra*, 4 Cal.4th at p. 273 fn. 14 [section 352 objection does not preserve claim that "by denying his motion, the court committed error . . . under the United States Constitution, including the due process clause"]; but see *People v. Partida* (2006) 37 Cal.4th 428, 431 [A defendant "may not argue on appeal that the court should have excluded the evidence for a reason not asserted at trial" but that a defendant

"may, however, argue that the asserted error in overruling the trial objection had the legal consequence of violating due process."]; *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6.)

2. The Court Did Not Err In Permitting Evidence Of Ms. Mejorado's Fear

Even assuming the claim that trial court improperly admitted evidence of threats against Ms. Mejorado is preserved for review, it is meritless. First, and most significantly, the portion of the record appellants rely on fails to disclose any evidence of a threat made against Ms. Mejorado. The testimony at issue concerned Ms. Mejorado's *fear*, not threats received from appellants. (See *People v. Warren, supra,* 45 Cal.3d at p. 481.) This not doubt explains why trial counsel never made any such objection in the trial court, thereby effectively waiving any such issue for appellate purposes. (See Evid. Code, § 353, subd. (a).)

Moreover, trial counsel objected on relevancy grounds to Ms. Mejorado's statement to Deputy Castillo that she was concerned about her brother's safety. However, as stated above, this concern was based not on a threat to her about her brother but rather on *her observations on the night of the shooting*. As aptly noted by the trial court, her answer was part of the totality of her statement. And, given what she related about the shooting incident and what appellants stated after they got back into the car, it is easy to see why she would be concerned about her brother's safety, especially after she gave a statement to the police regarding her observations.

To the extent appellants take exception to Deputy Castillo's testimony that Ms. Mejorado expressed concern for her brother's safety "from the people involved in this incident," such claim is waived since appellants failed to object to the question. And even had a timely and specific objection been presented,

Ms. Mejorado's statement to Deputy Castillo was still properly admitted since it explained the basis of her concern for her brother's safety. Appellants' claim concerning evidence of fear or threats to Ms. Mejorado's is meritless.

3. The Trial Court Did Not Err When It Permitted Mr. Berber To Testify As To A Term Of His Plea Agreement

Similarly, no evidence of threats against Mr. Berber was admitted. Indeed, the trial court specifically sustained defense counsel's objection about whether he had "any concerns about testifying." Appellants' complaint concerning Mr. Berber's testimony in the guilt phase is his testimony that he was relocated outside of Los Angeles County as part of his plea agreement. (SAOB 69-71.) This was obviously a proper matter for Berber to testify about, since it involved the circumstances surrounding his plea agreement. As correctly noted by the trial court, "it's all part of the plea agreement, and I think it's appropriate that the jury should know all of the circumstances." (15RT 1920.) The testimony clearly does not involve any evidence of threats against. Again, this no doubt explains why defense counsel did not pose an objection on that ground in the trial court. Appellants' claim must be rejected.

Assuming it is preserved, appellants' claim that the trial court at the penalty phase improperly admitted evidence of a threat against Mr. Berber because it was unconnected to appellants is likewise meritless, for several reasons. First, the portion of the record relied upon by appellants fails to reveal a threat made against by Mr. Berber by appellants or anyone else. True, Mr. Berber thought he would be killed if he returned to La Puente, but the record fails to reveal that was based on a specific threat made against him. Third, even assuming arguendo Mr. Berber had so testified, his testimony was properly admitted since it was an important factor for the jury to consider in evaluating his credibility. And, even were this interpreted as testimony concerning a

"threat," and a threat not expressly connected to appellants, the testimony would still have been properly admitted since it was relevant to his credibility. As this Court stated in *Burgener*, "It is not necessarily the source of the threat -- but its existence -- that is relevant to the witness's credibility." (*People v. Burgener, supra*, 29 Cal.4th at p. 869; see *People v. Olquin, supra*, 31 Cal.App.4th pp. 1368-1369.)

Appellants' claims must be rejected.

D. Any Error Was Harmless

In any event, even assuming any error, and assuming further that the error is preserved for review, it was nevertheless harmless.

> [T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair. [Citations.] Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error.

(*People v. Partida, supra*, 37 Cal.4th at p. 439.)

Here, as stated above in response to Argument I, the overwhelming evidence pointed exclusively towards appellants' guilt. Admission of the brief testimony at issue did not render appellants' trial fundamentally unfair, and thus they are not entitled to any relief based on a due process argument. Moreover, it is not reasonably probable the verdicts would have been more favorable to appellants absent the alleged error.

VIII.

THE TRIAL COURT DID NOT IMPROPERLY EXCLUDE EXPERT TESTIMONY ON EYEWITNESSES IDENTIFICATIONS PROCEDURES

Relying primarily on this Court's opinion in *People v. McDonald* (1984) 37 Cal.3d 351 ("*McDonald*"), appellant Soliz, joined by appellant Gonzales, contends the trial court committed prejudicial error at the guilt phase when it excluded "expert" testimony from Detective Lusk as to "investigatory procedures and mug show ups." (SAOB 74-80; GAOB 574.)

Respondent submits the trial court ruling was proper because, unlike *McDonald* and the assertion on appeal, the defense proffer below included having Detective Lusk, a gang expert witness, give his opinion as to the accuracy and propriety of the photographic lineup procedures used *in the instant case*. Moreover, appellant Soliz failed to demonstrate Detective Lusk was qualified to testify as an expert in this field, and in any event, the eyewitness identifications were substantially corroborated. Finally, even assuming any error, it was clearly harmless.

A. Relevant Proceedings Below

Detective Scott Lusk of the Los Angeles County Sheriff's Department was called as a gang expert and generally testified as to the Puente gang, its' history, structure, reputation, cliques and subgroups, members, territory and criminal activities. (16RT 2064-2071, 2081.) Detective Lusk also testified to his prior contacts with appellants and other witnesses and individuals, and opined as to their membership in the Puente gang at the time of the offenses for which appellants were being tried. (16RT 2072-2081.) Detective Lusk further testified as to his prior experience investigating crimes committed by members of the Puente gang. (16RT 2081-2088, 2124.) Detective Lusk opined the

murder and robbery of Mr. Eaton at the Hillgrove Market on January 26, 1996, was a good example of crimes committed to enhance the individual's reputation within the gang, as well as to enhance the reputation of the gang itself. (16RT 2088-2089.) He further opined the murder of Messrs. Skyles and Price was done in retaliation for the murder of Billy Gallegos on March 31, 1996. (16RT 2090-2094.) Detective Lusk additionally opined the double murder of Messrs. Skyles and Price on April 14, 1996, enhanced the reputation of the gang and those gang members who committed the crimes. (16RT 2094-2095.)

During cross-examination of Detective Lusk by counsel for appellant Soliz, the following colloquy occurred:

> Q: When you prepare a mug show up, do you try to get the -- do you try to place in the mug show up people who look generally like the person described who was the perpetrator?
>
> MR. SORTINO: Your Honor, I'm going to object to this as beyond the scope of direct --
>
> THE COURT: Sustained. It is beyond the scope of direct. It's improper cross-examination of this particular witness. It does not go to his gang expertise. [¶] So, counsel, I've tried to accommodate you reopen your cross, but you've got to stay in the framework of cross. [¶] Objection sustained.
>
> MR. BORGES: Your Honor, if the Court please, could I be allowed to call this witness as my own, since he's here?
>
> THE COURT: You may at a later time but not at this juncture of the trial.

(16RT 2136-2137.)

After the prosecution rested, appellant Soliz indicated his desire to call Detective Lusk as a defense witness. (16RT 2151.) When appellant Soliz was

asked for an offer of proof as to the additional testimony sought from Detective Lusk, the following colloquy occurred:

MR. BORGES: I'm going to ask him about his investigatory procedures with mug show ups, for one thing.

MR. SORTINO [prosecuting attorney]: What's the relevance of that? There's been cross-examination of the detective. This is a homicide detective who has no contact with this homicide investigation.

MR. BORGES: Oh, I'll be talking about general investigatory procedures. He's a homicide investigator. He's an expert that I'm entitled to call as my witness and ask what policies and procedures he follows in preparing --

THE COURT: You asked for an offer of proof. [¶] That's what you intend to ask him. [¶] What's the objective?

MR. BORGES: The objective is to show that the mug show ups in this case were not prepared properly.

MR. SORTINO: In what --

THE COURT: That's a question for the jury, --

MR. BORGES: Yes.

THE COURT: -- And that would be invading the province of the jury for him to express such an opinion. [¶] You can argue that. You can show the jurors how these particular mug shots were improperly prepared and how they triggered a response in the witnesses. That's all argument. [¶] But for a witness to say that this is unduly suggestive mug shot is an opinion and invades the province of the jury, and it's not admissible. I would not allow that question to be asked. [¶] So if that's what you intend to as Detective Lusk, save yourself the trouble, because I won't allow it.

MR. BORGES: Thank you, Judge.

THE COURT: But I certainly will allow you to argue it --

MR. BORGES: Thank you.

THE COURT: -- so it will get before the jury.

(16RT 2151-2152.)

B. The Trial Court Properly Denied Appellant Soliz's Motion

Respondent submits the trial court ruling was proper because the defense proffer below improperly included having Detective Lusk opine as to the accuracy and propriety of the photographic lineup procedures used *in the instant case*. Moreover, appellant Soliz failed to demonstrate Detective Lusk was qualified to testify as an expert in this field, and in any event, the eyewitness identifications were substantially corroborated.

Appellant Soliz relies on this Court's holding in *McDonald, supra,* 37 Cal.3d 351. (SAOB 76-77.) There, this Court held the lower court prejudicially abused its discretion when it excluded expert testimony on the psychological factors affecting eyewitness identification. Significant to this Court's holding in *McDonald* was the fact that in that case, the expert would not have testified that the particular identifications in the case were unreliable. Rather, the expert would merely have testified that various psychological factors *could* have affected the identification in the case. *(Id.* at pp. 362, 366.)

Appellants maintain Detective Lusk's testimony was proper and would not have "invade[d] the province of the jury," because, like the expert in *McDonald*, he "would not have testified that the particular identifications [in the instant case] were unreliable but simply informed the jury of certain procedures which if not followed may impair the accuracy of eyewitness identifications." (SAOB 76.) Thus, appellants argue the trial court's exclusion of Detective Lusk's expert opinion about photographic lineup procedures violated not only his federal constitutional rights under the Sixth, Eighth and

Fourteenth Amendments to the United States Constitution to a fair trial, to present a defense, to reliable guilt and penalty determinations and to due process, but his corresponding constitutional rights under the state Constitution. (SAOB 74-80.)

However, although appellants now argue *on appeal* that Detective Lusk's proposed expert testimony was similar to the expert in *McDonald*, *that is not what they proposed in the trial court.* Appellant Soliz nowhere articulated below a desire to call Detective Lusk as an general expert in eyewitness identification. Had this been the case, it would have been a simple matter for him to have said so. Instead, the record reasonably construed demonstrates that at trial, appellant Soliz wanted Detective Lusk to opine as an expert on the question of whether the photographic lineup procedures *in this case* were properly prepared. (See 16RT 2151-2152 ["The objective is to show that the mug show ups in this case were not properly prepared."].) Such a request was properly denied as Detective Lusk would have been offered to take over the jury's task of specifically evaluating the propriety of the photographic lineup procedures utilized in the instant case. This was not akin to the expert testimony proffered by the defense in *McDonald*. As this Court noted in *McDonald*:

> [t]he expert testimony in question does *not* seek to take over the jury's task of judging credibility: . . . it does not tell the jury that any particular witness is or is not truthful or accurate in his identification of the defendant. Rather, it informs the jury of certain factors that may affect such an identification in a typical case.

(*People v. McDonald, supra*, 37 Cal.3d at pp. 370-371; emphasis in original.)

Here, the trial court properly saw that appellants wanted to call Detective Lusk as to opine as an expert that the photographic lineup procedures *in the instant case* were not prepared properly and thus were unduly suggestive.

Indeed, counsel for appellant Soliz agreed when the trial court stated the opinion they sought from Detective Lusk was "a question of fact for the jury." Thus, based on the defense proffer in the trial court, appellants' claim must fail, as the premise of their argument -- namely, that Detective Lusk's testimony would *not* have invaded the province of the jury -- is factually incorrect. (See *People v. McDonald, supra*, 37 Cal.3d at pp. 362, 366; see *People v. Page* (1991) 2 Cal.App.4th 161, 187-191; *People v. Gray* (1986) 187 Cal.App.3d 213, 219.)

Moreover, even if appellant Soliz had instead desired only general "eyewitness identification" expert testimony from Detective Lusk, there is no evidence whatsoever to suggest Detective Lusk had any particular experience, training or expertise concerning eyewitness identifications that would qualify him as an expert in this field. Evidence Code section 720 requires a proponent of expert testimony to establish the qualifications of the witness:

> "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) An expert witness's testimony in the form of an opinion is limited to a subject "that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." (Evid. Code, § 801, subd. (a).)

(*People v. Catlin, supra*, 26 Cal.4th at p. 131.)

That Detective Lusk was employed by the Los Angeles County Sheriff's Department, and that he had many times qualified and testified *as a gang expert*, does not without more demonstrate he was necessarily qualified to testify as an expert and opine regarding eyewitness identification. The qualifications of an expert related to the particular subject upon which he actually testified does not *ipso facto* render him qualified to testify as an expert

on a different and unrelated subject. (See, e.g., *People v. Williams* (1992) 3 Cal.App.4th 1326, 1334 ["It is not unusual that a person may be qualified as an expert on one subject and yet be unqualified to render an opinion on matters beyond the scope of that subject."]; *Rogers v. Raymark Industries, Inc.* (9th Cir. 1991) 922 F.2d 1426, 1430 ["A person qualified to give an opinion on one subject is not necessarily qualified to opine on others."].)

Finally, even if appellant Soliz had properly articulated and sufficiently demonstrated qualifications and a proper evidentiary basis for calling Detective Lusk to testify as an "eyewitness identification" expert, the trial court would have properly denied the request as the eyewitness identifications at trial were substantially corroborated.

> In *People v. McDonald, supra*, 37 Cal.3d 351 [208 Cal.Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011] (*McDonald*), the leading California case allowing the introduction of expert testimony on eyewitness identification, this court said: "[T]he decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion; . . . 'we do not intend to "open the gates" to a flood of expert evidence on the subject.' [Citation.] We expect that such evidence will not often be needed, and in the usual case the appellate court will continue to defer to the trial court's discretion in this matter. Yet deference is not abdication. When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability . . . , it will ordinarily be error to exclude that testimony." (*Id.* at p. 377, fn. omitted.)

(*People v. Jones* (2003) 30 Cal.4th 1084, 1111 ("*Jones*").)

The evidence corroborating the eyewitness identification need only provide "links in the chain of evidence" and need not point unerringly to guilt.

(*People v. Sanders* (1995) 11 Cal.4th 475, 509.) The key considerations in reviewing whether a court erred in excluding such testimony is: (1) whether the eyewitness identification was "*substantially corroborated by evidence giving it independent reliability*;" (2) whether the defendant proffered "*qualified expert testimony* on *specific psychological factors*; (3) whether the record shows that these factors "could have affected the accuracy of the identification; and (4) whether these factors are "*not likely to be fully known to or understood by the jury*." (*Jones, supra,* 30 Cal.4th at pp. 1111-1112, citing *People v. McDonald*, *supra*, 37 Cal.3d at p. 377, italics added.)

Thus, for example, in *Jones*, this Court held the corroborating evidence met the *McDonald* standard as it was corroborated by five witnesses, and that it was irrelevant that three of these witnesses may have been accomplices, or that all five could have been impeached by proof of bias or inconsistent statements. (*Jones*, *supra*, 30 Cal.4th at p. 1112.) Likewise, in *People v. Sanders*, *supra*, 11 Cal.4th at p. 509, this Court held the lower court did not err when it excluded the proffered testimony as the eyewitness identification was "corroborated by other independent evidence of the crime and conspiracy leading to it."

This case clearly does not meet any of the stated prongs for assigning error to exclusion of expert eyewitness identification testimony. As stated above, the identity of appellants was substantially and fully corroborated. Overall, this simply was not a case in which the multiple eyewitnesses' identification evidence was "not substantially corroborated by evidence giving it independent reliability." (*People v. McDonald*, *supra*, 37 Cal.3d at p. 377.) Moreover, defense counsel fully cross-examined the officer who prepared the photographic lineup cards, and in doing so brought out each of the purported defects in that identification procedure. (12RT 1393-1405, 1417-1418, 1424-1431; 16RT 2164-2165, 2168-2169.)

Finally, in assessing prejudice, counsel argued the noted defects in closing argument (See 17RT 2246-2248, 2255, 2257-2259, 2276-2277), and the jury was properly instructed as to the factors to consider in proving identity by eyewitness testimony (3CT 686-687 [CALJIC No. 2.92]). Given the argument and instructions, it is not reasonably probable the jury would have had a reasonable doubt about appellants' identity, and thus about appellants' guilt, had the trial court allowed Detective Lusk to testify as an eyewitness identification expert. Accordingly, even if the trial court erred in excluding expert eyewitness identification testimony from Detective Lusk, any error was harmless.

IX.

THE TRIAL COURT DID NOT ERR WHEN IT DENIED THE CONTINUANCE

Appellant Soliz, joined by appellant Gonzales, argues the court abused its discretion and denied appellants a fair trial, effective assistance of counsel, due process and a reliable guilt and penalty determination when it refused at the guilt phase to grant a mid-trial continuance to enhance the tapes of appellant Gonzales' conversation with Mr. Berber. (SAOB 81-89; GAOB 574.) This claim is without merit.

A. Relevant Proceedings Below

Testimony at the guilt phase of the trial established that on September 25, 1996, Salvador Berber rode with appellant Gonzales in a sheriff's transport van from Los Angeles County Jail to the Pomona Courthouse. (15RT 1897.) The van trip took 90 minutes to two hours, and during the trip they also talked about other things unrelated to the crimes. (15RT 1900-1901.) Their conversation was tape recorded and transcribed. (Peo. Exhs. 57, 58; 15RT 1901-1902, 1905.) The transcript accurately transcribed what was on the accurate tape recording of their conversation. The tape recording played for the jury contained only that part of their conversation concerning appellant Gonzales' discussion of the Hillgrove Market robbery/murder of Mr. Eaton and the double murder of Messrs. Skyles and Price at the Shell gas station, but some of their conversation about unrelated matters was also on the edited tape. (Peo. Exhs. 57, 58; 15RT 1903-1905, 1908, 1910-1911, 1914, 1916.)

On cross-examination of Mr. Berber by counsel for appellant Soliz, the following colloquy occurred:

Q: At what point was it that he indicated he had a gun when he was shooting at them?

A [MR. BERBER]: When he told me he had a gun.

Q: Explain that a little more clearly to the jury so they understand it. When he told you he had a gun --

A: That was the time in the -- you can't hear it on the tape -- that he said that him and Jasper were struggling for the gun to, I guess, see who were gonna shoot the Black kids.

A: Him and Jasper?

A: Yes.

Q: Where was Jasper at this time? [¶] This is on the tape, Mr. Berber?

A: You can't -- it's not on the tape. That's why I didn't mention it before. You can't hear it. It's at one of the times where --

MR. BORGES: You know, I'm going to object and move to strike, your Honor.

THE COURT: This is part of the conversation. It's responsive to your question.

MR. BORGES: Okay.

Q: Let's go back here, Mr. Berber. [¶] When did this conversation take place?

A: At the same time that the tape was rolling, I guess we were in the van.

Q: That he and Jasper were fighting over a gun?

A: Well, not -- I guess not beating each other fighting, but they were struggling like saying who was gonna shoot who or something. I remember him saying that.

Q: This was when you were in the van?

A: Yes.

Q: This was when the conversation was being taped; is that right?

A: Yes.

Q: Have you ever mentioned this to anyone before today, Mr. Berber?

A: Yes.

Q: Who is that you mentioned this to?

A: Um, I think it was Willie West and then Reeder.

Q: Mr. Berber, you've read the transcripts -- I've read the edited version, and you've read the total transcript of -- the 53-page transcript, both of them, haven't you?

A: Yes.

Q: There's never been anything in any of those transcripts about Mr. Gonzales and Mr. Soliz fighting over a gun, is there?

A: No. You can't hear it, no.

(15RT 1955-1957.)

After a lunch break, the parties returned and outside the presence of the jurors, the following colloquy occurred:

MR. BORGES: Yes, your Honor. With respect to the testimony of Mr. Berber this morning, your Honor, on the -- when I was questioning Mr. Berber, I was asking him to describe the gestures that Mr. Gonzales made when he shot the two young Black men. In response to that question, he said you can't -- quote -- just generally paraphrasing it now, he said you can't hear it on the tape but he and Jasper were fighting with the gun over -- to see who was going to kill the two young Black males.

THE COURT: Would you read back the testimony that -- [¶] We'll have to stop now, because the Reporter can't do both.

MR. BORGES: Okay.

THE COURT: Would you read back the question and answer that Mr. Borges is referring to.

(RECORD READ)

MR. BORGES: Number one, your Honor, in that -- I asked the Court to strike that answer as being nonresponsive to the question. The Court declined to do that.

But I would point out to the Court that this is the first time in this case that I've ever heard anything about a struggle over a gun at the time -- shortly before the two young men were killed. But -- and it's supposedly on the tape. He says but you can't hear it.

At this point, since this is such a crucial part of the case and that testimony is so crucial, based upon total surprise by way of discovery, I'd ask for a continuance so I can have an expert listen to this tape again to determine whether there is any further conversation on that tape that we can't hear.

I think this jury's entitled to hear everything that's on that tape, number one; and number two, I would again urge the Court, if the Court is not inclined to grant a continuance for a short period of time so I can have an expert listen to the tape, I think that the answer of the witness should be stricken.

THE COURT: Mr. Sortino?

MR. SORTINO: Your Honor, the first that I heard of that was when Mr. Berber said it on the stand, as well. And I have never asked him about the portions of the tape that -- about portions of the tape that are -- what I characterize as unintelligible because of road noise or engine noise. And I believe that when he testified, that would be what he was referring to, that it's on one of those portions of the tape. But the first I heard of it is when he mentioned it on the stand this morning, as well.

THE COURT: Well, it would have been easier, of course, to determine the effect of this if you hadn't followed it up. But the

problem is you asked a series of questions. You asked the original question, and then when he talked about it, why, then, you explored it even further. So that it seems to me that you exacerbated the difficulty by asking all of the follow-up questions rather than having -- asking the original answer be stricken as nonresponsive, which I would have done.

But the only -- I am not inclined to grant a continuance for this because I don't think that any tape enhancement is going to bring out anything. Where there's road noise and static, if you amplify or tried to -- to enlarge upon this tape, I think you're going to get more static and more road noise, because there aren't any voices that are audible at all in the portions of it that we listened to that go on for a long time.

So I will -- at your request, I'll instruct the jury to disregard that portion of the testimony.

MR. BORGES: Thank you, Judge.

(15RT 1958-1961.)

After the Court took up a different matter, the following colloquy took place:

MR. BORGES: You Honor, before the jury comes out, I feel that -- I appreciate, number one, that the Court is going to admonish the jury that they're not to consider the statement of Mr. Berber relative to things that weren't on the tape and that that should be stricken from the record. I appreciate that. And I'm hopeful that it will have the desired effect. I still feel, though --

THE COURT: Wait just a minute, [Mr.] Borges. Don't go too far.

MR. BORGES: Okay.

THE COURT: You've been asking an awful lot of questions that aren't on the tape, because you've been asking about gestures and you've been asking about facial expressions and everything else. So if

I say they're to disregard everything that's not on the tape, it's going to wipe out half of your cross-examination.

MR. BORGES: I didn't mean it from that standpoint. I mean that answer relative to --

THE COURT: All right.

MR. SORTINO: Your Honor, can I just make an inquiry what the basis of the Court's ruling is for striking that response? [¶] It seems to me to be a fair response to the question that he was asked.

THE COURT: The basis is that as the initial question about the gun did not have anything to do with the particular answer that was volunteered and since the answer was completely outside the purview of anything that had been revealed in any pretrial discovery, I think that it was improperly before the jury. It was as though this witness brought up something of his own. And so I'm leaning over backwards in favor of the Defense, I realize, on this particular issue. But I don't think it's of that moment.

MR. SORTINO: Can I just make a brief record in that regard, your Honor?

THE COURT: Sure.

MR. SORTINO: In my opinion, the answers seemed to me to be a fair response to Mr. Borges' questions and his follow up.

And in terms of the fact that it's not on the tape itself, both counsel were aware there were long sections of this tape where we couldn't understand what was being said. I think Mr. Tyre [counsel for appellant Gonzales] even yesterday indicated he had intended at one point to ask Mr. Berber about those sections.

I didn't know about that statement prior to Mr. Borges' question, otherwise I would have advised him of that. But I didn't know about it.

And it seems to me it's sort of -- you ask questions about parts of the tape where it's largely unintelligible, you do so at your own peril.

THE COURT: And had the question been phrased that way, I would agree with you. But the context of the question was not about, oh, now let's talk about things that we can't hear on the tape and what was said. That's why I said he was taken completely by surprise about it. And the witness volunteered, and then, in sort of a self-serving declaration on the witness's part, that after he'd made the statement which implicated Mr. Soliz in the handling of the gun, he hastened to add, completely voluntarily, that wasn't on the tape; you couldn't hear it on the tape.

So that's why I'm saying I think that it was a -- a nonresponsive ejaculation as far as the witness was concerned; that Mr. Borges has a right to ask to be stricken, and that will be the ruling.

MR. SORTINO: Well, your Honor, I'd just ask the Court then to admonish the jury to disregard it without going into any explanation that it's self-serving or nonresponsive. I don't want to in any way affect Mr. Berber's credibility on the rest of is testimony.

THE COURT: All right.

MR. BORGES: Just finally, Judge, what I started to say was -- [¶] And I appreciate what the Court is going to do. I just feel it incumbent to make a record. [¶] I feel I should make a motion for a mistrial based upon the information coming in. [¶] But I understand how the Court -- [¶] In fact, I'm so moving at this point based upon the surprise of that response.

MR. TYRE: I would join.

THE COURT: Do you really think that this -- that this little piece of -- this evidence rises to that solemnity that you should abort the entire trial based on that moment?

MR. BORGES: I think that I should make a record on that basis, yes, Judge.

THE COURT: You should make a record but you don't mean this seriously.

MR. BORGES: I'm making a motion for a mistrial, your Honor.

THE COURT: The motion for a mistrial is denied.

THE CLERK: As to each defendant?

THE COURT: As to each defendant, yes.

(15RT 1967-1971.)

Thereafter, in the presence of the jury, the Court stated as follows:

THE COURT: . . . Before we reconvene as to the testimony of this witness, the jury is instructed that the answer of the witness to Mr. Borges' question about the gun where he referred to Jasper or Mr. Soliz engaging in a struggle with Mr. Gonzales over the gun is stricken from the record, and the jury is to disregard that.

When the Court strikes any testimony, then it's to be disregarded entirely; you're not to discuss it in your deliberations; you're to treat it as though you never heard it.

(15RT 1972.)

B. Standard Of Review

"""The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. In the lack of a showing of an abuse of discretion or of prejudice to the defendant, a denial of his motion for a

continuance cannot result in a reversal of a judgment of conviction.'" [Citations.] Entitlement to a midtrial continuance requires the defendant 'show he exercised due diligence in preparing for trial.' [Citation.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1105-1106; see also *People v. Gray, supra,* 37 Cal.4th at pp. 224-225; *People v. Panah, supra,* 35 Cal.4th at p. 423 [defendant bears the burden of establishing that denial of a continuance request was an abuse of discretion]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1125-1126; *People v. Samayoa* (1997) 15 Cal.4th 795, 840.)

"To establish good cause for a continuance, defendant had the burden of showing that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven." (*People v. Howard* (1992) 1 Cal.4th 1132, 1171.) "In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of a motion for a continuance does not require reversal of a conviction." (*People v. Barnett, supra,* 17 Cal.4th at p. 1126.)

A trial court has "'substantial discretion in ruling on midtrial motions to continue the case, and appellate challenges to a trial court's denial of such a motion are rarely successful.'" (*People v. Wilson* (2005) 36 Cal.4th 309, 352, citing *People v. Seaton* (2001) 26 Cal.4th 598, 660; see also *People v. Roybal* (1998) 19 Cal.4th 481, 504; *People v. Fudge, supra,* 7 Cal.4th at p. 1106.)

C. The Court Properly Denied The Mid-Trial Continuance Request

Appellant Soliz argues that rather than strike Mr. Berber's testimony and admonish the jury not to consider it, the trial court should instead have granted his request for a mid-trial continuance to attempt to locate and secure an expert to enhance the tape recording "to ascertain whether the alleged conversation could be recovered from the tape." (SAOB 87.)

This contention is without merit. As the prosecuting attorney stated (15RT 1969), appellant Soliz cross-examined Mr. Berber about parts of his conversation with appellant Gonzales that did not appear on the tape. (15RT 1955.) As such, he should not now be heard to complain when the answer he ultimately received was not what he expected.

In any event, under the applicable standards, appellant Soliz failed in his attempt to establish good cause for a continuance. "First [appellants] did not show that any expert existed who would be willing and able to offer material testimony within a reasonable time. [Citation.] Instead, [appellants] could only offer the prospect of further delay while [they] searched." (*People v. Howard*, *supra*, 1 Cal.4th at p. 1171; see also *People v. Roybal, supra*, 19 Cal.4th at p. 504; *People v. Beeler* (1995) 9 Cal.4th 953, 1003-1004.)

Second, appellants knew full well that the tape-recorded conversation between appellant Gonzales and Mr. Berber contained unintelligible sections, and had a more than adequate opportunity before and during trial to locate and secure an expert to "enhance" the tape, assuming one existed and that such an enhancement could have been done.[57/] "To support a continuance motion to secure a witness's attendance at trial, a showing of good cause requires a

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57. At the second penalty phase, Mr. Berber again testified, and the tape recording and transcription were again introduced. (Peo. Exhs. 156, 157.) Appellants did not call a tape-recording enhancement expert at the second penalty phase.

demonstration, among other things, that the defendant exercised due diligence to secure the witness's attendance." (*People v. Wilson, supra*, 36 Cal.4th at p. 352.) Appellants failure to show diligence in attempting to secure such an expert prior to trial further defeats this claim.

Third, appellants describe no actual prejudice flowing from the absence of a continuance. Appellant Soliz presumes prejudice exists, arguing that had his request for a continuance been granted, it would have "allowed the defense a reasonable opportunity to counter this damaging testimony [from Mr. Berber]." (SAOB 89.) This is not legally cognizable prejudice. To establish prejudice, appellant Soliz must show affirmatively that in the absence of the claimed error (here, denial of his mid-trial motion to continue to find an expert to enhance a tape recording), a result more favorable to him probably would have ensued. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

Here, as stated above, appellants have not cited any portion of the record remotely suggesting that subsequent testing or enhancement of the tape recording would necessarily have disclosed anything relevant or beneficial. (See *People v. Barnett, supra*, 17 Cal.4th at p. 1126.) It is rank speculation to conjecture the possibility of beneficial evidence from an expert enhancement of the tape. In sum, appellants cannot point to anything in the record to establish an expert could have been located, and that even if located, such an expert would have been available to offer anything helpful or relevant.

Finally, appellants have not demonstrated the trial court's ruling denied them their state and federal constitutional rights to due process of law, confrontation of witnesses, the effective assistance of counsel, or the right to reliable guilt and penalty determinations.

> "[I]t is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589 [11

> L.Ed.2d 921, 931, 84 S.Ct. 841].) Instead, "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (*Id.*, at pp. 589, 591 [11 L.Ed.2d at pp. 931- 932].) In this case, defendant could not show that he had been diligent in securing an expert witness's attendance, that a substitute would be available within a reasonable time, or that any witness, assuming one could be found, would say something material and helpful to the defense. Under these circumstances, "[g]iven the deference necessarily due a state trial judge in regard to the denial or granting of continuances," the court's ruling does not support a claim of error under the federal Constitution. (*See Ungar v. Sarafite*, *supra*, 376 U.S. at p. 591 [11 L.Ed.2d at p. 932]; cf. *Hicks v. Wainwright* (5th Cir. 1981) 633 F.2d 1146, 1149.)

(*People v. Howard*, *supra*, 1 Cal.4th at pp. 1171-1172.)

Here, as stated above, appellants have not established they could find an expert, or that even if one could have been found, he would necessarily have offered anything helpful, relevant and admissible. Additionally, as stated above, the court in fact struck the complained-of testimony and admonished the jury to disregard it. (15RT 1972.) "It must be presumed that the jurors acted in accordance with the instruction and disregarded the question and answer." (*People v. Cox* (2003) 30 Cal.4th 916, 961; see also *People v. Burgener*, *supra*, 29 Cal.4th at p. 879 ["[A]ny error in admitting the evidence was harmless, since the court ultimately instructed the jury to disregard the evidence of the threats. We presume the jury followed the court's admonition."].) Finally, counsel had more than an adequate opportunity during cross-examination to accomplish his objective of impeaching Mr. Berber's testimony.

For all of the reasons set forth above, there was no abuse if discretion in denying the mid-trial request for a continuance. And for the same reasons,

and in light of the overwhelming evidence pointing exclusively towards appellants' guilt, even assuming arguendo any error, appellants have failed to demonstrate that it violated their state and federal constitutional rights to due process of law, confrontation of witnesses, the effective assistance of counsel, or the right to reliable guilt and penalty determinations. (See., e.g., *People v. Samayoa*, *supra*, 15 Cal.4th at pp. 8401-841; *People v. Howard*, *supra*, 1 Cal.4th at pp. 1171-1172.)

X.

THE TRIAL COURT DID NOT ERR WHEN IT DENIED THE MOTION FOR A MISTRIAL

In a related contention, appellant Soliz, joined by appellant Gonzales, argues the trial court erred when it denied his motion for a mistrial, because the court "failed to recognize the significance of Berber's improper testimony and the irreparable damage to appellant's theory of defense." (SAOB 90-95; GAOB 574.)

Respondent disagrees and submits that even assuming arguendo that Mr. Berber's testimony was properly stricken, the court did not abuse its discretion when it denied the motion for a mistrial.

"Denial of a motion for a mistrial is reviewed for abuse of discretion and the motion should be granted only when 'a party's chances of receiving a fair trial have been irreparably damaged.'" (*People v. Jablonski* (2006) 37 Cal.4th 774, 828; see also *People v. Panah*, *supra*, 35 Cal.4th at pp. 444, 452-453.) "A trial court should grant a mistrial only if the defendant will suffer prejudice that is ""incurable by admonition or instruction."" [Citations.] In making this assessment of incurable prejudice, a trial court has considerable discretion." (*People v. Davis, supra,* 36 Cal.4th at p. 553.)

Applying these principles, it is clear appellant Soliz's claim of incurable prejudice lacks merit. First, as the prosecuting attorney stated (15RT 1969), appellant Soliz cross-examined Mr. Berber about parts of his conversation with appellant Gonzales that did not appear on the tape. (15RT 1955.) As such, appellants should not now be heard to complain when the answer ultimately received was not what was expected.

In any event, the trial court struck Mr. Berber's volunteered answer, and ordered the jury to disregard it. (15RT 1972.) Appellants engage "in the unsupported assertion that the trial court's admonition was either inadequate or

ineffective, but we presume the jury followed the court's instructions." (*People v. Panah*, *supra*, 35 Cal.4th at p. 453; see also *People v. Cox, supra,* 30 Cal.4th at p. 961; *People v. Burgener, supra,* 29 Cal.4th at p. 879.)

Finally, as stated above, counsel had more than an adequate opportunity during the defense case to accomplish his objective of impeaching Mr. Berber's testimony. For all of these reasons, and in light of the overwhelming evidence pointing exclusively towards appellants' guilt, even assuming arguendo any error, appellants have failed to demonstrate that it violated their state and federal constitutional rights to due process of law, confrontation of witnesses, the effective assistance of counsel, or the right to reliable guilt and penalty determinations. (See., e.g., *People v. Samayoa*, *supra*, 15 Cal.4th at pp. 8401-841; *People v. Howard*, *supra*, 1 Cal.4th at pp. 1171-1172.)

XI.

THE TRIAL COURT DID NOT ERR WHEN IT DENIED PERMISSION TO CROSS-EXAMINE DETECTIVE LUSK CONCERNING APPELLANT GONZALES' HEARSAY

Appellant Soliz, joined by appellant Gonzales, argues the trial court committed prejudicial error at the guilt phase when it restricted cross-examination of Detective Lusk, the gang expert, as to whether appellant Soliz took credit or admitted responsibility for the shootings of Messrs. Skyles and Price in a taped conversation with Luz Jauregui, his girlfriend and fiancé. (SAOB 96-105; GAOB 574.) The trial court properly restricted the cross-examination of Detective Lusk, and in any event, any error was clearly harmless.

A. Relevant Proceedings Below

The parties stipulated at trial that on October 19, 1996, the San Gabriel Valley Tribune newspaper ran an article describing the Hillgrove Market robbery/murder. The article indicated appellant Gonzales had been arrested for the murder; and quoted a member of the District Attorney's Office saying that "there were two more suspects outstanding" in that murder. (11RT 1267-1268.)

At trial, a tape-recorded conversation between appellant Soliz and his fiancé and girlfriend Luz Emily Jauregui on December 16, 1996, at the Men's Central Jail, was played, and transcriptions were distributed to the jurors. (Peo. Exhs. 24, 25; 11RT 1268-1269.) Ms. Jauregui was appellant Soliz's fiancé, and had been his girlfriend for three years. (19RT 2627.) During their conversation, appellant Soliz said he was letting his moustache grow "'Cause they said these fools are young. That did this shit. I got some glasses. I'm gonna let my hair grow a little. Comb it when I start to court. Put on a suit and tie." (Peo. Exh. 24.) When referring to the published newspaper article,

appellant Soliz told Ms. Jauregui, "It says -- 'cause -- what does it say on Rebs? They got two more suspects. They haven't found 'em yet? Damn, they got one of 'em right here. 'But your honor, I'm a changed man.'" (Peo. Exh. 24.) The tape and transcription were subsequently admitted into evidence. (Peo. Exhs. 24, 25; 16RT 2145, 2153-2154.)

Detective Lusk subsequently testified as a gang expert as to his prior contacts with appellants, and opined that the murder and robbery of Mr. Eaton, and the double murder of Messrs. Skyles and Price, were good examples of crimes committed to enhance the gang member's reputation within the gang, as well as to enhance the reputation of the gang itself, and further opined that the murder of Messrs. Skyles and Price was done in retaliation for the murder of Billy Gallegos. (16RT 2055-2095.)

Detective Lusk was asked on direct examination whether a gang member providing backup for another person for a shooting might later "brag to another gang member and take actual credit for the actual shooting," he replied that a gang member might do so, and when asked to explain stated as follows:

> A: It goes back to respect or fear or one's ranking within the gang. The fact that you're there and maybe you're talking to somebody who was not there. It's like embellishing. You know, I was there; well, take credit for the shooting also. And you're ranking will move up within the gang.

(16RT 2098.)

The following colloquy thereafter occurred during defense counsel's cross-examination of Detective Lusk:

> Q: . . . Do you have any other specific instance where someone has taken credit for a murder and actually described how they killed someone?
>
> A: I can't cite particular instances.

(16RT 2099.)

Q: Are you familiar with the confession that [appellant] Gonzales made on tape, you know, not -- in a van when he was surreptitiously taped?

A: I know [appellant Gonzales] made a statement; I don't know the specific statement, but I know he claimed to have done the shooting.

Q: Well, in your mind is there a difference between a claim of committing a crime and a specific confession wherein the confessor lays out the actual events of how he did the crime?

MR. SORTINO: Objection, vague, your Honor.

THE COURT: Sustained.

(16RT 2100-2101.)

Q: And with respect again to the last area of questioning that [the prosecutor] went into with you, that is, where a person providing backup actually takes the credit for the crime, are you aware in this case that it's the People's theory that [appellant] Gonzales was acting as a backup in this case and that [appellant] Soliz was the actual shooter? Are you aware of that theory?

A: Yes, sir.

Q: And you're aware that it's the People's theory that [appellant] Gonzales was providing backup and that [appellant] Soliz was the actual shooter in this case with respect to the Price/Skyles murder?

A: Yes. sir.

Q: And it's your testimony, as I understand it, that you don't have any other -- you don't have any other instance in mind, as a gang expert, where someone else is confessing to a crime that another gang member did under this scenario?

A: I can't cite specific crimes, no sir.

(16RT 2112-2113.)

Q: You're aware that the defendants in this case have been secretly taped; that is, conversations of the defendants in this case have been taped since they've been in custody, are you not?

A; Yes, sir.

Q: That includes [appellant] Soliz and [appellant] Gonzales; isn't that correct?

A: Yes, sir.

Q: That includes also a person by the name of Augie Mejorado, another person who you've referred to as a gang member, right?

A: Yes, sir.

. . . .

Q: You're aware that there have been many conversations of those three individuals taped with whoever was talking to them at the time of the investigation; isn't that right?

MR. SORTINO: Your Honor, I'm going to object on relevance grounds as to this line of questioning. [¶] I'd like an offer of proof at side bar.

THE COURT: All right.

(The following proceedings were held at sidebar in open court outside the presence of the jury:)

THE COURT: What's the offer? What are you getting at?

MR. BORGES: Your Honor, it's this gang expert's opinion that gang members often take credit for crimes they have not committed. In this case --

THE COURT: No. No. We're talking about now the taping when he's talking to his girlfriend and telling her --

MR. BORGES: And other gang members also that have visited him.

THE COURT: Yes.

MR. BORGES: At no time did Jasper take credit for either of these crimes. In any of these taped conversations.

MR. SORTINO: Well, your Honor, number one, he hasn't listened to the jail tape, so it's not an appropriate inquiry to him.

THE COURT: Right.

MR. SORTINO: And the fact Jasper may not have taken credit is not admissible, because it's hearsay and it's not offered as an admission against him. It's self-serving.

THE COURT: But the context in which he was talking to people had nothing to do with -- there was no reason for him at that time to be bragging to these people, because he was talking to people to reassure them in these other tapes. Richie Rich was being assured, well, you have nothing to worry about; and the girlfriend was being told what her position should be. It had nothing to do with braggadocio in any of those tapes, even if he had listened to them, so that's irrelevant on two bases.

MR. BORGES: All right. I understand the Court's ruling.

(16RT 2131-2133)

Q: At any time in this -- in this -- at any time in this case, are you aware of Jasper taking credit for either of these two crimes?

MR. SORTINO: I'll object. That calls for hearsay, your Honor.

THE COURT: Sustained.

(16RT 2137.)

After the People rested, outside the presence of the jurors, the following colloquy took place:

MR. SORTINO: Your Honor, in light of some of the questions counsel asked Detective Lusk on the stand -- my understanding is he

also wants to call Sergeant Holmes back to the stand. And I'd like offers of proof, because it's my belief he may be asking Sergeant Holmes whether there were any other admissions by [appellant] Soliz on these jail tapes. And I think that's an improper question. It's an attempt to get hearsay in front of this jury: The absence of an admission, and I don't think he can do that properly under the Evidence Code.

THE COURT: You can't. I mean I'm not going to have you prove a negative.

MR. BORGES: All I'm asking for is if there were other tapes; if he was taped on more than one occasion.

MR. SORTINO: I'd object on relevance grounds, then.

THE COURT: Well?

MR. BORGES: Well, based upon the testimony of the gang expert, your Honor, it's common for a gang member to take credit to prove he's a vato loco. And the fact that --

THE COURT: Not in the specific case with which he is being charged with capital offenses. No one ever charged that.

MR. BORGES: That's exactly what the gang expert --

THE COURT: No. No. That's not -- not in the case in which he's being charged. That isn't the situation at all.

MR. BORGES: Well --

MR. SORTINO: Plus I don't believe Detective Lusk's testimony was that it's common. I think he said that it was not uncommon or not unheard of but he wouldn't call it common.

THE COURT: No. But the fact that a defendant might have been taped on a number of situations in which he invoked his rights and he was taped, and so -- and he made no admissions. So you're attempting to prove a negative. I think that would be improper.

MR. BORGES: Your Honor, I'm not attempting to introduce any tapes where my client was advised of his rights and he exercised those rights.

All I'm trying to show to the trier of fact is that if they were taped on one occasion, they were taped on many occasions and we have no -- on no occasion has my client taken credit for either of these crimes.

THE COURT: If you propose to introduce all of the other tapes, then do it in the defense. [¶] And any tapes the People have, you have, --

MR. BORGES: Okay.

THE COURT: -- So if you intend to introduce them, then you can do it as part of your defense, if they're relevant.

MR. BORGES: All I would need from the People is a stipulation that they were taped on so many other times. That's the only evidence --

THE COURT: That isn't going to be forthcoming, because the People aren't going to stipulate to that. [¶] If you want the jury to have other tapes, -- and you have them -- why, then, you can put on a defense and bring in those tapes and give them to the jury. If they have any relevance. [¶] However, if they're self-serving declarations, then it wouldn't be admissible.

MR. SORTINO: That's the point, your Honor, is to the extent that the defendant's statements are being offered for his own defense, they are not admissions, and they are clearly hearsay. I'm not offering those tapes, and for counsel to do that violates hearsay rules.

THE COURT: That's true, Mr. Borges. You know better than that. You can't put in self-serving declarations on behalf of the defense, so --

MR. BORGES: Judge, I'm not attempting to get declarations in. I'm trying to show that there are no declarations; there are no

claims of credit for commission of this crime. I'm trying to show just the opposite.

THE COURT: All right. I think that that would be improper to ask those questions.

(16RT 2148-2150.)

B. The Court Did Not Err

Appellant Soliz argues the court's ruling "restricting appellant from establishing the absence of any evidence that he had not admitted the Skyles/Price shooting" violated the "constitutional imperatives for a full and fair cross-examination." (SAOB 101.) Appellant Soliz argues that even though Detective Lusk had not heard the tape, it was nevertheless appropriate to ask him whether appellant Soliz admitted to the murders of Messrs. Skyles and Price when he spoke to Ms. Jauregui because the tape was in evidence. (*Ibid.*)

Appellant Soliz's claim is without merit, for several reasons. First, Detective Lusk was called and testified *as a gang expert*, and he had never heard, did not rely on, and had no familiarity with the tape recording. It therefore was not error to preclude appellant Soliz from examining Detective Lusk about a tape recording he had not heard, was not a basis of his expert opinions, about which he had no personal knowledge, and to which his responses would clearly have been inadmissible hearsay.[58] (Compare *Washington v. Texas* (1967) 388 U.S. 14, 23 [87 S.Ct. 1920, 18 L.Ed.2d 1019] [state statute arbitrarily deprived defendant of right to call witness "who was physically and mentally capable of testifying *to events that he had personally*

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58. Evidence Code section 1200, subdivision (b), provides that "Except as provided by law, hearsay evidence is inadmissible," and appellants do not point to any provision of the Evidence Code that would provide an exception to the hearsay rule for the purported testimony sought from Detective Lusk.

observed, and who's testimony would have been relevant and material to the defense." (Emphasis added)].)

Second, Detective Lusk testified as a gang expert that a gang member might brag "*to another gang member*" so as to enhance and improve that gang member's ranking in the gang. (16RT 2098.) However, appellant Soliz desired to cross-examine Detective Lusk about whether appellant Soliz admitted to shooting Messrs. Skyles and Price when he was tape recorded speaking to Ms. Jauregui. *Ms. Jauregui was appellant Soliz's girlfriend and his fiancé, not a gang member.* (Peo. Exhs. 24, 25; 11RT 1268-1269; 19RT 2627.) Detective Lusk never offered any testimony or opinion, expert or otherwise, suggesting a gang member might gain some benefit if he admitted to non-gang members (or to his fiancé or girlfriend) to having committed crimes he did not actually commit. Thus, testimony as to whether appellant Soliz, when taped while speaking to his fiancé, admitted that he shot Messrs. Skyles and Price, was both hearsay and irrelevant, as the trial court properly found (16RT 2132), as it would not have impeached Detective Lusk's expert testimony.

Additionally, the tape recording of appellant Soliz's conversation with Ms. Jauregui was in fact played for the jury, transcriptions of it were distributed, and both the tape and the transcription were admitted into evidence. (Peo. Exhs. 24, 25; 11RT 1268; 16RT 2145, 2153-2154.) Thus, what appellant Soliz may have said to his fiancé in that tape recording was already before the jury, and there was no need for Detective Lusk to testify as to what was or was not said on it. Appellant Soliz concedes the tape was in evidence, but suggests it is "unclear as to whether the jury heard the entire tape or the prosecution only played portions of the tape" and that pursuant to Evidence Code section 356, he was "entitled to inquire as to the entire conversation." (SAOB 102, n. 25.) However, the parties in fact stipulated that this tape recording was a true and accurate recording of the visit between Ms. Jauregui and appellant Soliz.

(11RT 1268.) Appellant Soliz's speculation to the contrary, the tape recording speaks for itself; any testimony from Detective Lusk concerning what appears on the tape recording was inadmissible hearsay and irrelevant.

The trial court's ruling that this evidence was irrelevant is subject to review for an abuse of discretion. (*People v. Harrison* (2005) 35 Cal.4th 208, 230; *People v. Cole*, *supra*, 33 Cal.4th at p. 1195; *People v. Clair*, *supra*, 2 Cal.4th at p. 660.) No such abuse of discretion has been demonstrated on these facts.

Finally, appellant Soliz cites *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297], and argues the trial court's ruling shows it was "mechanically" applying the hearsay rule so as to deny him the opportunity to present "significant defense evidence." (SAOB 99-100.) This Court has repeatedly rejected such an argument in a series of cases. Thus, for example, in *People v. Lawley* (2002) 27 Cal.4th 102, this Court held:

> As we observed in *People v. Hawthorne* (1992) 4 Cal.4th 43 [14 Cal.Rptr.2d 133, 841 P.2d 118], however, the court made clear that in reaching its judgment it established no new principles of constitutional law, nor did its holding "'signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.'" (*Id.* at p. 56, quoting *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 302-303 [93 S.Ct. at pp. 1049-1050].) The general rule remains that "'the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.'" (*People v. Cudjo* (1993) 6 Cal.4th 585, 611

[25 Cal.Rptr.2d 390, 863 P.2d 635], quoting *People v. Hall* (1986) 41 Cal.3d 826, 834 [226 Cal.Rptr. 112, 718 P.2d 99].

(*Id.* at pp. 154-155.)

Further, in *People v. Morrison* (2005) 34 Cal.4th 698, this Court held:

Exclusion of the inadmissible hearsay at issue did not violate defendant's constitutional rights. As we recently explained, the United States Supreme Court has never suggested that states are without power to formulate and apply reasonable foundational requirements for the admission of evidence. (*People v. Ramos*, *supra*, 15 Cal.4th at p. 1178, 64 Cal.Rptr.2d 892, 938 P.2d 950 [discussing *Chambers v. Mississippi* (1973) 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297, *Skipper v. South Carolina* (1986) 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1, and other United States Supreme Court decisions]; see also *People v. Phillips* (2000) 22 Cal.4th 226, 238, 92 Cal.Rptr.2d 58, 991 P.2d 145.) Foundational prerequisites are fundamental, of course, to any exception to the hearsay rule. (*People v. Ramos*, *supra*, 15 Cal.4th at p. 1178, 64 Cal.Rptr.2d 892, 938 P.2d 950.)

(*Id.* at pp. 724-725.)

And in *People v. Ramos* (1997) 15 Cal.4th 1133, this Court noted:

The United States Supreme Court has repeatedly acknowledged "the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303 [93 S.Ct. 1038, 1049, 35 L.Ed.2d 297]; see *California v. Green*, *supra*, 399 U.S. at p. 154 [90 S.Ct. at pp. 1932-1933]; *Washington v. Texas* (1967) 388 U.S. 14, 23, fn. 21 [87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019].) This authority extends to conditioning admissibility of certain evidence on foundational prerequisites. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 56-57 [14

Cal.Rptr.2d 133, 841 P.2d 118].) "As a general proposition, criminal defendants are not entitled to any deference in the application of these constraints but, like the prosecution, 'must comply with established rules of procedure and evidence designed to assure both fairness and reliability . . . .' [Citation.]" (*Id.* at p. 57.)

The foundational requirements governing expert testimony are reasonably and rationally formulated to ensure the relevancy of such evidence. (See Evid. Code, §§ 801-803.) They are not "'applied mechanistically to defeat the ends of justice.'" (*Green v. Georgia* (1979) 442 U.S. 95, 97 [99 S.Ct. 2150, 2151-2152, 60 L.Ed.2d 738]; see also *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 294, 297-298, 302 [93 S.Ct. at pp. 1045, 1046-1047, 1049].) Trial courts exercise broad discretion in these matters consistent with constitutional principles. (*See*, *e.g.*, *People v. Price*, *supra*, 1 Cal.4th at p. 416; cf. *People v. Hawthorne*, *supra*, 4 Cal.4th at pp. 57-58.)

(*Id.* at pp. 1175-1176.)

The exclusion of the inadmissible and irrelevant hearsay did not deprive appellants of a significant defense or violate any other constitutional right. (Cf. *Chambers v. Mississippi, supra,* 410 U.S. at pp. 302-303.) As stated above, the actual tape recording was played to the jury, and appellants have pointed to nothing which would suggest, contrary to their stipulation below, that the tape was not accurate and complete. Any error in excluding further examination of Detective Lusk was harmless under any standard. (*People v. Morrison, supra,* 34 Cal.4th 698 at p. 726.)

XII.

THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANTS OF THE FIRST DEGREE MURDERS OF MESSRS. SKYLES AND PRICE

Appellant Gonzales argues there was insufficient evidence to establish he aided and abetted in the first degree murders of Messrs. Price and Skyles. (GAOB 167-181.) Appellants both contend the evidence was insufficient to establish premeditation and deliberation as to the double murder of Messrs. Skyles and Price. (GAOB 181-189; SAOB 106-109.) Respondent disagrees with both contentions.

A. Standard Of Review

"'To determine [the validity of a claim of insufficient] evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole. [Citations.]' (*People v. Johnson* [(1993)] 6 Cal.4th 1, 38, [23 Cal.Rptr.2d 593, 859 P.2d 673].) If we determine that a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, [99 S.Ct. 2781, 61 L.Ed.2d 560]), as is the due process clause of article I, section 15 of the California Constitution (*People v. Berryman* [(1993)] 6 Cal.4th [1048] at p. 1084, [25 Cal.Rptr.2d 867, 864 P.2d 40].)"

(*People v. Memro* (1995) 11 Cal.4th 786, 861.)

> The standard of appellate review is the same in cases in which the People rely primarily on circumstantial evidence. Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" "Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt."

(*People v. Bean* (1988) 46 Cal.3d 919, 932-933; see also *People v. Chatman* (2006) 38 Cal.4th 344, __ [42 Cal.Rptr.3d 621, 660]; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1329.)

B. There Was Sufficient Evidence To Show Appellant Gonzales Aided And Abetted In The Murders Of Messrs. Skyles And Price

Appellant Gonzales complains there was insufficient evidence to establish he aided and abetted in the murders of Messrs. Skyles and Price, because the evidence showed only that "[h]e was merely present at the scene watching the actions of [appellant Soliz]," and that he "did nothing to aid, promote, encourage or instigate the commission of the crimes." (GAOB 171-172.) Appellant Gonzales' argument is particularly ironic, given that he in fact told Mr. Berber that he shot Messrs. Skyles and Price, while appellant Soliz

remained in the car. (See Peo. Exhs. 57, 58 at 3.)[59] In any event, this claim is without merit.

> "All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." (§ 31.) Accordingly, an aider and abettor "shares the guilt of the actual perpetrator." The mental state necessary for conviction as an aider and abettor, however, is different from the mental state necessary for conviction as the actual perpetrator.
>
> The actual perpetrator must have whatever mental state is required for each crime charged, ... An aider and abettor, on the other hand, must "act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." The jury must find "the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense . . . ." Once the necessary mental state is established, the aider and abettor is guilty not only of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target offense.

(*People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123, citations omitted; see also *People v. McCoy* (2001) 25 Cal.4th 1111, 1117; *People v. Beeman* (1984) 35 Cal.3d 547, 560.)

> Aider and abettor liability is thus vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's

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59. Indeed, appellant Gonzales testified at the second penalty phase that he shot Messrs. Skyles and Price, and that appellant Soliz remained inside the car. (32 RT 4209-4210, 4273, 4281-4282, 4291, 4297-4298.)

own actions. When a person "chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts . . . .'" (*People v. McCoy, supra,* 25 Cal.4th at p. 1118, citations omitted.)

"The 'act' required for aiding and abetting liability need not be a substantial factor in the offense. '"Liability attaches to anyone 'concerned,' however slight such concern may be, for the law establishes no degree of the concern required to fix liability as a principal."'" (*People v. Durham* (1969) 70 Cal.2d 171, 185, fn. 11.)

The trial court gave the standard CALJIC instructions with regard to aiding and abetting, which stated, inter alia, that "persons concerned in the commission of a crime who are regarded by law as principals in the crime thus committed and equally guilty thereof" include "[t]hose who aid and abet the commission of the crime." (3CT 688 [CALJIC No. 3.00].) It further instructed that "a person who aids and abets the commission of a crime need not be personally present at the scene of the crime," that "[m]ere presence at the scene of the crime which does not itself assist the commission of the crime does not amount to aiding and abetting," and that "[m]ere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (3CT 689 [CALJIC No. 3.01].)

Appellant Gonzales complains that despite his statements to Mr. Berber that he in fact killed Messrs. Skyles and Price, he was convicted under an aiding and abetting theory, and the evidence showed only that he stood next to the car when appellant Soliz spoke with and shot Messrs. Skyles and Price. (GAOB 180-181.)

Respondent has already set forth above the overwhelming evidence of appellant Gonzales' guilt of the murder of Messrs. Skyles and Price. (See Argument I, above.) Appellants armed themselves and entered the backseat of a car; they slowly passed by Messrs. Skyles and Price twice, appellants

announced they knew the victims; appellants got out of the car together; appellants argued with the victims; Messrs. Skyles and Price were shot repeatedly in the head and body from a close range; appellants ran back to and entered the car together and told an occupant in the car that she did not see or know anything; the victims wore clothing associated with a rival gang, and a gang expert testified they had been shot in retaliation and to avenge the gang-related murder two weeks prior of Puente gang member Billy Gallegos.

This evidence demonstrated more than appellant Gonzales' "mere presence" at the scene "watching the actions of [appellant Soliz]." (GAOB 171-172.) The Court should decline appellant Gonzales' invitation to substitute its judgment for that of the jury. Indeed, this argument was made to and rejected by the jury, and the evidence reasonably justified the jury's findings. Appellant Gonzales has pointed to nothing suggesting their findings are unworthy of support.

C. There Was Sufficient Evidence Of Premeditation And Deliberation Of The Murders Of Messrs. Skyles And Price

Appellants argue there was insufficient evidence of premeditation and deliberation as to the murders of Messrs. Skyles and Price in counts IV and V because "there was no evidence of planning activity," that the gang expert testimony concerning the motive was "in reality just speculation," and that "the reasonable inference from the record is that the killings were the result of an unconsidered or rash impulse, which is more consistent with a conviction for second degree murder." (GAOB 181-187; SAOB 108-109.) Respondent disagrees.

> A murder that is premeditated and deliberate is murder of the first degree. (§ 189.) "In this context, 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined

upon as a result of careful thought and weighing of considerations for and against the proposed course of action.'" [Citation.] "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." [Citation.] A reviewing court normally considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported--preexisting motive, planning activity, and manner of killing -- but "[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation." [Citations.]

(*People v. Jurado* (2006) 38 Cal.4th 72, 118-119; see also *People v. Elliot* (2005) 37 Cal.4th 453, 471.)

When evidence of all three categories is not present, "we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing." [Citation.] But these categories of evidence, borrowed from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, 73 Cal.Rptr. 550, 447 P.2d 942, "are descriptive, not normative." [Citation.] They are simply an "aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." [Citation.]

(*People v. Cole, supra*, 33 Cal.4th at p. 1224.)

[W]hile premeditation and deliberation must result from "'careful thought and weighing of considerations[,]'" we continue to apply the principle that "[t]he process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow

each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ."

(*People v. Manriquez, supra*, 37 Cal.4th at p. 577, citations omitted; see also *People v. Stitely, supra*, 35 Cal.4th at p. 543.)

"Review on appeal of the sufficiency of the evidence supporting the finding of premeditated and deliberate murder involves consideration of the evidence presented and all logical inferences from that evidence in light of the legal definition of premeditation and deliberation that was previously set forth." (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) "A judgment will not be reversed so long as there is substantial evidence to support a rational trier of fact's conclusion that the murder committed was premeditated and deliberate." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 658.) "'Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Manriquez, supra,* 37 Cal.4th at p. 577.)

Here, the jury was instructed as to the definition of premeditation and deliberation pursuant to CALJIC No. 8.20, which has repeatedly been found to be a correct statement of the law. (*People v. Millwee* (1998) 18 Cal.4th 96, 135, fn. 13; *People v. Perez, supra*, 2 Cal.4th at p. 1123; *People v. Lucero* (1988) 44 Cal.3d 1006, 1021.) CALJIC No. 8.20 defined premeditated and deliberate murder as follows:

All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree.

The word "willful" as used in this instruction, means intentional.

The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for

and against the proposed course of action. The word "premeditated" means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

(3CT 688-689.)

Thus, in addition to the instructions on aiding and abetting set forth above, the trial court instructed the jury pursuant to CALJIC No. 3.31 that in each of the charged crimes of murder "there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the

perpetrator and unless such specific intent exists the crime to which it relates is not committed." (3CT 695.) The court also instructed pursuant to CALJIC No. 8.10 that the intent necessary for murder was "malice aforethought" (3CT 696); that "aforethought" meant "that the required mental state must precede rather than follow the act" (3CT 697); and that all murder "perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree" and that "'premeditated' means considered beforehand." (3CT 698.) The instructions on first degree murder further provided:

> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder in the first degree.

(*Ibid.*)

The overwhelming evidence supporting counts IV and V was summarized above. (See Argument I, above.) Appellants armed themselves and entered the backseat of a car; they slowly passed by the victims twice and announced they knew the victims; they got out of the car together; they argued with the victims; the victims were shot repeatedly in the head and body from close range; appellants ran back to and entered the car together and told an occupant in the car that she did not see or know anything; the victims wore gang clothing; and a gang expert testified they had been shot in retaliation and to avenge the gang-related murder two weeks prior of Billy Gallegos, another member of appellants' gang.

That appellants armed themselves prior to the murders supports the inference that they "'planned a violent encounter.'" (*People v. Elliot, supra,* 37

Cal.4th at p. 471.) Moreover, "[t]he act of planning--involving deliberation and premeditation -- requires nothing more than a 'successive thought[ ] of the mind,' and the brief period between the first time appellants passed the victims and then returning to the victims, parking and exiting the car is adequate for appellants "to have reached the deliberate and premeditated decision to kill [Messrs. Skyles and Price]." (*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 648.)

"The method of killing here also suggests premeditation." (*People v. Elliott, supra*, 37 Cal.4th at p. 471.) There were seven gunshot wounds on Mr. Price's body. (Peo. Exhs. 146, 149; 30RT 3905-3906; 32RT 4141.) The cause of Mr. Price's death was two gunshot wounds to his head. (30RT 3907-3908, 3910, 3915.) A bullet was recovered from Mr. Price's body. (Peo. Exh. 133; 29RT 3630-3631; 30RT 3912, 3927-3928; 32RT 4141.) There were nine gunshot wounds to Mr. Skyles' body. (Peo. Exh. 149; 30RT 3916, 3934-3936; 32RT 4141.) The primary cause of Mr. Skyles' death was a gunshot wound to his back, which entered and went through his lung, heart and liver. (30RT 3916-3917, 3926-3927.)

"A reasonable jury could have construed these shots as an ultimately unnecessary coup de grace to a fatal attack effected with a calculated design to kill." (*Elliot, supra,* 37 Cal.4th at p. 471.) And even if the victims' wounds "were only suggestive of rage, an inference of premeditation is not precluded." (*People v. San Nicolas*, *supra*, 34 Cal.4th at .p. 648.)

Finally, there was evidence of a pre-existing motive for the murders -- to avenge the murder of fellow Puente gang member Billy Gallegos by members of the rival Crips street gang.[60/] Appellant Soliz argues this motive

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60. At the second penalty phase, appellant Gonzales testified he went to the gas station to talk to the victims about the gang-related killing of his friend Billy Gallegos, and that he knew they were gang members. (32RT 4209-4210, 4264-4265, 4287)

theory was speculative and "made little sense," as the gang expert testified that the victims were not gang members, and that in any event, one victim wore clothing consistent with the Crips street gang and the other wore clothing consistent with the Bloods street gang. (SAOB 108.) Of course, the gang expert testified that the fact that the victims may not have been members of the Crips did not mean they were not killed in retaliation for the murder of Mr. Gallegos as "if the individual or individuals are found within the general area of that gang and they meet the right race; the right age; possibly the right style of dress, they're gonna be targeted." (16RT 2093.) He further testified that "even if they don't hit the right target, it goes back to enhancing the street gangs reputation: these guys are so crazy they don't care who they kill; they'll kill anybody." (16RT 2094.) Thus, Messrs. Skyles and Price were murdered "regardless of whether they were involved in the Gallegos murder; regardless of whether they were gang members themselves, their [because] appearance; their age fit the general description of who needed to be taken out." (*Ibid.*) And the jury found true the special allegations pursuant to Penal Code section 186.22 that the offenses were committed to benefit a street gang. "In any event, '[w]e have never required the prosecution to prove a specific motive before affirming a judgment, even one of first degree murder. A senseless, random, but premeditated, killing supports a verdict of first degree murder.'" (*People v. Thomas* (1992) 2 Cal.4th 489, 519.)

There was ample evidence of the three factors -- planning, motive, and manner of killing -- to support the inference reasonably and rationally found by the jury that appellants' killing of Messrs. Skyles and Price occurred as the result of "preexisting reflection rather than unconsidered or rash impulse." (*People v. Manriquez, supra,* 37 Cal.4th at p. 577, internal quotes omitted; see also *People v. Jablonski, supra,* 37 Cal.4th at p. 817.)

As there was sufficient evidence to support the theory that appellants premeditated and deliberated the killings of Messrs. Skyles and Price, the claim that appellants' right to a reliable sentence under the Eighth Amendment to the United States Constitution (SAOB 106) is also without merit. (See *People v. Young* (2005) 34 Cal.4th 1149, 1184.)

XIII.

THE COURT PROPERLY INSTRUCTED THE JURY ON THE LAW OF AIDING AND ABETTING THAT THE CRIME OF MURDER WAS A NATURAL AND PROBABLE CONSEQUENCE OF THE CRIME OF SIMPLE ASSAULT

As set forth above, the jury was instructed and the prosecuting attorney argued that appellant Gonzales was liable for the murders of Messrs. Skyles and Price as an aider and abettor, because the murders were a natural and probable consequence of assault. Appellant Gonzales, joined by appellant Soliz, argues that "one interpretation of the evidence" was that appellant Gonzales thought appellant Soliz intended only to commit a simple assault -- "to engage in a fisfight" -- with Messrs. Skyles and Price. (GAOB 210, 212; SAOB 308.) Thus, citing this Court's decision in *People v. Prettyman* (1996) 14 Cal.4th 248 ("*Prettyman*"), and the appellate court decision in *People v. Hickles* (1997) 56 Cal.App.4th 1183, appellant Gonzales argues the court below erred when it instructed the jury at the guilt phase on the law of aiding and abetting pursuant to CALJIC No. 3.02, because murder as a matter of law can never be a "natural and probable consequence" of the crime of simple assault. (GAOB 190-216.) Respondent disagrees.

A. Relevant Jury Instructions Given

The trial court instructed the jury with CALJIC No. 3.02 as follows:

> One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted.

Therefore, you may find the defendant guilty of the crime of murder as charged in Counts 4 and 5, even if he did not intend to commit murder, if you are satisfied beyond a reasonable doubt that:

1. The crime of assault was committed;

2. That the defendant aided and abetted that crime;

3. That a co-principal in that crime committed the crime of murder; and

4. The crime of murder was a natural and probable consequence of the commission of the crime of assault.

The crime of assault is defined elsewhere in these instructions.

(3CT 690.)

The trial court further instructed the jury with a modified version CALJIC No. 9.00, as follows:

In order to prove an assault, each of the following elements must be proved:

1. A person willfully committed an act which by its nature would probably and directly result in the application of physical force on another person; and

2. At the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another.

"Willfully" means that the person committing the act did so intentionally. To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted it may be considered in connection with other evidence in determining whether an assault was committed.

(3CT 691.)

B. There Was No Error

Respondent first contends any federal constitutional claims were waived by the failure to raise them below. (*United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1770, 123 L.Ed.2d 508].) In any event, there was no error, for several reasons.

First, *Prettyman* did not decide or hold "that a jury could not properly find that murder was a natural and probable consequence of simple assault." (GAOB 204.) "It is axiomatic a decision does not stand for a proposition not considered by the court." (*People v. Dickey* (2005) 35 Cal.4th 884, 901.) Indeed, this Court's language in *Prettyman* actually contradicts appellant Gonzales' argument. In this regard, under the natural and probable consequences doctrine, a conspirator is liable for "the unintended acts by coconspirators if such acts are . . . the reasonable and natural consequence of the object of the conspiracy," even if the act was not intended as part of the agreed-upon objective, and even if the conspirator did not know of the act and was not present when it was committed. (*People v. Hardy* (1992) 2 Cal.4th 86, 188; see also *People v. Prettyman, supra*, 14 Cal.4th at p. 260.)

The critical portion of *Prettyman* cited by appellant Gonzales concerns this Court's discussion of how an instruction on the target offense will "facilitate the jury's task of determining whether the charged crime allegedly committed by the aider and abettor's confederate was indeed a natural and probable consequence of any uncharged target crime that, the prosecution contends, the defendant knowingly aided and abetted." (GAOB 194; *People v. Prettyman, supra*, 14 Cal.4th at p. 267.) This Court in *Prettyman* thereafter gave examples based on the facts of the case before it, upon which appellant Gonzales bases his argument:

> If, for example, the jury had concluded that defendant Bray had encouraged codefendant Prettyman to commit an assault on [the victim]

but that Bray had no reason to believe that Prettyman would use a deadly weapon such as a steel pipe to commit the assault, then the jury could not properly find that the murder . . . was a natural and probable consequence of the assault encouraged by Bray. [Citation.] If, on the other hand, the jury had concluded that Bray encouraged Prettyman to assault [the victim] with the steel pipe, or by means of force likely to produce great bodily injury, then it could appropriately find that Prettyman's murder of [the victim] was a natural and probable consequence of that assault. Therefore, instructions identifying and describing the crime of assault with a deadly weapon or by means of force likely to produce great bodily injury (§ 245) as the appropriate target crime would have assisted the jury in determining whether Bray was guilty of . . . murder under the "natural and probable consequences" doctrine.

(*Prettyman*, *supra*, 14 Cal.4th at p. 267; GAOB 196.)

The Court in *Prettyman* noted: "Murder, for instance, is not the 'natural and probable consequence' of 'trivial' activities. To trigger application of the 'natural and probable consequences' doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed." (*Id.* at p. 269.) The Court concluded that "once the trial court, without a request therefor, chose to instruct the jury on the 'natural and probable consequences' rule, it had a duty to issue instructions identifying and describing each potential target offense supported by the evidence." (*Id.* at p. 270.)

This Court in *Prettyman* held that the lower court's error in failing to instruct the jury as to the target offense in that case was not prejudicial, as the parties did not refer to the "natural and probable consequences" doctrine in their arguments to the jury, and because "[t]here was no evidence of any other

possible 'target' apart from Prettyman's assault on [the victim], an act that was indisputably criminal." (*Id.* at p. 273.)

Prettyman did not hold and does not stand for the proposition put forward by appellant Gonzales that simple assault as a matter of law may not be the target offense of murder under the natural and probable consequences theory. Instead, this Court in *Prettyman* observed that *under the facts of the case before it*, it would have been proper for the jury in that case to conclude the murder was a natural and probable consequence of an aggravated or armed assault, but that if the female had no reason to believe the male would use a deadly weapon, it would have been unreasonable for a jury to conclude the murder was a natural and probable consequence of an unarmed assault.

Here, in contrast, appellant Soliz, the murderer of Messrs. Skyles and Price, was in fact armed with a deadly weapon, and the jury could reasonably and rationally conclude appellant Gonzales was aware of this.[61/]

Moreover, other language in *Prettyman* contradicts appellant Gonzales' argument. For example, the Court discussed the first case to apply the natural and probable consequences doctrine, *People v. Kauffman* (1907) 152 Cal. 331, in which the target offense was "breaking into the safe at the cemetery." (*Prettyman*, *supra*, 14 Cal.4th at pp. 260-261.) The Court further referred to subsequent cases applying the natural and probable consequences doctrine, including *People v. Montano* (1979) 96 Cal.App.3d 221, 226, in which the target offense of battery was described by the Court as "beat[ing] up rival gang members." (*Prettyman*, *supra*, at p. 262.)

Appellant Gonzales is correct that the Court in *Prettyman* cited *People v. Butts* (1965) 236 Cal.App.2d 817, 836, but incorrect in characterizing the citation as one "in support of its conclusion that a jury could not properly find that murder was a natural and probable consequence of simple assault."

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61. Indeed, appellant Gonzales was himself armed. (14RT 1810.)

(GAOB 204.) The Court in *Prettyman* merely cited *Butts* when it gave examples based on the facts of the case before it:

> [I]f the jury had concluded that [the] defendant . . . had encouraged [the] codefendant . . . to commit an assault on [the victim] but that [the defendant] had no reason to believe that [the codefendant] would use a deadly weapon such as a steel pipe to commit the assault, then the jury could not properly find that the murder of [the victim] was a natural and probable consequence of the assault encouraged by [the defendant]. (*People v. Butts*, *supra*, 236 Cal.App.2d at p. 836, 46 Cal.Rptr. 362.)

(*Prettyman*, *supra*, 14 Cal.4th at p. 267.) This Court's reference in *Prettyman* to *Butts* nowhere supports a holding that as a matter of law, murder can never be a natural and probable consequence of an assault. Indeed, *Butts* itself recognized that under other circumstances where "death was a 'reasonable and natural consequence,'" an aider and abettor to an assault may be guilty of murder. (*Butts*, *supra*, 236 Cal.App.2d at p. 836.) And later appellate court cases have expressly rejected *Butts* to the extent it can be read as appellant Gonzales reads it. (See, e.g., *People v. Montes* (1999) 74 Cal.App.4th 1050, 1055-1056;[62] *People v. Godinez* (1992) 2 Cal.App.4th 492, 501, fn. 5.[63])

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62. "To the extent *Butts* requires one accused of aiding and abetting to know of and encourage the perpetrator's intended use of a weapon, it is out of step with Supreme Court authority. 'The only requirement is that defendant share the intent to facilitate the target criminal act and that the crime committed be a foreseeable consequence of the target act.' [¶] *Butts* is also more than three decades old, a remnant of a different social era, when street fighters commonly relied on fists alone to settle disputes. Unfortunately, as this case illustrates, the nature of modern gang warfare is quite different." (Brackets and citations omitted.)

63. "Our review of *Butts* reveals it is at best unsupported by any law, and at worst inconsistent with subsequent authority."

Finally, respondent notes the following language in *Prettyman* contradicts appellant Gonzales' argument:

> [A]t trial[,] each juror must be convinced, beyond a reasonable doubt, that the defendant aided and abetted the commission of *a criminal act*, and that the offense actually committed was a natural and probable consequence of that act.

(*Prettyman*, *supra*, 14 Cal.4th at p. 268, italics original.) Likewise, in *People v. Mendoza*, *supra*, 18 Cal.4th 1114, this Court held as follows:

> A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of *any other crime* the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor actually foresaw the additional crime, but *whether, judged objectively, it was reasonably foreseeable.*

(*Id.* at p. 1133, italics added; see also *People v. Hayes, supra*, 21 Cal.4th at p. 1271; *People v. Croy* (1986) 41 Cal.3d 1, 11, fn. 5 [an aider and abettor "is guilty not only of the offense he intended to facilitate or encourage, but also of *any reasonably foreseeable offense* committed by the person he aids and abets.]" (Italics added.).)

And finally, in *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 106-108, this Court rejected the notion that brandishing a firearm cannot satisfy the implied malice element of murder as a matter of law.

> By asserting that the jury, in considering the matter of implied malice, should have limited its inquiry to the inherent dangerousness of the offense of brandishing a firearm, defendant seeks to diminish the significance of the circumstances surrounding his own conduct. . . . The "natural consequences" . . . of a person's act in brandishing a firearm necessarily relate to the context in which the act was committed: for

example, the brandishing (and subsequent discharge) of a firearm during a heated dispute justifiably could lead a jury to reach a verdict different from one which might be reached in a case involving an accidental shooting during a friendly hunt for wild game.

(*Id.* at pp. 107-108.)[64/]

Appellant Gonzales also cites *People v. Hickles* (1997) 56 Cal.App.4th 1183, which, like *Prettyman*, dealt with the trial court's failure to identify and define the target offenses. There, the appellate court distinguished the situation in *Prettyman*, "where the only potential target crime shown by the evidence was an assault with a deadly weapon,"and found that in their case, "the evidence could support a jury's determination that appellant knowingly and intentionally aided and abetted a murder, an assault with a deadly weapon, a simple assault, or even an argument," and thus reversal was required under *Prettyman* because the jury could have concluded that the defendant aided and abetted an assault and battery "but had no knowledge [that the murderer] was armed and no intention to aid and abet an altercation involving force likely to produce great bodily injury." (*Id.* at p. 1197.) *Hickles* was merely a straightforward

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64. See also *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10 [evidence supported conviction of murder as a natural and probable consequence of simple assault, a misdemeanor]; *People v. Montes*, *supra*, 74 Cal.App.4th at p. 1056 ["targeted offenses of simple assault and breach of the peace for fighting in public"]; *People v. Lucas* (1997) 55 Cal .App.4th 721, 731-732 [evidence supported conviction of murder as a natural and probable consequence of either assault with a deadly weapon or misdemeanor brandishing of a firearm]; *People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1375-1378 [in context of gang-related confrontation, murder was a natural and probable consequence of simple assault]; *People v. King* (1938) 30 Cal.App.2d 185, 200-204 [murder was the natural and probable consequence of a conspiracy to assault the victim]; *People v. Ford* (1914) 25 Cal.App. 388, 396-401 [murder was the natural and probable consequence of a conspiracy between union leader and striking laborers' to resist arrest or breach the peace].

application of *Prettyman*, and it too cannot stand for the proposition appellant Gonzales advances.

Unlike the situations that arose in both *Prettyman* and *Hickles*, the jury in the instant case was correctly instructed as to the target offense, and was specifically and correctly provided with an instruction which defined the elements of the target offense. (3CT 690-692.) Under the facts of the instant case, it was reasonably foreseeable that when the appellants simultaneously left the car to address two victims they believed to be rival gang members, and both appellants left the car armed, that the fatal shooting of Messrs. Skyles and Price would be the natural and probable consequence of the assault. There was no error.

XIV.

THE COURT HAD NO SUA SPONTE DUTY TO INSTRUCT THE JURY AS TO VOLUNTARY MANSLAUGHTER AS A LESSER INCLUDED OFFENSE

Appellants argue the trial court erred at the guilt phase by not instructing the jury sua sponte on voluntary manslaughter as a lesser included offense of the murders of Messrs. Skyles and Price based upon a sudden quarrel or heat of passion. (GAOB 217-237; SAOB 110-116.) Respondent again disagrees.

> "[A] defendant has a constitutional right to have the jury determine every material issue presented by the evidence." "'To protect this right and the broader interest of safeguarding the jury's function of ascertaining the truth, a trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present.'" Conversely, even on request, the court "has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction."

(*People v. Cole*, *supra*, 33 Cal.4th at p. 1215.)

> We have held that a defendant has a constitutional right to have the jury determine every material issue presented by the evidence and that, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present, the failure to instruct on a lesser included offense, even in the absence of a request, constitutes a denial of that right. """Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive."""
>
> "Manslaughter is 'the unlawful killing of a human being without malice.'" [Citation.] A court is not obligated to instruct sua sponte on voluntary manslaughter as a lesser included offense in the absence of

substantial evidence that the defendant acted in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or that the defendant killed in """unreasonable self-defense."""

(*People v. Benavides* (2005) 35 Cal.4th 69, 102, citations omitted.)

"The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must, subjectively and actually, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are viewed objectively. As we explained long ago in interpreting the language of section 192, 'this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.'"

(*People v. Cole*, *supra*, 33 Cal.4th at pp. 1215-1216.)

"'To satisfy the objective or "reasonable person" element of this form of voluntary manslaughter, the accused's heat of passion must be due to "sufficient provocation."'" (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1144.) "Accordingly, for voluntary manslaughter, 'provocation *and* heat of passion must be affirmatively demonstrated.'" (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1143, italics in original.)

Here, appellants argue there was evidence of "provocation" because: (1) the gang expert testified the shootings of Messrs. Skyles and Price "were in retaliation for the murder of Puente gang member Billy Gallegos two weeks earlier;" (2) both victims wore "gang type clothing;" (3) there was a "reasonable inference from the evidence that appellant Soliz was arguing with Messrs.

Skyles and Price over Gallegos murder;"and (4) appellant Soliz "must have concluded, based on that argument, that Skyles and Price were involved in the Gallegos murder." (GAOB 218, 224; SAOB 114.)

Appellants sole evidence of alleged "provocation" is the murder of Billy Gallegos -- which had occurred weeks before -- and appellants' "belief that Skyles and Price had been involved in the murder." (GAOB 227; SAOB 114.) This is conjecture and speculation, not evidence of provocation. In any event, such evidence of provocation might satisfy a *subjective* element of heat of passion, but it clearly does not establish evidence of the objective, reasonable person requirement, which requires provocation by the victim. (*People v. Cole, supra*, 33 Cal.4th at p. 1216.)

"If anything, [appellants] appear[] to have acted out of a passion for revenge, which will not serve to reduce murder to manslaughter." (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1144; see also *People v. Breverman* (1998) 19 Cal.4th 142, 163 [the passion aroused can be any violent, intense, high-wrought or enthusiastic emotion "other than revenge." (Citations omitted).) "For such an instruction, the killing must be 'upon a sudden quarrel or heat of passion' (§ 192); that is, 'suddenly as a response to the provocation, and not belatedly as revenge or punishment. Hence, the rule is that, if sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter.'" (*People v. Daniels, supra*, 52 Cal.3d at p. 868.)

Appellants fail to demonstrate the "objective, reasonable person requirement," for a voluntary manslaughter instruction, which requires both heat of passion and provocation by the victim. (*People v. Cole, supra*, 33 Cal.4th at p. 1216; *People v. Gutierrez, supra,* 28 Cal.4th at p. 1143.)

XV.

THE TRIAL COURT DID NOT ERR IN FAILING TO SUA SPONTE INSTRUCT THE JURY PURSUANT TO PENAL CODE SECTION 1111 ON ACCOMPLICE TESTIMONY

Appellant Gonzales, joined by appellant Soliz, argues that due to the testimony of Richard Alvarez, the trial court erred at the guilt phase when it failed to sua sponte instruct the jury pursuant to CALJIC No. 3.11 -- that appellants could not be found guilty based on an accomplice's testimony unless the testimony was corroborated by other evidence tending to connect the defendant with the commission of the offense -- and CALJIC No. 3.18 -- that the testimony of an accomplice ought to be viewed with distrust and should be examined with care and caution. (GAOB 238-250; SAOB 308.)

Respondent disagrees and submits the trial court had no sua sponte duty to instruct with CALJIC Nos. 3.11 and 3.18 as there was insufficient evidence to suggest that Mr. Alvarez aided or abetted, or otherwise facilitated appellant's criminal actions *with the requisite intent*, and because Mr. Alvarez's testimony was sufficiently corroborated. In any event, any error was clearly harmless in light of the other instructions given.

A. Evidence Concerning Richard Alvarez

At trial, Mr. Alvarez testified appellants spent the entire evening with him at Jennifer's house (10RT 1160-1161); denied making statements to Detectives West and Reeder (10RT 1162-1164); denied dropping appellants and Mr. Gonzales off before the robbery (10RT 1175); and denied waiting for appellants at the parking lot at Turnbull Canyon (11RT 1242). Counsel was subsequently appointed to advise Mr. Alvarez, and upon counsel's advice Mr. Alvarez invoked his right to remain silent when questioned outside the presence of the jurors. (11RT 1223-1226.) Outside the presence of the jurors, the

People gave Mr. Alvarez "use immunity" for his testimony, and the court entered an order requiring his testimony. (11RT 1226-1228.) Subsequently, in the presence of the jurors, the Court permitted the prosecuting attorney to treat Mr. Alvarez as a "hostile" witness. (11RT 1241.)

The testimony at trial concerning Richard Alvarez, largely through his statements to detectives, established he was known to members of the Perth street clique as "Richie Rich," and that he was appellants' friend. At sometime between 6:00 and 7:00 p.m, appellant Gonzales called him, saying he needed to be picked up at Jennifer's house. Mr. Alvarez drove to Jennifer's house, and appellants and Michael Gonzales followed him in the stolen blue van to a closed business at Turnbull Canyon, not far from the Hillgrove Market. Alvarez remained with his car at the closed business, while Michael Gonzales drove appellants in the stolen blue van to the Hillgrove Market. Appellants subsequently returned with Michael Gonzales in the blue van. Mr. Alvarez then drove them back to Jennifer's house, where they partied the rest of the night. (Peo. Exh. 11, 18, 56; 9RT 962-966, 979; 10RT 1088-1093, 1157-1160, 1170, 1186-1187;11RT 1244, 1246, 1253-1254; 13RT 1673; 14RT 1676.)

Also admitted at trial was a taped conversation between Mr. Alvarez appellant Gonzales at the county jail after the preliminary hearing. (Peo. Exhs. 19, 20, 21; 10RT 1165-1171; 11RT 1236-1238, 1247-1248.) Mr. Alvarez told appellant Gonzales he was nervous as he had been told that his name had been mentioned, and his car had been described, at appellants' preliminary hearing. (11RT 1171-1172, 1240-1241.) Appellant Gonzales told him not to be concerned as his nickname, "Richie Rich," was common. (Peo. Exh. 21; 10RT 1174; 11RT 1241-1242.)

B. There Was No Sua Sponte Duty To Instruct The Jurors With CALJIC Nos. 3.11 And 3.18

Respondent submits there was no sua sponte to instruct the jury with CALJIC Nos. 3.11 and 3.18 as there was insufficient evidence to support a finding that Mr. Alvarez was an accomplice.

> An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant." (§ 1111.) A witness is liable to prosecution within the meaning of section 1111 if he or she is a principal in the crime. (*People v. Lewis* (2001) 26 Cal.4th 334, 368-369 & fn. 31, 110 Cal.Rptr.2d 272, 28 P.3d 34.) If there is evidence to permit a jury to find by a preponderance of the evidence the witness was an accomplice, "'the trial court must instruct the jury that the witness's testimony should be viewed with distrust.'" (*People v. Hernandez* (2003) 30 Cal.4th 835, 874, 134 Cal.Rptr.2d 602, 69 P.3d 446.) "'But if the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony.'" (*People v. Lewis*, *supra*, 26 Cal.4th at p. 369, 110 Cal.Rptr.2d 272, 28 P.3d 34.)

(*People v. Hinton* (2006) 37 Cal.4th 839, 879.) "If sufficient evidence is presented at trial to justify the conclusion that a witness is an accomplice, the trial court must so instruct the jury, even in the absence of a request." (*People v. Brown* (2003) 31 Cal.4th 518, 555.)

As noted above, an accomplice is one who is subject to prosecution for the identical offense charged against the defendant. (Pen. Code, § 1111.) "To be liable as an aider and abettor, the person must act both with knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating

commission of the offense." (*People v. Hayes*, *supra*, 21 Cal.4th at p. 171, fn. 19.)

Here, the record lacks evidence from which the jury could have found that Mr. Alvarez "aided or abetted, or otherwise facilitated, with the requisite intent," the robbery and murder of Mr. Eaton, and thus Mr. Alvarez would not appear to have been, "at least as a matter of law, an accomplice whose testimony the jury should have been instructed to view with distrust." (*People v. Coffman* (2004) 34 Cal.4th 1, 105.)

Finally, even assuming the trial court erred in failing to instruct as to the possibility that Mr. Alvarez was an accomplice, the error was harmless.

> A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is "sufficient corroborating evidence in the record." [Citation.] To corroborate the testimony of an accomplice, the prosecution must present "independent evidence," that is, "evidence that tends to connect the defendant with the crime charged" without aid or assistance from the accomplice's testimony. [Citation.] Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. [Citations.] "'[T]he corroborative evidence may be slight and entitled to little consideration when standing alone.' [Citation.]" [Citation.]

(*People v. Avila* (2006) 38 Cal.4th 491, ___ [43 Cal.Rptr.3d 1, 60-61]; see also *People v. Hinton, supra,* 37 Cal.4th at p. 880.)

Here, Mr. Alvarez's testimony that he brought appellants to the parking lot at Turnbull Canyon, and then picked then up after they returned in the blue van from the Hillgrove Market, was amply corroborated through independent evidence, including eyewitnesses, and through appellant Gonzales' statements to Mr. Berber and others. (See *People v. Brown*, *supra*, 31 Cal.4th at p. 556.)

Moreover, "[e]ven if there were insufficient corroboration, reversal would not be required 'unless it is reasonably probable a result more favorable to the defendant would have been reached. [Citation.] The purpose of an instruction pursuant to section 1111 is to compel the jury to view accomplice testimony with distrust and suspicion.'" (*People v. Avila*, *supra*, 38 Cal.4th at p. __ [43 Cal.Rptr.3d at p. 61].)

Here, the jury had reasons to view his testimony with distrust. Mr. Alvarez testified appellants spent the entire evening with him at Jennifer's house (10RT 1160-1161); denied making any statements to Detectives West and Reeder (10RT 1162-1164); denied dropping appellants and Mr. Gonzales off before the robbery (10RT 1175); and denied waiting for appellants at the parking lot at Turnbull Canyon (11RT 1242). Thus, Mr. Alvarez's statements inculpating appellants largely came in through the testimony of the detective who interviewed Mr. Alvarez. (11RT 1250-1257.)

Finally, the jury was instructed in accordance with a modified version of CALJIC No. 2.20 that in assessing the credibility of a witness it may consider "[t]he existence . . . of a bias, interest or other motive"; "[a] statement previously made by the witness that is . . . inconsistent with the testimony of the witness"; "[a]n admission by the witness of untruthfulness"; and "[t]he witness' prior conviction of a felony." (3CT 671.) And the jury was also instructed with CALJIC No.2.21.2 that "[a] witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others." (3CT 672.)

These other properly given instructions sufficiently advised the jury to assess Mr. Alvarez's testimony, and thus there was no reasonable probability appellants would have obtained a more favorable result had the trial court instructed the jury with the full complement of accomplice instructions. (See *People v. Lewis* (2001) 26 Cal.4th 334, 371; *People v. Box* (2000) 23 Cal.4th 1153, 1208-1209.)

XVI.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN HIS FINAL GUILT PHASE ARGUMENT

Appellant Gonzales, joined by appellant Soliz, argues the prosecuting attorney committed misconduct in his final argument when he: (1) argued for the jury to find appellant Gonzales guilty of the murders of Messrs. Skyles and Price because he had murdered Mr. Eaton; (2) argued appellant Gonzales' trial counsel had conceded his guilt of the murder of Mr. Eaton during defense final argument; and (3) "attacked" defense counsel when he argued defense photographs of the scene of the murders of Messrs. Price and Skyles were deceptive. (GAOB 251-267; SAOB 308.) Respondent disagrees with all three contentions, and submits the prosecuting attorney committed no impropriety or misconduct, and that even assuming any error it was clearly harmless.

A. Applicable Law Governing Alleged Misconduct During Argument

> Prosecutorial misconduct is reversible under the federal Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury."
>
> Generally, "a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety."

(*People v. Guerra, supra*, 37 Cal.4th at p. 1124, citations omitted; see also *People v. Carter, supra,* 36 Cal.4th at p. 1204.)

"'Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.'" (*People v. Gray, supra*, 37 Cal.4th at p. 215.) "'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. Hinton, supra,* 37 Cal.4th at p. 863.) A defendant may be excused from objecting if an objection would have been "'futile or an admonition ineffective,'" but a defendant claiming that one of these exceptions applies "must find support for his or her claim in the record," and "'[t]he ritual incantation that an exception applies is not enough.'" (*People v. Jablonski, supra,* 37 Cal.4th at p. 835; accord *People v. Panah, supra*, 35 Cal.4th at p. 462.)

> "'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.] 'Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide.'"

(*People v. Jablonski, supra*, 37 Cal.4th at p. 835.)

B. The Prosecutor Did Not Commit Misconduct As He Did Not Argue That The Jury Could Find Appellant Gonzales Guilty Of The Murders Of Messrs. Skyles And Price Because He Had Murdered Mr. Eaton

Appellant Gonzales first argues the prosecuting attorney committed misconduct when he allegedly argued for the jury to find appellant Gonzales

guilty of the murders of Messrs. Skyles and Price because he had murdered Mr. Eaton. (GAOB 253-257.)

"Preliminarily, by failing to object to the argument and seek a curative admonition, [appellant Gonzales] has forfeited the claim." (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 835.) Appellant Gonzales concedes his failure to object, but argues the court's pretrial denial of severance should excuse him "from the necessity of making a timely objection because the objection would have been futile." (GAOB 256.) Moreover, appellant Gonzales believes "an admonition would not have cured the harm caused by the misconduct." (*Ibid.*)

The court's pretrial ruling on the severance motion did not *ipso facto* render it futile to object to alleged prosecutorial misconduct during the final guilt phase argument. And assuming the comments were somehow improper, it would have been a "simple matter, upon proper objection and request," for the trial court to have admonished the jury not to have improperly used the evidence from one set of offenses to convict appellant Gonzales of the other set of offenses. (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 835.) Appellant Gonzales' "failure to assert a timely objection and request such an admonition constitutes a failure to preserve the claim on appeal." (*People v. Carter, supra,* 36 Cal.4th at p. 1204, fn. 44; accord *People v. Kennedy* (2005) 36 Cal.4th 595, 625; *People v. Panah, supra,* 35 Cal.4th at p. 462; *People v. Monterroso* (2005) 34 Cal.4th 743, 785; *People v. Crew* (2003) 31 Cal.4th 822, 855.)

In any event, the prosecuting attorney's argument was not misconduct. As stated above, the prosecutor did not state or imply that proof appellant Gonzales committed one set of offenses constituted proof he committed the other set of offenses.

Indeed, as stated above, the portion of the prosecuting attorney's argument and chart to which appellant now complains (GAOB 253-254) was, in proper and full context, merely an argument that the jury could draw proper

and reasonable inferences from the evidence that appellants were members of the same gang; that they committed crimes together; that they had already killed Mr. Eaton by the time of the Skyles and Price murders; that they had both stated in the car, when they first passed Messrs. Skyles and Price, that they knew them; that they both got out of the car at the same time; that they both had a common gang and retaliation motive for the murders of Messrs. Skyles and Price; that the same gun used in the Hillgrove Market robbery was used to murder Messrs. Skyles and Price; and that after the murders they both re-entered the car at the same time and both told the witness that she did not see anything. (17RT 2307-2312.). "'[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper.'" (*People v. Panah, supra,* 35 Cal.4th at p. 463.) "'Whether the inferences the prosecutor draws are reasonable is for the jury to decide.'" (*People v. Harrison*, *supra*, 35 Cal.4th at p. 249.) The prosecutor's argument was entirely proper. (See, e.g., *People v. Stitely, supra*, 35 Cal.4th at p. 557.)

Finally, assuming the complained-of comments were improper, and further assuming this argument is preserved despite the failure to object and request and admonition, there was no prejudice. In this regard, the trial court's instructions before opening statement and again before closing argument that the attorneys' statements were not evidence, coupled with the instructions that the jury must decide all questions of fact in the case from the evidence and from no other source, would have dispelled any prejudice. (*People v. Hinton, supra,* 37 Cal.4th at p. 863; *People v. Valdez*, *supra*, 32 Cal.4th at p. 134; *People v. Ervin, supra*, 22 Cal.4th at p. 98; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1137.)

C. The Prosecutor Did Not Commit Misconduct During His Rebuttal Argument When He Stated Defense Counsel "Essentially Conceded Their Client's Guilt In The Hillgrove Market Robbery Murder In Their Closing Arguments"

During his closing argument, counsel for appellant Soliz stated:

> With respect to the Hillgrove Market murder, there's no question in my mind and there should be no question in your mind that my client, Michael Soliz, is guilty of murder by reason of being an aider and abettor. there's absolutely no question about that.

(17RT 2243-2244.) After explaining this concession, counsel for appellant Soliz again stated: "And that's why I said Mr. Soliz is guilty of aiding and abetting in the market murder" and ". . . because I'm telling you that based upon the evidence as far as the Hillgrove Market murder, he is guilty of aiding and abetting" and "He's guilty of murder, again, as I told you in -- in the Hillgrove Market case, as an aider and abettor." (17RT 2246, 2248, 2253.)

Counsel for appellant Gonzales thereafter began and focused much of his argument with a discussion of the murders of Messrs. Skyles and Price. (17RT 2279-2289.) When addressing the murder of Mr. Eaton, counsel for appellant Gonzales stated: "John Gonzales' statement, if you believe it, would make him culpable of the Hillgrove murder. But, again, if you are asked not to believe half of it, then I'd ask you not to believe all of it." (17RT 2289.) Counsel for appellant Gonzales pointed out that appellant Gonzales' confession differed from Mrs. Eaton's testimony, and if the jury believed her testimony, "then it wasn't John Gonzales who went in and had the situation with her husband." (17RT 2289-2290.) He then argued that if the jury discredited appellant Gonzales' confession, "then the only thing you're left with is one or -- or two people went into that store, of the group of four or five people, went in with the intent to rob that store and that, unfortunately, since Mr. Eaton had a gun, the situation got out of hand and he was killed." (17RT 2290.) Counsel

for appellant Gonzales acknowledged the evidence that his client's fingerprints were found on papers inside the van, but argued that this only indicated that he had been inside the van at some time. (17RT 2291.)

When the prosecuting attorney began his rebuttal argument at the guilt phase, he stated as follows:

> Now I'm going to be arguing to you for a little while here yet, probably 20 minutes or so, so try to get comfortable. [¶] And I'm going to be arguing primarily about the Skyles/Price double murder. And the reason for that is both counsel essentially conceded their clients' guilt in the Hillgrove Market robbery murder in their closing arguments.

(17RT 2298.)

The prosecuting attorney thereafter argued that in light of all the evidence about the Hillgrove Market robbery murder, it was reasonable to believe that appellant Gonzales' confession was true. (17RT 2323-2324.) The prosecuting attorney further argued that even absent appellant Gonzales' confession the facts proved beyond a reasonable doubt that appellant Gonzales murdered Mr. Eaton. (17RT 2324.)

At the conclusion of the prosecuting attorney's argument, counsel for appellant Gonzales objected to the complained-of remarks as being "totally improper," and stated that he did not immediately object because he did not want to bring attention to it. (17RT 2330-2332.) The court stated that the jury had been instructed that counsel's statements were not evidence, and that in any event the comments were not improper or misconduct because they were directed at defense counsel's "tacit admission, which is the spin [the prosecutor] could put on it and which the jurors could put on it." (17RT 2331-2332.)

Appellant Gonzales argues the prosecuting attorney's remark was prejudicial misconduct. (GAOB 257-263.) Respondent disagrees and submits that in light of the defense counsels' closing arguments, the prosecuting

attorney's brief (and never repeated) introductory comment in his lengthy rebuttal argument was not misconduct. The complained-of comment was not improper and neither infected the trial "'with such unfairness as to make the conviction a denial of due process,'" nor did it involve "'the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.'" (*People v. Guerra, supra,* 37 Cal.4th at p. 1124.)

In any event, assuming the complained-of comments were improper, there was clearly no prejudice. The statement was brief and never repeated, and the trial court's repeated instructions that the attorneys' statements were not evidence, coupled with the instructions that the jury must decide all questions of fact in the case from the evidence and from no other source, would have dispelled any prejudice. (*People v. Hinton, supra,* 37 Cal.4th at p. 863; *People v. Valdez, supra,* 32 Cal.4th at p. 134; *People v. Ervin, supra,* 22 Cal.4th at p. 98; *People v. Barnett, supra,* 17 Cal.4th at p. 1137.)

D. The Prosecutor Did Not Commit Misconduct During His Rebuttal Argument When He Argued That The Defense Photographs Of The Scene Were "Misleading And Deceptive"

Appellant Gonzales next complains the prosecuting attorney "attacked" defense counsel when he stated counsel had "presented misleading and deceptive photographs in evidence concerning the scene of the Skyles and Price murders." (GAOB 263.)

Once again, appellant Gonzales did not object below, and on appeal he does not attempt to show how an objection would have been futile. (GAOB 263-267.) Thus, it is well-settled this issue is not preserved for appellate review. (*People v. Jablonski, supra,* 37 Cal.4th at p. 835; *People v. Carter, supra,* 36 Cal.4th at p. 1204, fn. 44; *People v. Kennedy, supra,* 36 Cal.4th at p. 625; *People v. Panah, supra,* 35 Cal.4th at p. 462; *People v. Monterroso, supra,*

34 Cal.4th at p. 785; *People v. Turner* (2004) 34 Cal.4th 406, 429; *People v. Crew, supra,* 31 Cal.4th at p. 855.)

Even if the issue is preserved, the prosecuting attorney's rebuttal argument concerning the photographs, in their full and proper context as set forth below, was merely directed to the fact that the photographs were "misleading and deceptive" to the extent they were used to show the actual lighting conditions on the evening of the murders and for accurate distance measurement:

> Counsel pointed out these photos. I believe they're Defense double A through double D, that were actually crime scene photos taken by the sheriff's deputies that night, and a series of photos that were taken a couple of weeks ago by the defense investigators, which show the scene of the Skyles/Price murder. And counsel repeatedly said to you I'm not offering them to show the lighting or to show exactly how it looked that night but for to you [sic] get an idea of the lighting and to get an idea of the distances.
>
> Well, ladies and gentleman, you all know from common sense you can't look at a photograph, especially a photograph taken at night under God knows what kind of lighting conditions or what kind of artificial light, a flash or the absence of artificial light, camera flashes, and look at that and say that's an accurate perception of what an individual standing in that position would see.
>
> In fact, Alejandro Garcia even said that in response take [sic] a defense question. If you recall, it was one of the two defense lawyers was asking him, looking at these photos, does that show the way the scene looked that night from this position? And he said, in response to defense question, well, yeah. That's pretty much the way the lighting

looked; that's pretty much the way the scene looked, but that's not what you'd see if you were a person standing there.

And he's absolutely right. Use your common sense. These photographs are misleading and they're deceptive in terms of what a person standing in that position would see. They do not accurately show distances. They do not accurately show what you would see based upon those lighting conditions.

The only people that can tell you what the situation was like that night in the position they were in are the people who testified: Carol Mateo, Jeremy Robinson, Alejandro Garcia. They saw what they saw, and they were able to see what they saw, and to impeach what they say based upon these photographs is simply misleading, and it's not accurate. So keep your common sense in mind when you look at these pictures.

And in terms of judging distances -- again, these photos don't accurately show distance.

The way to accurately show distance is to look at this diagram. Which is done to scale. You'll see the scale right up here. That will tell you what the distance is. And that's the best we can do, ladies and gentleman, because none of us were there that night. This is the accurate way to measure distance, not looking at some kind of photograph which you don't know the conditions under which it was taken.

(17RT 2304-2305.)

As is clear from the argument in its' proper and full context, the prosecuting attorney's argument was neither improper or misconduct, but was instead properly based on the evidence before the jury. As stated above, the prosecuting attorney "'has the right to fully state his views as to what the

evidence shows and to urge whatever conclusions he deems proper'" (*People v. Panah, supra,* 35 Cal.4th at p. 463), and "[w]hether the inferences the prosecutor draws are reasonable is for the jury to decide'" (*People v. Harrison, supra,* 35 Cal.4th at p. 249). Indeed, a prosecutor is "permitted to urge, in colorful terms, . . . [and] to argue on the basis of inference from the evidence that a defense is fabricated." (*People v. Turner, supra*, 34 Cal.4th at p. 430, citing *People v. Pinholster* (1992) 1 Cal.4th 865, 948.)

It is correct that a prosecutor may be held to have committed misconduct if he or she "'attacks the integrity of defense counsel, or casts aspersions on defense counsel.'" (*People v. Turner, supra,* 34 Cal.4th at p. 429.)

> "If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." [Citation.] "'An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.'"

(*People v. Turner*, *supra*, 34 Cal.4th at p. 429.)

Here, however, the prosecuting attorney's comments were directed at reasonable and permissible inferences from the evidence, and "did not amount to an attack on their integrity or rise to the level of an aspersion on [counsels'] character," and thus, "'it did not cross the "line of acceptable argument, which is traditionally vigorous and therefore accorded wide latitude."'" (*People v. Turner*, *supra*, 34 Cal.4th at p. 430.) Indeed, the prosecuting attorney's argument was "not remotely similar in degree of impropriety to the comments [this Court] have held to constitute prejudicial misconduct." (*People v. Carter*, *supra*, 36 Cal.4th at p. 1264, citing *People v. Hill* (1998) 17 Cal.4th 800.)

Finally, assuming the complained-of comments were improper, and further assuming this issue is preserved for review, there was clearly no

prejudice. The trial court's repeated instructions that the attorneys' statements were not evidence, coupled with the instructions that the jury must decide all questions of fact in the case from the evidence and from no other source, would have dispelled any prejudice. (*People v. Hinton, supra,* 37 Cal.4th at p. 863; *People v. Valdez, supra,* 32 Cal.4th at p. 134; *People v. Ervin, supra,* 22 Cal.4th at p. 98; *People v. Barnett, supra,* 17 Cal.4th at p. 1137.)

XVII.

THERE WERE NO GUILT PHASE ERRORS, CONSIDERED SEPARATELY OR CUMULATIVELY

Appellant Gonzales, joined by appellant Soliz, argues his convictions must be reversed based upon a "cumulative effect" of the guilt phase errors. (GAOB 268-270; 308.) However, as set forth herein, appellants have not demonstrated any guilt phase errors, and to the extent there were any, and that they were properly preserved for appellate review, each error or possible error was harmless, whether considered separately or cumulatively. (See *People v. Jurado*, *supra*, 38 Cal.4th at p. 127; *People v. Jablonski*, *supra*, 37 Cal.4th at p. 824.) Appellants were "entitled to a fair trial but not a perfect one." (*People v. Osband* (1996) 13 Cal.4th 622, 701, internal quotations omitted.) "The trial was fair." (*Ibid.*)

PENALTY PHASE ISSUES

XVIII.

THE COURT DID NOT MISLEAD COUNSEL ON THE SCOPE OF VOIR DIRE FOR THE SECOND PENALTY PHASE

Appellant Gonzales, joined by appellant Soliz, contends their death sentences must be reversed because the trial court did not allow counsel to voir dire the prospective jurors for the second penalty phase on the issue of racial bias. (GAOB 271-286; SAOB 133-138.) Appellant Soliz, joined by appellant Gonzales, further argues the trial court erred "by expressly prohibiting appellant's counsel from conducting any voir dire [for the second penalty phase] on the concept of lingering doubt." (SAOB 138-141; GAOB 574.) Respondent submits this issue is waived as counsel did not timely seek to have such voir dire. In any event, the court did not abuse its discretion in the manner it conducted voir dire, and any error was harmless.

A. Relevant Proceedings Below

After the first penalty phase, the process for selection of the jurors for the second penalty phase began with the prospective jurors completing juror questionnaires. (24RT 2864-2872.) The court thereafter began the process of determining hardship for the prospective jurors. (14RT 2874-2907.) The prospective jurors were thereafter excused, and the following colloquy occurred:

> THE COURT: Well, we're going to go through this first group of 50 or 55 that are going to come in on Tuesday, and if they're not challenged -- if they remain in the pool, then we direct them to come back on Thursday, and we'll get through that bunch. Then Wednesday we'll go

through the next bunch. The ones that are excused are gone. The ones that are not excused will come back Thursday for final jury selection.

Then on Thursday it will be a relatively simple procedure, cuz it's simply going to be exercising peremptories. Because the cause objections are all going to be done on Tuesday and Wednesday.

That's the way we did it last time on this case, and I think that's the most expeditious way to do it.

MR. SORTINO [the prosecuting attorney]: So Tuesday and Wednesday we'll focus primarily just on death qualification and challenges for cause, primarily on that ground; is that correct?

THE COURT: As I did before, I'm going to allow some time for questioning, with the understanding the questions will be focused on the questionnaire, with no repetition. In other words, you're not going to ask people where they're employed or not going to ask them things that've been answered sufficiently. But if there are ambiguities or equivocations or flat out refusals to consider one penalty or the other, before excusing them, I'll allow you to explore that to attempt to rehabilitate jurors, if that's possible.

So that will be the procedure that we'll go through. And we may not complete the whole thing with these people on Tuesday, but we'll do the best we can.

. . . .

Then we'll do the same thing on Wednesday; final selection on Thursday, and, as we've told the jurors, the actual trial witnesses in court will be on the following Monday.

All right? Any questions? [¶] All right. That will close the record for today, then.

(24RT 2908-2909.)

Voir dire of the prospective jurors thereafter began, with all parties questioning the prospective jurors for their challenges for cause. (24RT 2919-3022.) During this voir dire, the following colloquy occurred:

THE COURT: While we're here, is there -- does anybody have any serious questions about any of these jurors that I've not touched on?

MR. TYRE: No.

MR. SORTINO: I have some people I'd like to inquire of a little more, if the court's not going to do that, I have some problems with.

MR. BORGES: I have some questions I want to ask -- Judge, are we going to -- may I ask this question? Are we going to just pick a pool and voir dire that pool again?

THE COURT: No. The ones we've excused, they'll be the first ones in the box when we come back.

MR. TYRE: We're gong to question them when they come back.

THE COURT: No, you will not. You get peremptories when they come back.

MR. BORGES: See, that's not how we did it before, Judge. What we did is we did the qualifying before and then we brought them back an as a general pool and voir dired generally.

THE COURT: I know, but that's because it was the trial. Here we're just on this narrow issue, and we're finding cause now. And you've got the questionnaires, which you had those before, too.

MR. BORGES: Sure. [¶] I have a few questions that I'd like to ask because you're not voir diring these jurors.

THE COURT: Well, all right. They'll had all of the benefit of this morning. They've heard all of this so far.

MR. BORGES: I know.

THE COURT: So that's why I'm saying I don't want to ask the same question over and over again.

MR. BORGES: I understand that, but there are questions that you haven't asked that I need to ask.

THE COURT: Such as?

MR. BORGES: General voir dire questions.

THE COURT: Oh, no. That's what the questionnaire serves the purpose of. I'm not going to allow general voir dire. You've got the questionnaire. The primary focus is the *Hovey* questions. I've asked them generally in voir dire if there was any reason why any of them felt -- other than in the questionnaire, there was any reason why they couldn't serve. They could've told you anything. Nobody raised a hand. Then I've got through the particular ones that were the kick outs, the obvious kick outs. And so unless -- right now you've seen the questionnaires. You tell me which jurors you want to challenge.

MR. BORGES: Oh. Okay. Then I'm not going to get to ask them any questions, your Honor?

THE COURT: Tell me why you want to challenge. If you don't want to challenge, then, no, you can't ask them any questions. You've got to at least have a tentative challenge in mind.

MR. BORGES: Well --

MR. TYRE: Well -- okay. Then I guess my question would be if that's going to be the position, if the D.A. has someone he wants to challenge, I'd like to know that, too.

THE COURT: Sure. All three of you.

MR. SORTINO: Your Honor, I would like further inquiry for cause with respect to Juror Number 1625. He's our Juror Number 22 on the random list.

THE COURT: All right. I've got him as equivocal. And I'll let you both inquire of him.

MR. SORTINO: I believe -- I would like to ask a few questions of 1156, who is position number 31, but nothing extensive. Just a few specific questions. Those are the two that I had concerns about.

THE COURT: Okay.

MR. TYRE: And I guess I would object the fact that the judge didn't spend a lot of time on 31.

. . . .

MR. BORGES: And I have a couple of questions. The first juror, either her brother was killed by his wife or something along those lines. I want to go into that area with her.

. . . .

MR. BORGES: There is one area I wanted to go into with you, judge, with respect to the general questions to the jurors. Counsel has indicated that the first jury has decided their guilt, they're not to question that aspect if the case at all. However, what I wanted to point out to them is that they -- as my client's advocate, I feel the first jury erred in certain -- . . . in certain aspects of evidence that they considered, and, although they can't change the verdict, there are certain areas that I'm going to ask them to consider in terms of whether or not the first jury might have erred.

THE COURT: No.

MR. BORGES: Let me just point this -- let me just say for the record why. [¶] We have an instruction that I assume you're going to give, which is the lingering doubt instruction.

THE COURT: I am not going to give that instruction to this jury, because it is not appropriate. Because this jury didn't decide the question of guilt or innocence.

MR. SORTINO: Your Honor, we can argue jury instructions later. I think specifically for purposes of voir dire that is an inappropriate question, and I suggestion [sic] we move on and argue this later.

MR. BORGES: Can I state my position, though, judge, on the record, so at least it's clear.

THE COURT: All right.

MR. BORGES: Number one, I'm dismayed that the Court has indicated that it may not give that instruction, based of [sic] the evidence that John Gonzales confessed on tape, which I intend to present to this jury, and to point out that the wrong person may have been convicted of being the shooter. That's the lingering doubt aspect. That's crucial to my case, which is why I agreed to a joint trial, was the confession of John Gonzales.

THE COURT: All right.

MR. BORGES: Which you allowed -- indicated it was a declaration against penal interest and allowable in as evidence.

MR. SORTINO: Whether or not it's allowable, whether or not he gets an instruction is not relevant at this point, your Honor, and this certainly should not be asked in voir dire.

THE COURT: And I agree. I may have misspoken myself when I said I wouldn't give that instruction, because, on reflection, I think you are right. You are probably going to be entitled to it.

But I don't think it's appropriate on voir dire, because we've tried to tell this whole jury that the whole matter of guilt was behind them, and then you say, well, we're going to retry this case on guilt because maybe

they got the wrong guy, we're going to do some Perry Mason thing and expect somebody to come running up to the stand and say I did it.

MR. BORGES: I understand the Court's position, then. Okay.

. . . .

MR. BORGES: Oh. Your Honor, I just felt that I should be allowed to ask some questions at this point on -- regarding the possibility of the first jury making an error, not that this jury can change their verdict, but that it's something that they can consider as a mitigating circumstance and can they consider that as evidence.

THE COURT: You've already put that on the record.

MR. BORGES: I just wanted to make sure.

THE COURT: Okay.

. . . .

THE COURT: All right. We'll bring the jurors in. [¶] As I indicated in the conference we had just before the recess, I will allow limited questions of those remaining jurors on this panel that -- where there's been some equivocation. But I want to finish with this panel and get the next 14 in the box, so this inquiry is going to be necessarily very limited. [¶] Did you have any questions that you wanted to ask of these jurors?

MR. TYRE: The Court has indicated that it's not going to let me go into general voir dire of this jury.

THE COURT: Right.

MR. TYRE: So, based on that, I don't, because the Court has gone into the *Hovey* questions.

(24RT 3023-3032.)

After the parties and the Court completed the voir dire for cause, the prospective jurors returned for the exercise of peremptory challenges. (26RT

3155.) The parties thereafter exercised the peremptory challenges and the jury and alternates were sworn. (26RT 3155-3171.)

After some argument concerning admission of evidence of prison conditions, the following colloquy occurred:

THE COURT: . . . Mr. Tyre, do you have another issue?

MR. TYRE: Yes, I have another issue. [¶] With all due respect to the Court, at the beginning of this week we started going through these questionnaires with the jurors, and the Court, in essence, limited us with the jurors to dealing with death penalty issues. Meaning all the other issues that were dealt with in the initial part prior to the death penalty issues in this questionnaire we weren't able to delve in, which means asking questions concerns [sic] certain issues. And I guess some of the issues that I would have liked to have gone into or further followed up with, I wasn't able to do. And there are certain issues that had to do with -- like racial issues that have to deal with, perhaps the victims in a couple of the murders were African-American, and there are, you know, jurors that are possibly going to be affected by that. But we really didn't get to deal with that and delve into that with a lot of the jurors.

THE COURT: I think it's a little late to bring this to the Court's attention, because if you'd asked me to inquire on that subject, I would.

But I will remind you that in the voir dire that was conducted, mostly by me, that I went outside the death penalty issues where I saw things that appeared to be of interest in the questionnaire and then I invited the attorneys to ask further questions, if they felt that there was anything else that needed to be explored as to a particular juror. And you did on a couple of occasions, and other occasions you said you had no additional questions. And I gave you an open question period with almost all of the jurors.

MR. TYRE: I think I indicated on the record that I had no more questions concerning the death penalty part of the questionnaire. Because there were some issues that were brought up that had to do with -- I think you had indicated too us that you have the questionnaires -- and I think it had to do with when I spent that hour the first day dealing with the jurors -- that really the questionnaires would be self explanatory. And I could see that -- the Court's point of view on that. But there were just some of the jurors that I believed needed to be followed up with some of the questions concerning racial issues in this case.

THE COURT: As I say, I think that had you raised that at the time, that I think that it would have been a subject matter that we could have addressed because of the fact that there are African-American jurors that were on the panel, many that were on the panel. And I don't recall offhand whether there are any that are actually seated. But there certainly were a number of them, and it could have been raised. And your failure to say anything about it during the time that we had this voir dire inquiry, I think you have effectively waived it.

But, in any event, you've got 15 jurors seated in this matter that I think that you've exercised a great number of challenges, and you both picked jurors that appear to satisfy you.

So I don't know, when you bring it up now, what are you asking me to do? Declare a mistrial?

MR. TYRE: I guess, in essence, I'm asking -- you know, I don't think there's a proper remedy other than that at this time, so I would be asking for a mistrial.

THE COURT: All right.

MR. SORTINO: I'd oppose it.

THE COURT: The motion is denied.

MR. TYRE: Thank you, your Honor.

. . . .

MR. BORGES: For the record, I join in that. Just for the record.

(26RT 3180-3183.)

B. Applicable Authority And Standard Of Review

In *Aldridge v. United States* (1931) 283 U.S. 308, 311-313 [51 S.Ct. 470, 75 L.Ed. 1054], under the Supreme Court's supervisory power over federal trials, the Court overturned the conviction of a Black male for the murder of a White police officer because the federal trial judge had refused the defendant's request that the venire be questioned about racial prejudice.

In *Ham v. South Carolina* (1973) 409 U.S. 524 [93 S.Ct. 848, 35 L.Ed.2d 46], involving a Black male tried in South Carolina courts for possession of marijuana, who alleged he had been framed for the crime in retaliation for his widely-known civil rights activities, the Supreme Court recognized that even though the *Aldridge* decision was "not expressly grounded upon any constitutional requirement":

> Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these 'essential demands of fairness,' e.g., *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race, *Slaughter-House Cases*, 16 Wall. 36, 81, 21 L.Ed. 394 (1873), we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice.

(*Id.* at p. 526.)

In *Ristaino v. Ross* (1976) 424 U.S. 589 [96 S.Ct. 1017, 47 L.Ed.2d 258] ("*Ristaino*"), a case involving two Black defendants charged with armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder a White security guard, the United States Supreme Court distinguished *Ham* from the case before it, and held the "the need to question veniremen specifically about racial prejudice" did not rise to "constitutional dimensions" because "[t]he mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham*." (*Id.* at p. 597.) The Court in *Ristaino* specifically noted that while permitting such questions would have been the "wiser course," the States were nevertheless "free to allow or require questions not demanded by the Constitution." (*Id.* at p. 598, fn. 9.) To implicate the "constitutional" standard, the Court indicated the circumstances must "suggest a *significant likelihood* that racial prejudice might infect [the defendant's] trial." (*Id.* at p. 598, emphasis added.) The Court further noted "the actual result in *Aldridge* should be recognized as an exercise of our supervisory power over federal courts." (*Id.* at p. 598, fn. 10.)

Five years later in *Rosales-Lopez v. United States* (1981) 451 U.S. 182 [101 S.Ct. 1629, 68 L.Ed.2d 22], a direct review case involving a male of Mexican descent charged with participating in a plan by which Mexican aliens were illegally brought into the United States, a plurality of justices of the Supreme Court concluded there had been no "unconstitutional" abuse of discretion in failing to conduct voir dire concerning racial prejudice, because the petitioner in that case had never "argued that the matters at issue in his trial involved allegations of racial or ethnic prejudice" and "neither the Government's case nor his defense involved any such allegations." (*Id.* at p. 192.) The plurality noted that "[a]s *Ristaino* demonstrates, there is no per se

constitutional rule in such circumstances requiring inquiry as to racial prejudice" and concluded that under its supervisory review of federal trials:

> In our judgment, it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued. Failure to honor his request, however, will be reversible error only where the circumstances of the case indicate that there is a *reasonable possibility* that racial or ethnic prejudice might have influenced the jury.

(*Id.* at p. 191, emphasis added.)

The concurring justices in *Ristaino* refused to join in the following portion of Justice White's opinion:

> *Aldridge* and *Ristaino* together, fairly imply that federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups. This supervisory rule is based upon and consistent with the "reasonable possibility standard" articulated above.

(*Id.* at p. 192; see *id.* at pp. 194-195 (Rehnquist, J., joined by Burger, C.J., concurring in the result.)

Thereafter, in *Turner v. Murray* (1986) 476 U.S. 28 [106 S.Ct. 1683, 90 L.Ed.2d 27], a case "involving a Black defendant sentenced [in Virginia] to death for killing the White owner of a jewelry store during a robbery, the high court held that, upon request, 'a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.' (*Id.* at pp. 36-37 [106 S.Ct. at p. 1688].)" (*People v. Earp* (1999) 20 Cal.4th 826, 854.)

And finally, in *Mu'Min v. Virginia* (1991) 500 U.S. 415 [111 S.Ct. 1899, 114 L.Ed.2d 493] ("*Mu'Min*"), the defendant was convicted of murder and

sentenced to death, and the voir dire issue involved pretrial publicity and the extent to which potential jurors had read or heard about the case. The Supreme Court reviewed and compared the cases set forth above, recognizing they arose under both its direct review of federal trials and under its more restricted review of state trials, and stated:

> [T]wo parallel themes emerge from both sets of cases. First, the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice; second, the trial court retains great latitude in deciding what questions should be asked on voir dire. . . . *To be constitutionally compelled . . . it is not enough that such questions might be helpful. Rather, the trial court's failure to ask [certain] questions must render the defendant's trial fundamentally unfair.*

(*Id.* at pp. 424-426, emphasis added.)

Addressing *Turner* and *Mu'Min*, this Court in *People v. Holt* (1997) 15 Cal.4th 619, explained that such an inquiry into possible racial bias is "essential in a case in which an African-American defendant is charged with commission of a capital crime against a White victim," and suggested that trial court judges "should closely follow the language and formulae for voir dire recommended by the Judicial Council in the Standards to ensure that all appropriate areas of inquiry are covered in an appropriate manner." (*Id.* at pp. 660-661.) Nevertheless, the Court held that while a trial court judge's failure to do conduct such voir dire on timely request "may be a factor to be considered in determining whether a voir dire was adequate," this determination ultimately requires considering "the entire voir dire." (*Id.* at p. 660-661.) Thus, "[u]nless the voir dire by a court is so inadequate that the reviewing court can say that the

resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal." (*Id.* at p. 661.)

Subsequently in *People v. Stewart* (2004) 33 Cal.4th 425, the Court agreed with the defendant that voir dire questions concerning his racial bigotry "might have assisted defense counsel in exercising challenges," but citing the language quoted above from *Mu'Min*, held the "court acted within its discretion by channeling the voir dire examination of the jurors within reasonable bounds and in a manner designed to expedite the jury selection process." (*Id.* at p. 458.)

And finally, this Court in *People v. Cleveland* (2004) 32 Cal.4th 704, concluded as follows:

> Accordingly, "the trial court retains great latitude in deciding what questions should be asked on voir dire," and "'content' questions," even ones that might be helpful, are not constitutionally required. (*Mu'Min v. Virginia*, *supra*, at pp. 424, 425, 111 S.Ct. 1899.) To be an abuse of discretion, the trial court's failure to ask questions "must render the defendant's trial fundamentally unfair." (*Id.* at pp. 425-426, 111 S.Ct. 1899.) "Such discretion is abused 'if the questioning is not reasonably sufficient to test the jury for bias or partiality.'" (*People v. Box*, *supra*, at p. 1179, 99 Cal.Rptr.2d 69, 5 P.3d 130.)

(*Id.* at p. 737; see also *People v. Benavides*, *supra*, 35 Cal.4th at p. 88.)

Thus, "'[u]nless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal.'" (*People v. Carter, supra,* 36 Cal.4th at p. 1250.)

C. Any Objection To The Manner Voir Dire Was Conducted At The Second Penalty Phase Was Waived; In Any Event, It Was Not Error

Respondent submits appellants failed to preserve this claim for appeal by failing to timely object to the questionnaire or to the manner or completeness of the court's questioning on this issue. (See *People v. Vieira* (2005) 35 Cal.4th 264, 288; *People v. Benavides, supra*, 35 Cal.4th at p. 88; *People v. Roldan, supra*, 35 Cal.4th at p. 694-695; *People v. Stewart, supra*, 33 Cal.4th at p. 485; *People v. Bolden* (2002) 29 Cal.4th 515, 539; *People v. Cunningham* (2001) 25 Cal.4th 926, 1004; *People v. Staten* (2000) 24 Cal.4th 434, 451-452; *People v. Bradford* (1997) 14 Cal.4th 1005, 1046-1047.)

In any event, even if this claim is preserved for review, it fails. The facts and circumstances of the instant case -- the robbery and murder of shopkeeper Lester Eaton in counts I, II and III and the gang retaliation murders of Elijah Skyles and Gary Price in counts IV and V -- do not suggest a case in which racial prejudice was necessarily or directly an obvious issue. (Cf. *Roldan, supra,* 35 Cal.4th at pp. 695-696.) Moreover, "even assuming that the trial court should have asked additional questions designed to elicit whether any prospective juror actually held a racial bias, any such error would have been harmless . . . [as it] cannot say that the voir dire examination that was conducted was 'so inadequate that . . . the resulting trial was fundamentally unfair.'" (*People v. Robinson* (2005) 37 Cal.4th 592, 620.)

> Unquestionably, further investigation and more probing voir dire examination may be called for in such situations, but discharging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venire persons would be insufficient protection for the defendant. The present case falls short of that mark. We

conclude the trial court did not err in declining to discharge the entire venire.

(*People v. Medina* (1990) 51 Cal.3d 870, 889.)

Finally, appellants have cited to as authority dictating that prospective jurors for a penalty phase be subjected to voir dire concerning "lingering doubt." And, as set forth below, the concept of lingering doubt is a subject of argument, and not one requiring instruction of the jurors. (See *People v. Boyer* (2006) 38 Cal.4th 412, ___ [42 Cal.Rptr.3d 677, 741].)

Thus, "even were we to assume that the trial court abused its discretion in restricting voir dire, defendant has failed to establish prejudice." (*People v. Carter, supra,* 36 Cal.4th at p. 1251.)

XIX.

THE RECORD CONTAINS SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S FOR-CAUSE EXCUSAL OF PROSPECTIVE PENALTY PHASE JUROR 8763

Relying on *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841], and *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776], appellants contend the trial court improperly excused for cause Prospective Juror No. 8763 because the "record does not establish that the juror's views on capital punishment 'would prevent or substantially impair the performance of [her] duties as a juror' within the meaning" of *Wainwright* and *Witt*. Accordingly, appellants maintain that the improper exclusion of Prospective Juror No. 8763 "resulted in a violation of appellants' federal constitutional right to due process of law under the Fourteenth Amendment of the United States Constitution and requires automatic reversal of his death sentence." (GAOB 287-297; SAOB 308.) Appellants' claim is meritless since the record contains substantial evidence supporting the for-cause excusal of Prospective Juror No. 8763.

A. The Applicable Law

In *Wainwright v. Witt, supra,* 469 U.S. at page 424, the United States Supreme Court held:

> the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . 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."

(See *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Crittenden* (1994) 9 Cal.4th 83, 120-121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.)

"In *Wainwright v. Witt* (1985) 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841, the high court clarified its decision in *Witherspoon* and held that a prospective juror may be excluded for cause because of his or her views on capital punishment if those views would "'prevent or substantially impair'" the performance of his or her duties as a juror in accordance with the trial court's instructions and his or her oath." (*People v. Avila, supra*, 38 Cal.4th at p. __ [43 Cal.Rptr.3d at p. 33].) The critical question in each challenge is "whether the juror's view about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*." (*People v. Bradford, supra*, 15 Cal.4th at pp. 1318-1319, emphasis original; see also *People v. Vieira, supra*, 35 Cal.4th at pp. 283-284; *People v. Heard* (2003) 31 Cal.4th 946, 958.) The same standard under the state Constitution. (*People v. Gray, supra,* 37 Cal.4th at p. 192.)

If a prospective juror provides conflicting or equivocal answers to questions concerning his or her impartiality, the trial court's determination as to that person's true state of mind, which may include an evaluation of the juror's demeanor, is binding on the appellate court. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 975; *People v. Bradford, supra*, 15 Cal.4th at p. 1319; *People v. Mayfield, supra*, 14 Cal.4th at p. 727; see also *Wainwright v. Witt, supra*, 469 U.S. at pp. 425-426.) A prospective juror who has expressed an unwillingness to impose the death penalty may properly be excused for cause. (*People v. Jenkins* (2000) 22 Cal.4th 900, 986-987.) "There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." (*People v. Gray, supra*, 37 Cal.4th at pp. 192-193.) The trial court's decision to excuse for cause a prospective juror must be upheld if supported by

substantial evidence. (*Gray*, *supra*, 37 Cal.4th at pp. 192-193; *People v. Holt*, *supra*, 15 Cal.4th at p. 651.)

B. The Relevant Proceedings

1. The Jury Questionnaire

Prospective Juror No. 8763, a 56-year-old female (13CT 3290), answered several questions in her jury questionnaire indicating that because of her religious beliefs she could not in good conscience impose the death penalty because the decision as to whether a person should live or die was a matter for God, not human beings. For example, in response to Question No. 91, which asked whether she would "have any problems or concerns" sitting as a juror in the penalty phase where she was not asked to decide guilt or innocence, Prospective Juror No. 8763 responded, "this will be very difficult for me to do because even though these individuals have been already found guilty, it would still be hard for me to sit in judgement [sic] with making such a decision." (13CT 3307.) When asked in Question No. 92 about her general feelings about the death penalty, Prospective Juror No. 8763 answered, "Even though I believe that a person(s) should be punished for hideous crimes, I don't know if I could agree to putting a person to death. I still believe that only God should judge and decide this." (13CT 3307.) Prospective Juror No. 8763, after stating "I don't know," reaffirmed this answer in Question No. 93 when asked whether she believed California should have the death penalty. (13CT 3307.)

Prospective Juror No. 8763 responded in Question No. 96 with "Somewhat" when asked if her views on the death penalty were "based upon religious principles." (13CT 3308.) When asked in Question No. 97 whether regardless of her views on the death penalty she would be able to vote to impose the death penalty after hearing all the evidence, Prospective Juror No. 8763 responded, "Only God should that judge." (13CT 3308.) Prospective

Juror No. 8763 responded, in part, "I don't know" when asked in Question No. 94 if she believed the death penalty is used too often or too little. (13CT 3308.) Prospective Juror No. 99 circled both "Agree" and "Disagree" when asked in Question No. 99 about her view if a person kills another person during the commission of a robbery the person should "automatically and regardless of the evidence receive the death penalty." (13CT 3309.)

Prospective Juror No. 8763 also indicated her approval with the following statements: a person who kills another during the commission of a robbery should, automatically and regardless of the evidence, receive life imprisonment without the possibility of parole (Question No. 100); a person who intentionally kills more than one person should automatically and regardless of the evidence receive life imprisonment without the possibility of parole (Question No. 102): during the penalty phase, she would vote to impose life imprisonment without the possibility of parole regardless of the evidence (Question No. 103); she believed life imprisonment without the possibility of parole is a more severe punishment than the death penalty (Question No. 105; 13CT 3309); and she had conscientious objections to the death penalty which "might impair her ability to be fair to the prosecution in a case where the death penalty is sought (Question 106). (13CT 3309.) When asked if she would sit as a juror in this death penalty case if given a choice, Prospective Juror No. 8763 answered, "No. This would be a difficult job -- determining someone's fate." (13CT 3310.) Prospective Juror No. 8763 also indicated in her answer to Question 108 that her views on the death penalty had not changed in the last 10 years. (13CT 3310.)

2. The Voir Dire

During voir dire, the trial court, after referencing the answers Prospective Juror No. 8763 provided to Questions Nos. 92, 93, 97 and 99,

asked for a "clarification" of her views on imposition of the death penalty. (See 25RT 3095-3097.) Specifically, prospective Juror No. 8763 responded "That's right. That's my feeling" when asked by the trial court "Do you feel that if [the instant case was] a proper case for the death penalty to be imposed, that you as a juror could *not* go along with [voting for the death penalty] because you feel that as a human being you have no right to make a decision which only divinity should decide?" (25RT 3097.) In response to the next question about whether she would ever be able to vote for the death penalty, Prospective Juror No. 8763 stated that she would not like to vote for the death penalty "but if the circumstances should occur and I feel that that person *probably* would be put to death, then I *guess* as a last resort, and if all the evidence is against him, then, yes, I *guess* I would vote for death." (25RT 3097.) When the trial court expressed concern over her answers that she feels human beings "should not decide the question of whether a person is to be executed," Prospective Juror No. 8762 responded, in part, "I still feel that way. . . ." (25RT 3098.)

Defense counsel commenced his questioning of Prospective Juror No. 8763 by assuring her that "we appreciate your thoughts and your concerns about not wanting to undertake such a serious responsibility." (25RT 3099.) When asked by defense counsel whether, if accepted as a juror, she would consider the evidence presented by both the prosecution and defense in determining whether to vote for the death penalty, Prospective Juror No. 8763 did not respond. (25RT 3100.) In response to defense counsel's question of whether she could put aside her personal beliefs and accept her responsibility as a juror to consider the evidence presented by the prosecution in determining penalty, Prospective Juror No. 8763 responded:

I don't know, to be honest. It's really hard and difficult for me to do that. And I have pondered this since I've been asked that question.

. . . .

And I still truly believe that only God should allow a person -- or put a person to death. I don't feel in true judgment that it's up to me to do that. (25RT 3101.) Defense counsel thanked Prospective Juror No. 8763 "for being candid with us" and asked no additional questions. (25RT 3101.)

3. The Trial Court's Ruling

The trial court excused Prospective Juror No. 8763 for cause:

"All right. we really do, as I've told other jurors, appreciate your candor and your sincerity in this matter, but in view of your strong beliefs on the subject, you are excused from this jury." (25RT 3101.)

C. Analysis

Here, substantial evidence was presented in the questionnaire and voir dire to support the trial court's ruling excusing Prospective Juror No. 8763 for cause. Prospective Juror No. 8763 repeatedly indicated in her answers on the jury questionnaire that "only God should judge" whether a person should live or die. Prospective Juror No. 8763 repeatedly stated in her jury questionnaire that she did not believe in the death penalty and that her views on the death penalty were "somewhat" based on her religious convictions. She readily acknowledged that she would have a problem sitting in judgment of another person and that "it will be very difficult for me to do" because "only God should judge and decide this." Prospective Juror No. 8763 also stated in her jury questionnaire answers that "regardless of the evidence" she would impose the penalty of life imprisonment without the possibility of parole. She candidly acknowledged that she had conscientious objections to the death penalty which "might impair her ability to be fair to the prosecution in a case where the death penalty is sought."

During voir dire, Prospective Juror No. 8763 reaffirmed he belief "only divinity" should decide a matter of life and death and that human beings "should not decide the question of whether a person is to be executed." Significantly, when asked by *defense counsel*, whether she could put aside her personal beliefs and accept her responsibility as a juror to consider the evidence and engage in the weighing process of whether death or life imprisonment should be imposed, she responded, "I don't know . . . It's really hard and difficult for me to do that" and "I still truly believe that only God should . . . put a person to death. I don't feel in true judgment that it's up to me to do that."

Such strongly held views are sufficient and ample evidence to support the trial court's excusal for cause of this prospective juror since her views on capital punishment were apparently based on religious beliefs that "only God" could make a life and death decision and thus would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*People v. Cunningham, supra*, 25 Cal.4th at p. 982; *People v. Millwee, supra*, 18 Cal.4th at pp. 146-147.)

It is true that Prospective Juror No. 8763 provided a single answer during voir dire where she "guessed" she could "probably" vote for the death penalty as "a last resort" where "all the evidence" is against the defendant. And, of course, this is the lone statement upon which appellants rely in an effort to demonstrate the trial court erred in its ruling. However, all of Prospective Juror No. 8763 answers in the jury questionnaire, as well as her answers during voir dire both before and after this statement reflect the exact opposite: that she was unable to participate in the process of weighing the evidence in determining the appropriate penalty of life imprisonment or death because "only God" can make that decision. Based on the totality of her answers in the questionnaire and voir dire, the trial court was obviously persuaded that that single answer upon which appellants rely so heavily was not reflective of her

true feelings and state of mind. To the extent this prospective juror gave conflicting answers, the trial court resolved those differences adversely to appellants by granting the challenge. The trial court's determination as to the prospective juror's true state of mind, if supported by substantial evidence, as is the case here, is binding on the appellate court. (*People v. Barnett, supra*, 17 Cal.4th at pp. 1114-1115 [while some answers showed willingness to follow the law and the court's instruction, other answers furnished substantial evidence of prospective juror's inability to consider the death penalty]; see also *People v. Bradford, supra*, 15 Cal. 4th at p. 1329.)

Finally, the cases cited and relied upon by appellant Gonzales are distinguishable. For example, in *People v. Heard*, *supra*, 31 Cal.4th 946 (see GAOB 293-294; SAOB 308), this Court found reversible error from the dismissal of a prospective juror on *Witt* grounds, holding there was no substantial evidence supporting the trial court's determination that the juror's views on capital punishment would prevent or substantially impair the performance of his duties. The prospective juror in *Heard* unequivocally indicated "that he would not vote 'automatically'" for life without parole or death. (*Id.* at pp. 964-965.) The prospective juror also "indicated he was prepared to follow the law and had no predisposition one way or the other as to imposition of the death penalty." (*Id.* at p. 967.) Here, as demonstrated above, Prospective Juror No. 8763 not only gave equivocal and conflicting answers on her ability to impose the death penalty, but made statements indicating that she could not, in good conscience because of her religious beliefs, vote for death. Unlike the situation in *Heard*, there was substantial evidence in the instant case that Prospective Juror No. 8763 views on capital punishment would prevent or substantially impair the performance of her duties, and thus the trial court properly excused her for cause.

Likewise, appellants reliance on *People v. Stewart, supra*, 33 Cal.4th at pp. 446-447 (GAOB 294-296; SAOB 308) is misplaced. In *Stewart*, five jurors who indicated on their jury questionnaire that they had conscientious opinions or beliefs about the death penalty which would prevent or make it difficult for them to ever impose the death penalty were excused for cause without any follow-up questioning by the trial court. This Court held, in part, that the trial court erroneously excused the five jurors for cause based solely on their answers to questions on the jury questionnaire, which were insufficient to form an assessment under *Witt* as to whether the jurors could perform their duties as required by law, without any follow-up voir dire on the matter. (*People v. Stewart, supra*, 33 Cal.4th at pp. 446-452.) As demonstrated above, the situation which occurred in *Stewart* did not occur in the instant case.

XX.

APPELLANT GONZALES' RIGHT TO COUNSEL WAS NOT DENIED DUE TO AN ALLEGED "CONFLICT OF INTEREST"

During the deliberation of the jurors at the first penalty phase, appellant's brother David Gonzales and his wife Kimberly attempted to smuggle heroin into appellant Gonzales by sewing 15 vials of it into clothing they handed to appellant Gonzales' counsel in court. Appellant Gonzales argues his counsel thus had a conflict of interest, resulting in a break down of the attorney-client relationship, because he was now a potential defendant and/or a potential prosecution witness against his own client in a future case. (GAOB 298-333.) This claim is without merit.

A. Relevant Proceedings Below

After the prosecuting attorney's opening argument at the first penalty phase, the court took the noon recess, and after the recess the following colloquy occurred outside the presence of the jurors:

> MR. SORTINO: . . . I think, in an abundance of caution, it's necessary to put some things on the record that occurred or that I was advised occurred over the noon hour in this case.
>
> I was advised through the sheriff's department that some clothes that were intended for Mr. Gonzales were searched prior to being given to him over the noon recess, and a large quantity of narcotics was found secreted in them and that the clothes were not given to him and, I assume, have been seized by the sheriffs as potential evidence, should an investigation continue.

It's also my understanding that those clothes were given to Mr. Tyre by a member of defendant John Gonzales' family and that Mr. Tyre handed them to the bailiff.

Now, I, in no way, am implicating Mr. Tyre in this conduct. My understanding from conversing with the deputies and from my knowledge of Mr. Tyre, just as a professional matter and over the course of being in Pomona, is that he had nothing whatsoever to do with this; that this was done without his knowledge and using him as someone -- and using him without his knowledge.

My belief is, based upon my conversations with the sheriff's deputies and my knowledge of the incident, that probably Mr. Gonzales knew about it and that whoever the family member was who was handing the clothes would certainly know about it. But certainly Mr. Gonzales, because there would be no point to smuggling narcotics into the jail in pants that he would wear unless he would know about them to be able to take the items out prior to removing the clothes and going back to the jail tonight.

But, because this is a death penalty case and because if what has transpired, I think it's important to put on the record what did occur.

I don't think that in any way this invalidates the penalty phase or the arguments that should occurred today. I believe that to in any way invalidate what has occurred in terms of the penalty phase in argument would be to reward Mr. Gonzales for his own obvious misconduct. But I think it was important, because this is a death penalty case and in the event that a death verdict is returned, that these matters be placed on the record.

And again I want to reiterate that in my opinion and from [what} I know about this case, Mr. Tyre had absolutely nothing whatsoever to do with this incident.

THE COURT: I don't have a moment's doubt about that. I'm completely satisfied that the attorneys are blameless in this matter and that -- that the crimes that have been committed, circumstantial evidence certainly would point very strongly in the direction that you indicate.

However, because the trial cannot be sidetracked because of these events, none of this is going to be communicated to the jury directly or indirectly at any time during arguments or during their deliberations. So the jury will be as much in the dark about this as if it had never happened.

Now, what follow up there is as far as any subsequent arrests that may be made, that's going to be a matter for law enforcement to take care of.

MR. SORTINO: I understand. [¶] Just so the record is clear, your Honor, it's my understanding that the jury has in no way been advised of this or has any way of knowing that this has transpired, and therefore, this is as if it never happened, at least as far as the jury is concerned.

THE COURT: All right.

MR. TYRE: Your Honor, just for the record, I was given the clothes prior to lunch and I was accompanied by Deputy Encinas up to the sheriff's department where I left the clothes. I don't think -- Mr. Gonzales had never said anything to me about any knowledge, you know, about any narcotics at that point.

THE COURT: All right.

MR. TYRE: But I had just left the clothes up at the sheriff's department. that was the last I saw of them until I came back from lunch

and I ran into Mr. Borges and they indicated that they wanted to talk to me about it. And that was the only thing I knew.

THE COURT: All right. [¶] Well, as I said, I don't have a moment's hesitation believing in my own heart and mind and from the facts that counsel in this matter are entirely blameless.

MR. SORTINO: I would agree, your Honor.

(19RT 2692-2695.)

After the first penalty phase, the jurors indicated they were deadlocked concerning penalty as to count I for appellant Gonzales, and concerning the penalty as to counts I, IV and V for appellant Soliz. (19RT 2757-2759, 2765-2768.) The court declared a mistrial as to these counts. (19RT 2768-2769.)

Prior to the second penalty phase, counsel for appellant Gonzales filed a "motion of possible conflict" and a request for an evidentiary hearing "to determine if defense counsel should be relieved as attorney of record." (Supp. CT 234-235.) Counsel argued that evidence of the attempt to smuggle narcotics to appellant Gonzales was not relevant evidence at the second penalty phase, but that if the prosecuting attorney intended to offer it, then counsel could possibly be called as a witness, and thus he sought a "ruling on potential evidence so that a conflict could be declared if necessary." (Supp. CT 235.)

At the hearing on the motion, counsel for appellant Gonzales agreed with the trial court that if the prosecuting attorney was not permitted to introduce the evidence at the second penalty phase, then the issue raised by this motion was moot. (20RT 2779.) The prosecuting attorney stated he would not seek to directly introduce evidence of the smuggling attempt at the second penalty phase, but would use it as impeachment evidence should appellant Gonzales or the implicated family members seek to testify. (20RT 2781-2782.) The following colloquy then took place:

THE COURT: What about Mr. Tyre?

MR. SORTINO: I think Mr. Tyre is a witness in that case to the extent charges are filed. He was the unknowing or unwitting mule, if you will, that the clothes were handed to. I believe Mr. Gonzales, and his family, has placed Mr. Tyre right in the middle of that investigation.

THE COURT: I certainly would agree with that, that Mr. Tyre was placed in a -- what could have been a very compromising situation. And, unfortunately for him, he had exculpatory witnesses from the time the clothes were handed over until they were delivered to the sheriff's upstairs, so that there is no possible way that, even if we were -- had reason to suspect Mr. Tyre, which certainly none of us do -- and I emphasize that I have no thought of any complicity on his part. But it could have put him in a very embarrassing situation had he unobserved custody of the clothing for some time as far as the chain is concerned. But I think that that's a matter that's going to be have to be addressed.

On the issue of the motion to -- so the motion of conflict, I think, is going to have to be resolved at the time the matter is reset in Department A.

(20RT 2782-2783.)

After the trial court sentenced appellant Gonzales on the counts upon which the jury reached a verdict, it indicated the case was going to be reassigned to another judge for a second penalty phase, that he had already discussed with that judge "the possible relieving of Mr. Tyre as counsel," and that "very probably Mr. Tyre is going to be relieved in this matter," but that he was leaving that decision up to the "[trial] setting judge, because he's going to have a position of having to appoint other counsel, if he does, in fact, grant the motion." (20RT 2788-2789.) Counsel for appellant Soliz thereafter indicated that "on reflection, there is a strong possibility that a conflict exists also as to me for the same set of facts because of the potential involvement of my client

and my contact with Mr. Tyre as these events unfolded." (20RT 2791.) The trial court disagreed, but repeated this was something he should take up with the next assigned judge. (*Ibid.*)

When the matter was taken up by the Master Calendar Court for assignment to a new court, appellants indicated they would be filing in the trial court "appropriate papers as to a possible conflict and a waiver of conflict." (20RT 2797-2798.) When the matter was thereafter assigned briefly to the Honorable Judge Theodore D. Piatt, counsel for appellant Gonzales again indicated that depending on whether evidence of the smuggling attempt was to come in either as impeachment of witnesses or as evidence itself, then he might have a "legal conflict." (21RT 2805.) The prosecuting attorney repeated that "Mr. Tyre had nothing whatsoever to do with that and was unknowing in what he did," and that the act itself was not admissible as aggravating evidence at the penalty phase, but that if the responsible family members were called to testify, or appellant Gonzales were to testify, then he believed such evidence was appropriate and relevant impeachment evidence. (20RT 2806.)

The Court questioned Mr. Tyre, who indicated that sheriff's personnel were present at all times, from the time he received the clothes until the clothes were taken into the lockup. (20RT 2807.) The following colloquy then took place:

> THE COURT: I don't see any potential for impeachment under those circumstances. I don't know how you could be called as a witness. There isn't going to be any question, based upon what the district attorney has said and based upon the answers that you have given to my questions, that anyone could assert that you secreted these items inside the clothing or that you had any knowledge of it.
>
> MR. TYRE: I still think that under 352 the Court could exclude it, but I think any mention of my name during impeachment, such as, did

you bring these to Mr. Tyre, having some kind of mention of my name associated with this incident could have some effect on the jury's attitude towards either myself --

THE COURT: I wouldn't permit evidence to be presented to the trier of fact that clothes were -- that anything was done other than the clothes were brought to court and transported to lockup for their benefit, thereafter, certain things were found in them.

I don't see any need to have mention of your name, since there isn't any suggestion whatever that you were anything more than a conduit.

(201RT 2807-2808.)

The prosecuting attorney indicated a concern that "to the extent Mr. Tyre has information about who contacted him about the clothes the night before, who handed the clothes to him, that may become relevant in terms of, if those people testify -- and they did testify at the prior penalty phase in this case[.]" (21RT 2808.) The prosecuting attorney indicated his belief that appellant Gonzales' brother and sister-in-law were involved in the smuggling attempt, that appellant Gonzales knew about it, that should any of them testify, such evidence was admissible impeachment, and that counsel for appellant Gonzales "has information about who contacted him about the clothing or gave him the clothes and I think he is a potential witness, not as a defendant, but as an eyewitness, as an eyewitness to that event." (21RT 2809.)

The Court indicated there was no conflict, that there was no reason counsel could not continue to represent appellant Gonzales, that counsel would not be a witness, and that the Court would not permit him to be called as a witness. (21RT 2811.)

Thereafter, when appellant Gonzales testified in his defense at the second penalty phase, the prosecuting attorney in a conference outside the

presence of the jurors requested to cross-examine appellant Gonzales concerning the smuggling attempt, and the following colloquy took place:

> THE COURT: The problem is that they never got to him and he was not the one who sewed them in the clothes, and so I think that it's just too far afield. I mean I just -- circumstantially I think it's a matter of common sense we probably know he anticipated getting them. But I don't think it's appropriate right now without further proof, without something to tie him to them. If he had gotten the clothes and had taken even one piece of it out, why, I'd let you go full bore. But, under the circumstances, I don't think that's fair.

(32RT 4262.) After the prosecuting attorney made an offer of proof, the Court again denied the request:

> THE COURT: Well, I agree with what you said, but I'm simply saying that under the circumstances I think, on balance, I'm going to have to lean over the other way on that and not let you go into that because of the fact that even though the circumstantial evidence is very strong, I think at this point to attribute something to him that he never touched himself and that he had no control over and never actually took possession of is just -- is not appropriate. So, no, you may not go into that.

(32RT 4263.)

B. There Was No Conflict Of Interest

Appellant Gonzales argues there was an "actual conflict" because his trial counsel was "exposed to the possibility of being criminally prosecuted for smuggling heroin into the jail," and that *if* criminal charges were ever to be filed, the trial counsel would be prosecuted "by the same government agency prosecuting appellant on the murder charges." (GAOB 305-306.) He further

argues there was an "actual conflict" because *if* charges were ever filed against appellant or his relatives, trial counsel *might* be called as a prosecution witness against them, thereby turning trial counsel into a "witness against his own client." (GAOB 306.)

While it is true that "[a]n actual conflict of interest negates the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney" (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 356 [100 S.Ct. 1708, 64 L.Ed.2d 333] (conc. and dis. opn. of Marshall, J.) ("*Cuyler*")), to establish a Sixth Amendment violation based on an actual conflict, the defendant must show an actual conflict that adversely affected his lawyer's performance (*Cuyler*, *supra*, 446 U.S. at p. 338). In other words, to demonstrate an actual conflict, appellants must show that trial counsel's interests "diverge[d] [from his attorney's] with respect to a material factual or legal issue or to a course of action." (*Cuyler*, *supra*, 446 U.S. at p. 356, fn. 3.)

> "The right to effective assistance of counsel, secured by the Sixth Amendment to the federal Constitution, and article I, section 15 of the California Constitution, includes the right to representation that is free from conflicts of interest." [Citation.] "'Conflicts of interest may arise in various factual settings. Broadly, they "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests."'" [Citation.]
>
> Under the federal Constitution, when counsel suffers from an actual conflict of interest, prejudice is presumed. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333.) This presumption arises, however, "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" (*Strickland v.*

Washington (1984) 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674, citing *Cuyler v. Sullivan*, *supra*, at p. 348, 100 S.Ct. 1708.) An actual conflict of interest means "a conflict that affected counsel's performance--as opposed to a mere theoretical division of loyalties." (*Mickens v. Taylor* (2002) 535 U.S. 162, 171, 122 S.Ct. 1237, 152 L.Ed.2d 291, italics omitted.) "Under the Sixth Amendment of the federal Constitution, reversal is required if a defendant, over a timely objection, is forced to continue with conflicted counsel." [Citation.] To obtain a reversal for this type of error, "the defendant need not demonstrate specific, outcome-determinative prejudice. [Citation.] But he must show that an actual conflict of interest existed and that that conflict adversely affected counsel's performance." (*People v. Bonin* (1989) 47 Cal.3d 808, 837-838, 254 Cal.Rptr. 298, 765 P.2d 460; see generally *Mickens v. Taylor*, *supra*, 535 U.S. 162, 122 S.Ct. 1237.)

"'To show a violation of the corresponding right under our state Constitution, a defendant need only demonstrate a potential conflict, so long as the record supports an "informed speculation" that the asserted conflict adversely affected counsel's performance. [Citations.]' [Citation.] 'But "[p]ermissible speculation giving rise to a conflict of interest may be deemed an informed speculation . . . only when such is grounded on a factual basis that can be found in the record."' [Citations.]

"To determine whether counsel's performance was 'adversely affected,' we have suggested that [*Cuyler v.*] *Sullivan* [, *supra*, 446 U.S. 335, 100 S.Ct. 1708,] requires an inquiry into whether counsel 'pulled his punches,' i.e., whether counsel failed to represent defendant as vigorously as he might have, had there been no conflict. [Citation.] In undertaking such an inquiry, we are . . . bound by the record. But where

a conflict of interest causes an attorney not to do something, the record may not reflect such an omission. We must therefore examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission." [Citation.]

(*People v. Roldan*, *supra*, 35 Cal.4th at pp. 673-674; see also *People v. Cornwell* (2005) 37 Cal.4th 50, 74-75.)

An attorney must withdraw from representation, absent the client's informed written consent, whenever he or she knows or should know he or she ought to be a material witness in the client's cause. (Cal. Rules of Prof. Conduct, rule 5-210; see *Comden v. Superior Court* (1978) 20 Cal.3d 906, 911, fn. 1, 145 Cal.Rptr. 9, 576 P.2d 971 [motion to disqualify opposing counsel].) The determination whether an attorney ought to testify ordinarily is based on an evaluation of all pertinent factors, including the significance of the matters to which the attorney might testify, the weight the testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established. (*Comden*, *supra*, at p. 913, 145 Cal.Rptr. 9, 576 P.2d 971.) An attorney should "resolve any doubt in favor of preserving the integrity of his testimony and against his continued participation as trial counsel." (*Id.* at p. 915, 145 Cal.Rptr. 9, 576 P.2d 971.)

(*People v. Dunkle* (2005) 36 Cal.4th 861, 914.)

Ultimately, an "actual conflict" is one "that affected counsel's performance -- as opposed to a mere theoretical division of loyalties." (*Mickens v. Taylor* (2002) 535 U.S. 162, 171 [122 S.Ct. 1237, 152 L.Ed.2d 291]; see also

id. at p. 172, fn. 5 ["An 'actual conflict', for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance."].)

Appellant Gonzales' theory -- that his trial counsel's performance was "adversely affected" merely because he *might* have been a potential defendant, or *might* be a potential witness against appellant Gonzales, in an as yet uncharged future criminal case -- appears to be nothing more than an *ipse dixit*: It adversely affected counsel's performance because I say so. The simple "possibility of conflict is insufficient to impugn a criminal conviction." (*Cuyler, supra*, 446 U.S. at p. 350.) And trial counsel's suggestion below of a possible conflict resulting from a criminal case that could at some point have been charged against him or appellant Gonzales does not dictate an actual conflict existed. (See, e.g., *Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1452 ["The existence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict."].)

Appellant Gonzales points to no adverse act or omission by his trial counsel that resulted from or was related to this alleged conflict. "[D]efects in assistance that have no probable effect upon the trial's outcome do *not* establish a violation" of a criminal defendant's Sixth Amendment right to "the Assistance of Counsel for his defence." (*Mickens v. Taylor, supra,* 535 U.S. at p. 166, emphasis added; see also *Cuyler, supra*, 446 U.S. at p. 349 [To obtain a new trial, a defendant must prove that the conflict manifested itself as "an actual lapse in representation."].) Indeed, unless *ipse dixit* alone is sufficient to establish the existence of an actual conflict and resulting adverse affect, appellant Gonzales has pointed to nothing suggesting trial counsel's performance was in any way affected. This claim is without merit, as appellant

Gonzales has not shown he was deprived of his Sixth Amendment rights by an actual conflict of interest.

XXI.

THE COURT PROPERLY REFUSED TO ADVISE THE JURORS AS TO THE SENTENCE APPELLANT GONZALES HAD RECEIVED AS TO COUNTS IV AND V

Appellant Gonzales argues the court at the second penalty phase violated his federal constitutional rights, under the Eighth and Fourteenth Amendments to the federal Constitution, when it refused his request that the second penalty phase jury be advised and instructed that he had already been sentenced to life without the possibility of parole by a prior jury for the murders of Messrs. Skyles and Price, as this was potentially mitigating evidence he was constitutionally entitled to have the jury consider. (GAOB 417-438.) Respondent disagrees and submits the sentence appellant Gonzales received for the murders of Messrs. Skyles and Price in counts IV and V was not an aggravating or mitigating factor and was irrelevant to the jury's resolution of the issues remaining at the second penalty phase.

A. Relevant Proceedings Below

Prior to distributing a questionnaire to the prospective jurors at the second penalty phase, the parties argued as to what the prospective jurors should be told concerning what had occurred in the first guilt and penalty phases. Appellants argued the prospective jurors should be advised that the prior jury at the first penalty phase had already decided that the appellant Gonzales should be sentenced to life in prison without the possibility of parol for he murders of Messrs. Skyles and Price. (24RT 2829-2831.) Appellants also argued that because the People would bring in evidence of appellant Gonzales' convictions pursuant to Penal Code section 190.3, then they should also be told of the penalty. (24RT 2840-2844.) The prosecuting attorney argued evidence of appellant Gonzales' life sentences was irrelevant and

immaterial to the second penalty phase jurors' decision, and that it was being offered by counsel to improperly influence the jurors. (24RT 2831-2832, 2837.) The court denied appellants request, and ordered that the questionnaire submitted to the prospective jurors advise them in pertinent part as follows:

> In this case, the guilt phase of the trial has already occurred. A jury has already convicted both defendants of the first-degree murder of Lester Eaton, which occurred on January 27, 1996, and of the first-degree murders of Elijah Skyles and Gary Price, which occurred on April 14, 1996.
>
> That jury also found true special circumstances alleged in connection with these three murders. Specifically, in connection with the murder of Lester Eaton, the jury found true the "felony-murder" special circumstance. A "felony-murder" special circumstance occurs when a first-degree murder is committed during te commission of certain other felonies, including robbery. In this case, the jury found that the first-degree murder of Lester Eaton occurred during the commission of a robbery.
>
> The second special circumstance, which the jury found true in connection with both the Lester Eaton murder and the murders of Elijah Skyles and Gary Price, is "multiple murder." The "multiple murder" special circumstance occurs when a defendant is convicted of more than one count of murder in a single case, and at least one of those murders is of the first-degree.
>
> In the previous trial, the jury reached verdicts as to the appropriate penalty for defendant John Gonzales for the murders of Elijah Skyles and Gary Price. Therefore, the penalty phase as to defendant Gonzales for those murders is not before you. The decision you must make in this penalty phase is what punishment should be imposed on defendant

Gonzales for the murder of Lester Eaton, and what punishment should be imposed on defendant Michael Soliz for the murder of Lester Eaton and the murders of Elijah Skyles and Gary Price.

If you are selected as a juror in this case, you will **not** re-decide whether or not the defendants are guilty of these three murders. You will decide **only** what punishment each should receive. In the case of defendant Gonzales, you will decide what punishment he should receive for the first-degree murder of Lester Eaton. In the case of defendant Michael Soliz, you will decide what punishment he should receive for the first-degree murder of Lester Eaton and for the first-degree murders of Elijah Skyles and Gary Price.

(Cf. 7CT 1550-1551, bold face and underlining in original; 24RT 2838-2839, 2843-2844.)

Before a panel of prospective jurors was brought in, appellants again objected to the way the questionnaire was phrased. (24RT 2863.) The court stated that it would stand by the ruling made, that it had reviewed the revised questionnaire and believed it was consistent with the court's ruling. (*Ibid.*)

The jurors were subsequently instructed as follows:

Both defendants were previously convicted of the first-degree murder of Lester Eaton. In connection with that conviction, the previous jury also found true the special circumstance and that the murder occurred during the commission of a robbery.

Both defendants were also previously convicted of the first degree murders of Gary Price and Elijah Skyles. In connection with those two murders and the murder of Lester Eaton, the previous jury found true the multiple murder special circumstance. You must determine the penalty defendant John Gonzales is to receive for the first degree murder of Lester Eaton. You must determine the penalty defendant Michael Soliz

is to receive for the first degree murders of Lester Eaton, Gary Price and Elijah Skyles.

(4CT 920.)

B. The Trial Court Did Not Err In Refusing To Advise Or Instruct The Jury That Appellant Gonzales Had Already Received Life Sentences As To The Murders Of Messrs. Skyles And Price

Appellant Gonzales argues evidence of the sentence he received "was expressly admissible under the statute as evidence of a 'prior felony conviction,'" and that because the jury was advised of his *convictions* of the murders of Messrs. Price and Skyles, evidence of the *sentence* he received for the convictions was relevant as it would have "weakened the effect of the prior murder convictions and would have assisted the jury in assessing the significance of the evidence of [appellant Gonzales'] two prior murder convictions." (GAOB 421.)

Respondent submits evidence of appellant Gonzales' life sentences as to the murders of Messrs. Skyles and Price in counts IV and V was inadmissible at the second penalty phase, as it was not relevant evidence of any aspect of appellant Gonzales' character and record, or to the circumstances of the offense.

"'[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [102 S.Ct. 869, 71 L.Ed.2d 1], quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973] (plurality opinion) ("*Lockett*").) "Recognizing 'that the imposition of death by public authority is . . . profoundly different from all other penalties,' the plurality [in *Lockett*] held that the sentencer must be free to give 'independent mitigating weight to aspects of the defendant's character and record and to

circumstances of the offense proffered in mitigation. . . .' *Id.*, at 605, 98 S.Ct., at 2965." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 110; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S.Ct. 1669, 1670, 90 L.Ed.2d 1]; *People v. Stanley* (1995) 10 Cal.4th 764, 825; *People v. Davenport* (1986) 41 Cal.3d 247, 282.)

> The constitutional mandate contemplates the introduction of a broad range of evidence mitigating imposition of the death penalty. (See *Payne*, *supra*, 501 U.S. at pp. 820-821 [111 S.Ct. at pp. 2605-2606]; *People v. Whitt* (1990) 51 Cal.3d 620, 647 [274 Cal.Rptr. 252, 798 P.2d 849]; cf. *Lockett*, *supra*, 438 U.S. at pp. 602, 604 [98 S.Ct. at pp. 2963-2965] [noting that concept of individualized sentencing, including the traditionally wide range of factors taken into account by sentencer, ensures a greater degree of reliability in capital sentencing determinations].) The jury "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." (*Jurek v. Texas* (1976) 428 U.S. 262, 271 [96 S.Ct. 2950, 2956, 49 L.Ed.2d 929].)
>
> At the same time, however, the United States Supreme Court has made clear that the trial court retains the authority to exclude, as irrelevant, evidence that has no bearing on the defendant's character, prior record or the circumstances of the offense. (*Lockett*, *supra*, 438 U.S. at p. 604, fn. 12 [98 S.Ct. at p. 2965]; see, e.g., *People v. Jackson*, *supra*, 13 Cal.4th at p. 1230 [no error in excluding evidence of defendant's offer to stipulate to facts underlying prior conviction for rape because not relevant to character]; *People v. Zapien* (1993) 4 Cal.4th 929, 989 [17 Cal.Rptr.2d 122, 846 P.2d 704] [trial court acted within discretion in barring evidence having no bearing on defendant's background or circumstances of offense].) Thus, in a proper exercise of

its discretion, the trial court determines the relevancy of mitigation evidence in the first instance. (*People v. Carpenter* (1997) 15 Cal.4th 312, 404 [63 Cal.Rptr.2d 1, 935 P.2d 708] (*Carpenter*); *Fauber*, *supra*, 2 Cal.4th at p. 856; cf. *Kordenbrock v. Scroggy* (E.D.Ky. 1988) 680 F.Supp. 867, 889 [relevance is the threshold inquiry in assessing claim of *Skipper* error].)

In *McKoy v. North Carolina* (1990) 494 U.S. 433 [110 S.Ct. 1227, 108 L.Ed.2d 369], the court provided further guidance on the nature of the relevancy inquiry at the penalty phase. The court observed that the concept of relevance as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally. (*Id.* at p. 440 [110 S.Ct. at p. 1232].) "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. . . .'" (*Ibid.*, quoting *State v. McKoy* (1988) 323 N.C. 1 [372 S.E.2d 12, 45] (dis. opn. of Exum, C. J.); see also Evid. Code, § 210 [relevant evidence is evidence having tendency in reason to prove or disprove any disputed fact of consequence to determination of action].)

(*People v. Frye* (1998) 18 Cal.4th 894, 1015-1016.)

Appellant Gonzales is correct that evidence of appellant Gonzales' prior felony *convictions* is statutorily recognized as relevant and admissible penalty phase evidence under Penal Code section 190.3.[65/] However, evidence of the

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65. Penal Code section 190.3. provides in pertinent part:
In the proceedings on the question of penalty, evidence may be presented by both the People and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence,

sentence appellant Gonzales received upon being convicted for the murders of Messrs. Skyles and Price is not recognized by statute or in caselaw as a relevant aggravating or mitigating factor, as it does not "tend[] logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*McCoy v. North Carolina* (1990) 494 U.S. 433, 440 [110 S.Ct. 1227, 108 L.Ed.2d 369], internal quotation marks omitted.) In other words, the *sentence* appellant Gonzales received upon his convictions for the murders of Messrs. Skyles and Price is not *evidence* bearing on the issues of appellant Gonzales' "character or the circumstances of the offense." (See, e.g., *People v. Burgener*, *supra*, 29 Cal.4th at p. 888.)

Finally, even assuming arguendo the court erred when it excluded evidence that appellant Gonzales' had already been sentenced to two terms of life in state prison for the murders of Messrs. Skyles and Price, reversal is not required because the error was harmless beyond a reasonable doubt. (*People v. Frye*, *supra*, 18 Cal.4th at p. 1017.) The aggravating evidence against appellant Gonzales was overwhelming, including eyewitness testimony, pretrial statements and his own testimony at the second penalty phase as to his cold, callous and unprovoked robbery and murder of Mr. Eaton. Moreover, the jury also heard overwhelming evidence, and was urged by the prosecuting attorney to find, that appellant Soliz, not appellant Gonzales, shot Messrs. Skyles and Price. Thus, there is no reasonable possibility that any error in excluding excluded evidence of the two life sentences appellant Gonzales had already received for the murders of Messrs. Skyles and Price could have affected the outcome. (*Chapman*, *supra*, 386 U.S. at pp. 23-24.)

> the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

XXII.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CROSS-EXAMINATION OF APPELLANT GONZALES AT THE SECOND PENALTY PHASE

Appellants argue the prosecutor committed misconduct at the second penalty phase when he repeatedly asked appellant Gonzales whether prosecution witnesses had lied during their testimony. (GAOB 334-360; SAOB 156-169.) Respondent submits this issue is waived by the failure to timely object and request an admonition below. In any event, such questioning was neither improper nor misconduct, and even if it were, it was clearly harmless.

A. Relevant Proceedings Below

During the prosecuting attorney's cross-examination of appellant Gonzales at the second penalty phase, the following colloquy occurred:

Q: When you and Mr. Soliz went into the market that night, you had bandannas on, right?

A: Nope.

Q: You didn't have any bandanna on?

A: I didn't.

Q: Mr. Soliz have one on?

A: Can't recall.

Q: Do you remember Dorine Ramos testifying in here that she saw you and Mr. Soliz before the robbery playing with bandannas and putting them around your face?

A: Yes.

Q: Your testimony is that you didn't have a bandanna that night?

A: Yeah, I didn't have one.

Q: Did you have one earlier that evening when Dorine Ramos saw you?

A: No.

Q: So Dorine Ramos wasn't telling the truth when she came in here?

A: No.

Q: You heard that Mrs. Eaton originally told both the police officers, both the patrol officers interviewed her at the scene and the detectives who interviewed her back at the Industry Station, that the two men that came into the store were wearing bandannas that night? Remember?

A: Yeah. yes.

Q: So Mrs. Eaton told the officers initially that both the men who robbed the store had bandannas across their face, correct?

A: Yes.

Q: Your testimony here today that Mrs. Eaton wasn't telling the truth to those officers?

A: Yes.

You're the one telling the truth tonight -- today when you said that you didn't have a bandanna on.

A: Yes.

Q: Did you have a hat on that night, a kind of beanie?

A: No. I had on a hooded sweater, a red hooded sweater.

Q: How about Jasper? Did he have a beanie to cover the top of his head?

A: He had a cap on.

Q: So he was wearing a cap that night?

A: Yes.

. . . .

Q: A beanie cap?

A: Yeah. I think it was light, though, a light color.

Q: Exactly what Miss Ramos said she saw hanging out of his pocket; is that right?

A: What?

Q: That he had a beanie cap hanging out of his pocket?

A: (Moves head in side-to-side motion)

Q: No?

A: No it was a baseball cap.

Q: It had a bill?

A: It had a bill. Baseball cap.

Q: So your testimony is Ms. Ramos wasn't telling the truth when she said she saw beanie caps hanging out of your pockets that night?

A: No. She wasn't telling the truth. [¶] We were never on Perth.

MR. BORGES: I'm sorry. I didn't hear the last statement.

THE WITNESS: "We were never on Perth."

BY MR. SORTINO:

Q: You were never anywhere near Perth Street that night?

A: No.

Q: So Miss Ramos is just making all that up what she saw that night?

A: Yeah.

Q: But you're telling the truth here today?

A: Yes.

Q: Even though you couldn't remember whether or not Jasper had a gun that night.

MR. BORGES: That's argumentative.

THE COURT: Sustained.

(32RT 4233-4236.)

Q: Were you rehabilitating yourself when Deputy Esquivel came into your cell and found that jail-made shank in the envelope with your name on it?

A. Didn't find it in my cell.

Q: Oh. Was he lying when he took the stand?

A: Pretty much -- yes. Yes.

Q: So Dorine Ramos was lying when she talked about what she saw the night of the robbery murder?

A: Yes.

Q: Mrs. Eaton was lying to the police when she told them what she saw the night of the murder?

A: Not really lying, cuz that's what she thought she saw.

Q: Deputy Esquivel was lying when he said he found the shank in your cell?

A: Yes.

Q: You're telling the truth, though, today.

A: Yes.

Q: Is your testimony to this jury, Mr. Gonzales, that that shank that Deputy Esquivel found or said he found in the cell was not your shank?

A: It wasn't mine.

Q: And your testimony is he never found it in your cell that day?

A: Never found it in my cell.

Q: So your testimony is that he came in here into this Court and lied about finding that shank in your cell belonging to you?

A: Yes.

(32RT 4260-4261.)

Q: You heard about Miss Mejorado's statements to the police when she was first interviewed and her testimony during the preliminary

hearing where she said both you guys talked about going back and talking to those guys. You remember that?

A: Yes.

Q: Was she lying to the police when she said that?

A: Yes.

Q: Was she lying at the preliminary hearing when she said that testimony under oath?

A: Yes.

Q: But you're the one telling the truth now.

A: Yes.

. . .

Q: So [Miss Mejorado] was lying when she told the police that both of you got out of the car that night?

A: Yes.

Q: Was she lying when she testified under oath that both of you got out of the car that night?

A: Yes.

Q: But you're telling the truth now.

A: Telling the truth.

(32RT 4272-4274.)

Q: Okay. You heard about the identification made by Ms. Mateo –

A: That's wrong.

Q: -- of Jasper?

A: All the witnesses you guys had were wrong. I don't know where you got them from, but they're wrong.

Q: So Carol Mateo was lying when she testified here in Court that this was the man she saw?

MR. BORGES: Your Honor, that's an incorrect statement. I'd object. He said she was wrong, not that she was lying.

THE COURT: Before he said two or three times that she was lying. So in cross-examination I think counsel is entitled to pick up that portion of it.

BY MR. SORTINO:

Q: Carol Mateo was lying when she came in here to court and said Michael Soliz was the man she saw pulling the trigger?

A: Yes.

Q: And she was lying when she testified at the earlier trial in this case and said the same thing?

A: Yes.

Q: And she was lying when she said the same thing at the preliminary hearing?

A: Yes.

Q: And she was lying when she picked his picture out of the six-packs and told the police officers that was guy who did the shooting.

A: Yes

Q: Jeremy Robinson wasn't telling the truth when he picked Jasper's picture out of the six-pack and said that looked like the guy that did the shooting.

A: Yes.

Q: And Alejandro Mora Garcia, when he picked Jasper's picture out of the six-pack and said that looks like the guy that got into the driver's side of the car, he wasn't telling the truth either?

Q: I don't know if he ever picked him.

Q: Well, assuming he did, was he not telling the truth, too?

A: If he picked him, he wasn't telling the truth.

Q: All right. And had Judith told the police that Jasper was the guy that got back in the left side of the car after the shooting, she wasn't telling the truth?

A: No.

Q: And when she testified at the preliminary hearing and said the same thing under oath, she wasn't telling the truth?

A: No.

Q: You're the one telling the truth today.

A: Yes.

Q: All those other people, they conspired together to lie against you and Jasper?

MR. TYRE: Objection, argumentative, your Honor.

THE COURT: Sustained.

(32RT 4275-4277.)

B. Applicable Law

"When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury." [Citation.] As a prerequisite for advancing a claim of prosecutorial misconduct, the defendant is required to have objected to the alleged misconduct and requested an admonition "unless an objection would have been futile or an admonition ineffective." [Citation.] "A defendant claiming that one of these exceptions applies

must find support for his or her claim in the record. [Citation.] The ritual incantation that an exception applies is not enough." [Citation.] (*People v. Jablonski, supra,* 37 Cal.4th at p. 835.)

C. This Issue Is Waived; In Any Event, The Questioning Was Not Improper, And Any Error Was Harmless

Respondent first submit that because appellants failed to timely object or seek an admonition, they waived the right to complain of any misconduct on appeal. (*People v. Turner, supra*, 34 Cal.4th at p. 422; *People v. Brown, supra*, 33 Cal.4th at pp. 398-399; *People v. Hill, supra*, 17 Cal.4th at p. 820.)

Appellants acknowledge their failure to timely object below, but nevertheless cite the following exchange for the principle that further objection would have been "futile":

> Q: So Carol Mateo was lying when she testified here in Court that this was the man she saw?
>
> MR. BORGES: Your Honor, that's an incorrect statement. I'd object. He said she was wrong, not that she was lying.
>
> THE COURT: Before he said two or three times that she was lying. So in cross-examination I think counsel is entitled to pick up that portion of it.

(32RT 4275; see GAOB 356-357; SAOB 162-163.)

Respondent submits that this is not a case fitting within the narrow "futility" doctrine. As noted by this Court in *People v. Hillhouse* (2002) 27 Cal.4th 469,

> It is true that in an extreme case, when misconduct was pervasive, defense counsel had repeatedly but vainly objected to try to curb the misconduct, and the courtroom atmosphere was so poisonous that

further objections would have been futile, we have excused counsel from having to object continually.

(*Id.* at pp. 501-502.) As the transcript quoted above makes clear, "t]his case was not remotely close to that extreme." (*Ibid.*) Thus, while the failure to object may "may be excused where an objection would have been futile or an admonition could not have cured the harm," "that is not the case here" as appellants did not timely, specifically or repeatedly object, and the trial court "said nothing to suggest an objection would have been futile." (*People v. Holloway, supra*, 33 Cal.4th at p. 136.) Here, "t]he trial atmosphere was not poisonous, defense counsel did not object at all, and the record fails to suggest that any objections would have been futile." (*People v. Riel* (2000) 22 Cal.4th 1153, 1213.) Under such circumstances, "the normal rule requiring an objection applies here, not the unusual one applied to the extreme circumstances[.]" (*Ibid.*) Assuming arguendo such questioning was improper, a timely and properly articulated objection would have discontinued such questioning, and an instruction to disregard the question "could have dissipated whatever prejudice was created." (*Ibid.*; compare *People v. Chatman, supra,* 38 Cal.4th at p. __ [42 Cal.Rptr.3d 621, 653] [issue preserved where "Defense counsel did object to a number of 'were they lying' questions as argumentative, speculative, and irrelevant" and the trial court judge "overruled these objections, indicating generally that it would permit this line of questioning."].)

In any event, assuming this prosecutorial misconduct claim is preserved for review, it is without merit.

This Court recently addressed the question of whether the "were they lying" questions "invaded the province of the jury" or were "argumentative, or called for irrelevant or speculative testimony" in *Chatman, supra,* 38 Cal.4th at p. __ [42 Cal.Rptr.3d at p. 653]. There, the Court initially "question[ed] whether this issue is properly considered one of misconduct" as "[a]lthough it

is misconduct for a prosecutor intentionally to elicit inadmissible testimony . . . merely eliciting evidence is not misconduct," and stated that the "real argument is that the evidence was inadmissible." (*Id.* at p. __ [42 Cal.Rptr.3d at p. 652].)

> Although the prosecutor in this case certainly asked the questions intentionally, nothing in the record suggests he sought to present evidence he knew was inadmissible, especially given that the court overruled defendant's objections and, as discussed below, the applicable law was unsettled at the time of trial. But whether we label the issue misconduct or the erroneous admission of evidence does not greatly matter, for defendant's argument is essentially identical under either characterization. Because the cases generally discuss the issue under the rubric of misconduct, we will do so also.

(*Id.* at pp. __-__ [42 Cal.Rptr.3d at pp. 652-653].)

The Court then decided such questions should not be categorically excluded as argumentative, or as calling for irrelevant or speculative testimony:

> If a defendant has no relevant personal knowledge of the events, or of a reason that a witness may be lying or mistaken, he might have no relevant testimony to provide. No witness may give testimony based on conjecture or speculation. (See Evid.Code, § 702.) Such evidence is irrelevant because it has no tendency in reason to resolve questions in dispute. (Evid.Code, § 210.)
>
> In challenging a witness's testimony, a party implicitly or explicitly urges that because a witness is lying, mistaken, or incompetent, the witness should not be believed. A party who testifies to a set of facts contrary to the testimony of others may be asked to clarify what his position is and give, if he is able, a reason for the jury to accept his testimony as more reliable.

The permissible scope of cross-examination of a defendant is generally broad. "When a defendant voluntarily testifies, the district attorney may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them. [Citation.] A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies. [Citation.]" [Citation.]

A defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately. As a result, he might also be able to provide insight on whether witnesses whose testimony differs from his own are intentionally lying or are merely mistaken. When, as here, the defendant knows the other witnesses well, he might know of reasons those witnesses might lie. Any of this testimony could be relevant to the credibility of both the defendant and the other witnesses. There is no reason to categorically exclude all such questions. Were a defendant to testify on direct examination that a witness against him lied, and go on to give reasons for this deception, surely that testimony would not be excluded merely because credibility determinations fall squarely within the jury's province. Similarly, cross-examination along this line should not be categorically prohibited.

Here defendant took the stand and put his own veracity in issue. He urged that a number of witnesses should not be believed, but that he should be. The jury had to determine whose testimony to credit. It is

one thing for a witness to assert that he had a better vantage point from which to observe an event, or that his memory is superior to one who was inattentive or has given inconsistent accounts. It is another thing entirely for a witness to claim that witness after opposing witness has lied. Defendant was not asked to opine on whether other witnesses should be believed. He was asked to clarify his own position and whether he had any information about whether other witnesses had a bias, interest, or motive to be untruthful.

It was permissible for the prosecutor to clarify defendant's own position in this regard. It was also permissible to ask whether he knew of facts that would show a witness's testimony might be inaccurate or mistaken, or whether he knew of any bias, interest, or motive for a witness to be untruthful. The cross-examination was legitimate inquiry to clarify defendant's position. The questions sought to elicit testimony that would properly assist the trier of fact in ascertaining whom to believe.

Defendant had personal knowledge of the conversations he had with the other witnesses, and they were all friends or relatives. He could provide relevant, nonspeculative testimony as to the accuracy of their information and any motive for dishonesty. If he provided a reason for one of them to have testified inaccurately, the jury could consider that reason for whatever value it believed it had. If he provided no reason, the jury might also consider the fact that not even defendant, who, as the prosecutor pointed out knew the witnesses better than anyone else in the courtroom, could think of any reason why their testimony should not be credited.

The were they lying questions regarding other witnesses generally called for and received an actual answer. For example, in answering a

> question regarding the witnesses' testimony that defendant was bragging, he provided an alternative reason for the discrepancy. He said that he was not bragging, but because of his demeanor, someone may have erroneously thought he was. Moreover, the were they lying questions were brief and generally precursors to follow-up questions as to whether defendant knew of any reason the witnesses had to lie. At least when, as here, the defendant knows the witnesses well, we think questions regarding any basis for bias on the part of a key witness are clearly proper.

(*Id.* at pp. __-__ [42 Cal.Rptr.3d at pp. 654-655].)[66/]

Respondent first submits the prosecuting attorney's questions were not improper or misconduct because, as was the case in *Chatman*, "nothing in the record suggests he sought to present evidence he knew was inadmissible," and "the applicable law was unsettled at the time of trial."[67/] (*Ibid.*) In addition, respondent submits such questions were not categorically improper, because appellant Gonzales, like the defendant in *Chatman*, was "a percipient witness to the events at issue," had "personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately," "took the stand and put his own veracity in issue," and "could provide relevant, nonspeculative

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66. The Court also rejected the argument that such questions "invaded the province of the jury," citing Dean Wigmore, which found that phrase a """legal cliche,""" """empty rhetoric""" and """so misleading, as well as so unsound, that it should be entirely repudiated""" and """simply one of those impracticable and misconceived utterances which lack any justification in principle.""" (*Id.* at p. __ [42 Cal.Rptyr.3d at p. 653].)

67. When the prosecutor cross-examined appellant Gonzales at the second penalty phase in 1998, no California court had yet determined the propriety of such questions. (*Chatman, supra*, 38 Cal.4th at p. __ [42 Cal.Rptr.3d at p. 653 [recognizing *People v. Zambrano* (2004) 124 Cal.App.4th 228, issued on November 19, 2004, as "the first California case to determine the propriety of such questions"]].)

testimony as to the accuracy of their information and any motive for dishonesty." (*Ibid.*)

Finally, even assuming such questions were improper, and assuming further this issue is preserved despite the failure to properly and timely raise it below, appellant Gonzales' credibility was already severely impeached by the testimony of eyewitnesses about whom he was questioned, by the facts and circumstances of the murders, by his taped statements to Mr. Berber, by his pretrial attempts to have witnesses change their testimony, and by his obviously evasive, false and contradictory testimony. Under such circumstances, any error was nevertheless harmless, as it is not reasonably possible appellants would have received a more favorable result if the questioning had not occurred. (See, e.g., *People v. Zambrano* (2004) 124 Cal.App.4th 228, 243.)

XXIII.

THE TRIAL JUDGE'S REMARKS DID NOT VIOLATE APPELLANTS' FEDERAL OR STATE CONSTITUTIONAL RIGHTS

Appellants argue the trial judge's brief comment during the cross-examination of appellant Gonzales violated Evidence Code sections concerning judicial notice, and their rights to a fair trial, due process, and confrontation. (SAOB 144-155; GAOB 361-373.) Even presuming these grounds were not waived by the failure to assert them below, they are without merit, and in any event, appellants were in no way harmed.

A. Relevant Proceedings Below

During the cross-examination of appellant Gonzales at the second penalty phase, the following colloquy took place:

Q: Did you blackout when you were shooting Elijah Skyles and Gary Price, too, Mr. Gonzales?

A: No, not really, no.

Q: Why did you shoot 'em eleven times?

A: Just kept shooting. I don't know. Just -- automatic. I -- leave your hand on the rigger, and it just goes.

Q: You have to pull the trigger every time you fire a round, Mr. Gonzales?

A: We had that one rigged.

Q: That 9-millimeter, you had it rigged?

A: The semi-automatics, we had that one rigged.

Q: Explain to the jury how you rigged that one to be fully automatic.

A: I think it's the firing pin, the spring to the firing pin, or something like that, you just take it out, something in there, and it just keeps going fully automatic instead of semi.

Q: What did you do to do that?

A: Just like I said. Something inside there. A piece that you take off.

Q: What is it that's inside?

A: I think it's a spring.

Q: Is it a spring?

A: Yeah. I think it's a spring.

Q: Where does the spring go to?

A: To the trigger. The back of the trigger.

Q: With -- when did you do that?

A: Right before.

THE COURT: The Court will take judicial notice of the fact that you cannot render a semi-automatic fully automatic by any manipulation with a spring behind the trigger. That is a physical impossibility with that weapon. The Court knows from its own experience.

BY MR. SORTINO:

Q: Your testimony is, Mr. Gonzales, that the reason you shot Mr. Skyles and Mr. Price is because you thought one or both of them was going for a for a gun?

A: Yeah. Thought one of them was.

Q: And that you shot them so many times because basically you couldn't stop pulling the trigger. Is that fair to say.

Q: I just kept pulling it.

Q: Eleven times?

A: Yeah. I don't know how many times. I just kept pulling it. But, you know, it's what happened. Just -- I don't know how many bullets came out.

Q: How about when they were lying on the ground, did you keep shooting at them?

A: Naw. Not that I remember. After that, I just left. I seen them go to the floor, and I just left.

Q: So your testimony is as soon as they hit the ground, you stopped shooting?

A: Yes.

Q: Can you explain to the ladies and gentleman of the jury, then, why there were strike marks on the pavement near their bodies?

A: I just kept shooting. I seen them falling. And I just kept shooting. That's it.

(32RT 4303-4306.)

Shortly thereafter, examination of appellant Gonzales was completed, and a the following colloquy took place at a sidebar, outside the presence of the jurors:

MR. TYRE: . . . . First of all I'm objecting to the Court editorializing about the gun. I understand the Court may have knowledge of that, but no one called the Court to testify in this case, and for the Court to offer its own interjection as, quote, an expert, I am objecting to. I'm just indicating that for the record.

MR. BORGES: I'll join in that, your Honor.

THE COURT: I'm sorry, but when you have something as basic as that, it's as though you would say that you could render it automatically -- make it full automatic by putting a piece of chewing gum in the magazine.

MR. TYRE: I understand.

THE COURT: It was just nonsense, and it's so palpably untrue.

MR. BORGES: I wasn't aware of that, judge.

MR. TYRE: I wasn't either.

(32RT 4308.)

Following the verdicts, appellants filed motions for a new trial, arguing the court committed misconduct when it "took an advocate's position during the trial" and "enlightened the jury on the ability to convert a firearm from semi-automatic to automatic without qualifying as an expert or without counsel being able to cross-examine him on his expertise," and the jury was thereafter "able to attack the defendant's credibility based upon the court finding." (4CT 965-971, 985-982-987.)

The People opposed the motions, arguing that to the extent the court's brief comments were improper, the review of appellant Gonzales' "complete cross-examination shows that his credibility was severely impeached in many other areas," and that his "evasive demeanor on the stand -- which does not show in the cold record -- further impeached his credibility." (4CT 989.) In addition, the People noted that the comment was not mentioned again, and was not argued by the People in their closing arguments, and thus there was not a reasonable probability appellants would have received a more favorable result in the absence of the Court's comments. (*Ibid.*)

At the argument on appellant Soliz's motion for a new trial, counsel for appellant Soliz argued the court's comments "so influenced the jury and so destroyed the credibility of Mr. Gonzales when he was, in fact, confessing to the jury, that Mr. Soliz did not receive a fair trial as to the penalty phase." (35RT 4539.)

The court denied the motion, stating as follows:

THE COURT: Well, I feel that the jury, in hearing Mr. Gonzales' testimony, had every opportunity to reject his credibility, based on the totality of his testimony and his demeanor on the stand and everything about his testimony.

As far as the Court's comment is concerned, I have to concede that it was probably error for the Court to have made the comment that it did based on the Court's personal knowledge, having carried a semi-automatic weapon as an officer in the marine corps as a side arm. And, in a sense, I was an uncross-examined expert witness, which I certainly did not intend to be. So in conceding your points, both of you, that it was probably error for me to have made that comment, I feel that under the totality of the circumstances it was harmless error and it did not affect the judgment of the jury as, in fact, they rejected the whole of Mr. Gonzales' testimony as to the killing of Skyles and Price.

So the motion for a new trial on the penalty phase is also denied. (35RT 4539-4540.)

At the argument on appellant Gonzales' motion for a new trial, counsel for appellant Gonzales argued that appellant Gonzales took the stand "over my vehement objection" and "testified consistent with his tape that was done in the van," that his credibility was "very important" to the jurors, that the court's comments "attacked his credibility," and that the error was not harmless. (35RT 4542-4543.)

The court denied appellant Gonzales' motion for a new trial, finding as follows:

THE COURT: . . . . As to the other point that the Court's position on influencing the judgment on the jury on the credibility of the defendant Gonzales in his testimony, as I say, I think that's de minimus, because the effect of the judgment of credibility that they made can go

to the totality of Mr. Gonzales' testimony both on direct and cross-examination where he -- his credibility was just practically zero as far as the jury was concerned, except insofar as he admitted the killing of Lester Eaton, which the evidence was overwhelming.

And, of course, circumstantial evidence, as I had mentioned in Mr. Borges's argument, as to -- plus the eye-witness identification was certainly strong to negate anything that Mr. Gonzales would say when he had every reason that he could testify with impunity as to the Skyles/Price murders because of the fact that he had already been sentenced to the lesser penalty for those two crimes.

So the motion for a new trial as to John Gonzales is denied.

(35RT 4544.)

B. The Issue Was Waived, And In Any Event, Even Assuming The Court's Brief Comment Was Improper, Appellants Were Not Harmed

Respondent first submits this issue was waived as appellants did not timely object and request and admonition below. As a review of the transcript quoted above demonstrates, the trial court judge made his brief comment and then the questioning thereafter continued, with no objection made until after examination of appellant Gonzales had concluded. (32RT 4303-4306.) Thus, this claim is waived, as appellants have not shown that a timely objection and request for an admonition would not have cured any harm. (See, e.g., *People v. Monterroso, supra,* 34 Cal.4th at pp. 759-760; *People v. Hines* (1997) 15 Cal.4th 997, 1041; *People v. Fudge, supra,* 7 Cal.4th at p. 1107.)

Even if not waived, it is not clear the court's brief comment was necessarily improper. In this regard, this Court has held that a court commits misconduct if it "'utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in

other ways discredits the cause of the defense. . . .'" (*People v. Fudge, supra,* 7 Cal.4th at p. 1107.) However, this Court has also held a trial judge need not "remain passive at the trial while the attorneys are presenting the evidence," noting that "[n]umerous courts including our own have recognized that it is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible." (*People v. Mayfield, supra*, 14 Cal.4th at p. 738.) More recently, this Court in *People v. Harris* (2005) 37 Cal.4th 310, noted the following:

> The role of a reviewing court "is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial. (*United States v. Pisani* (2d Cir.1985) 773 F.2d 397, 402.)" [Citation.] In deciding whether a trial court has manifested bias in the presentation of evidence, we have said that such a violation occurs only where the judge "'officiously and unnecessarily usurp [ed] the duties of the prosecutor . . . and in so doing create[d] the impression that he [was] allying himself with the prosecution.'" [Citation.]

(*Id.* at p. 347.)

Here, it does not appear the trial court judge's brief, never-repeated comment was necessarily improper. (See, e.g., *People v. Harris, supra,* 37 Cal.4th at p. 348.) In any event, even assuming the brief comment was improper, and further assuming this claim is preserved for review despite appellants failure to timely object and request an admonition, any error was clearly harmless.

A judge's comments are evaluated "'on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.' [Citation.] 'The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made.'" (*People v. Sanders*, *supra*, 11 Cal.4th at pp. 531-532.)

Here, the court's comment was brief and never-repeated by the court or argued by counsel. Moreover, the transcript of the examination and cross-examination of appellant Gonzales repeatedly showed him to be evasive and deceitful, and his testimony concerning appellant Soliz's involvement in the shooting of Messrs. Skyles and Price was contradicted by numerous eyewitnesses. Any state-law error was clearly harmless under the "reasonable probability" test of *People v. Watson, supra*, 46 Cal.2d at p. 836, and any federal constitutional error was harmless under the "beyond a reasonable doubt" test of *Chapman, supra*, 386 U.S. at pp. 23-24.

XXIV.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE RELATING TO JAIL INCIDENTS AS "OTHER CRIMES" EVIDENCE

Appellant Soliz argues the court erred in when it failed to hold a hearing outside the presence of the jurors and then admitted inadmissible evidence at the penalty phase relating to jail incidents "because the prosecution made no effort to tie the jail incidents to the violation of any particular criminal statute and presented insufficient evidence to establish an implied threat of use of force or violence." (SAOB 170-189.)

Appellant Soliz's contentions are incorrect, as the trial court was not required to hold such a hearing, and did not abuse its discretion when it admitted and properly instructed the jury as to the aggravating evidence. In any event, any error was clearly harmless in light of the overwhelming aggravating evidence.

A. Relevant Proceedings Below

Aggravating evidence was admitted at the penalty phase that on October 16, 1997, appellant Soliz was observed throwing paper onto a fire on a burning mattress from his one-man cell at the Men's Central. (31RT 4114-4118.) When a deputy tried to put the fire out, appellant Soliz assaulted the officer by throwing apples, oranges and full milk cartons at him. (31RT 4119-4121.)

Additional aggravating evidence was admitted as the penalty phase that: (1) on January 10, 1998, appellant Soliz's single-man cell at the Men's Central Jail was searched, and inside the cell a deputy found and recovered five razors, one altered razor and an aluminum food tray; such items were considered contraband, and the razor blades were typically fashioned by inmates into slashing and stabbing devices (31RT 4123-4127); (2) on July 31, 1998,

appellant Soliz's single-man cell was searched, and inside the cell a deputy found and recovered two altered razors, five disposable razors, and an unsharpened flat metal object; the altered razors was capable of being fastened into a slashing device; the unsharpened flat metal object was capable of being transformed into a stabbing device; all of the items were contraband (31RT 4131-4135); and (3) it was stipulated that appellant Soliz had a prior felony conviction on November 10, 1992, in Case No. KA011224, for unlawful driving or taking of a vehicle, in violation of Vehicle Code section 10851 (Peo. Exh. 162; 31RT 4138).

B. The Trial Court Was Not Required To Hold A Formal Hearing Before Admitting Evidence As To Appellant Soliz's "Other Crimes" And Did Not Abuse Its Discretion When It Admitted The Evidence

Appellant Soliz's contentions are without merit. Appellant Soliz cites this Court's plurality opinion in *People v. Phillips* (1986) 41 Cal.3d 29, 72, fn. 25 ("*Phillips*"), for the proposition that "[t]o decide whether such evidence is admissible, the trial court should, outside the presence of the jury, 'conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of the other criminal activity.'" (SAOB 174.) Of course, the plurality opinion in *Phillips* does not require such hearings, instead holding only that "*in many cases it may be advisable*" to hold them. (*Id.* at p. 72, fn. 25, emphasis added.) Indeed, this Court has recognized that *Phillips* did not require trial courts to conduct such hearings, and that admission of evidence of unadjudicated criminal conduct was not predicated on the outcome of such an inquiry or on live testimony. (*People v. Boyer, supra*, 38 Cal.4th at p. __, fn. 51 [42 Cal.Rptr.3d at p. 732, fn. 51]; *People v. Young, supra*, 34 Cal.4th at p. 1209; *People v. Clair, supra,* 2 Cal.4th at pp. 677-678; *People v. Jennings* (1991) 53 Cal.3d 334, 389.)

Moreover, the trial court did not abuse its discretion as the jail incidents were admissible as aggravating evidence at the penalty phase.

> [A] trial court's decision to admit "other crimes" evidence at the penalty phase is reviewed for abuse of discretion, and no abuse of discretion will be found where, in fact, the evidence in question was legally sufficient.

(*People v. Boyer, supra,* 38 Cal.4th at p. __, fn. 51 [42 Cal.Rptr.3d at p. 732, fn. 51].)

Appellant Soliz argues that his possession of the razors recovered from his one-man cell "does not establish proof beyond a reasonable doubt of an implied threat or use of force or violence, a necessary element of factor (b) evidence," and further that implying such a threat from mere possession of the razors renders overbroad the aggravating factor of Penal Code section 190.3, subdivision (b). (SAOB 177, 180.)

Of course, as appellant Soliz recognizes (SAOB 177), this Court has held precisely to the contrary, and has repeatedly and recently reaffirmed that an inmate's possession of such items involves an implied threat of violence and is therefore admissible under factor (b). (See, e.g., *People v. Jurado, supra,* 38 Cal.4th at pp. 138-139; *People v. Combs* (2004) 34 Cal.4th 821, 859-860; *People v. Martinez* (2003) 31 Cal.4th 673, 693-694; *People v. Nakahara, supra*, 30 Cal.4th at pp. 719-720; *People v. Gutierrez, supra*, 28 Cal.4th at p. 1153; *People v. Hughes*, *supra*, 27 Cal.4th at pp. 382-384; *People v. Lucero* (2000) 23 Cal.4th 692, 727-728; *People v. Smithey* (1999) 20 Cal.4th 936, 1002-1003; *People v. Williams, supra*, 16 Cal.4th at pp. 237-238; *People v. Ramos, supra*, 15 Cal.4th at pp. 1173-1174; *People v. Hines, supra,* 15 Cal.4th at pp. 1056-1057; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589.) Appellant Soliz's request for the Court to revisit, reconsider and reverse this well-established line of authority (SAOB 177-180) is unpersuasive.

Appellant Soliz also argues the "evidence relating to the fire incident in the jail hallway" should not have been admitted as aggravating evidence at the penalty phase because "the mere burning of some papers and a smouldering mattress was an annoyance, not the use of force or violence." (SAOB 180.) This contention is asserted perfunctorily and without argument in support, and thus need not be considered. (See, e.g., *People v. Williams*, *supra*, 16 Cal.4th at p. 250; *People v. Mayfield* (1993) 5 Cal.4th 142, 196.) Moreover, the evidence demonstrated that appellant Soliz continued to feed the fire until it grew and spread to approximately four cells, and the deputy attempting to extinguish the flames had to return twice, and required the assistance of another deputy, before the flames were finally extinguished. (31RT 4117-4121.) Such actions, particularly in a jailhouse, clearly constituted more than an "annoyance."

XXV.

THE COURT DID NOT ERR WHEN IT DENIED APPELLANT SOLIZ'S MOTION FOR A NEW TRIAL BASED ON "NEWLY DISCOVERED EVIDENCE" OF APPELLANT GONZALES' TESTIMONY AT THE SECOND PENALTY PHASE

Appellant Soliz, joined by appellant Gonzales, argues the trial court erred when it denied his motion for a new guilt phase trial based upon "newly discovered evidence" of appellant Gonzales' testimony at the second penalty phase. (SAOB 117126; GAOB 574.) Respondent disagrees, and submits the trial court did not abuse its discretion when it denied the motion as appellant Gonzales' testimony at the second penalty phase was not "newly discovered evidence."

A. Relevant Proceedings Below

Appellant Gonzales did not testify at the guilt phase or the first penalty phase. One piece of evidence admitted at the guilt phase (Peo. Exhs. 57, 58) and at the second penalty phase (Peo. Exhs. 156, 157) was a tape-recorded conversation between appellant Gonzales and Salvador Berber, in which appellant Gonzales claimed, among other things, to have shot Messrs. Skyles and Price while appellant Soliz remained inside the car. This testimony was contradicted by eyewitnesses Carol Mateo and Jeremy Robinson who saw appellant Soliz shoot Messrs. Skyles and Price. (Peo. Exhs. 40, 41, 42, 43, 46, 48; 12RT 1462-1469, 1475-1479; 13RT 1502, 1571-1572, 1574-1578, 1581-1584, 1586-1587, 1602-1603, 1650-1652.) It was also contradicted by testimony and pretrial identification from Alejandro Garcia (Peo. Exhs. 40, 41, 42, 43, 48; 13RT 1620-1623, 1652), and by the pretrial statements and preliminary hearing testimony of Judith Mejorado. (14RT 1728-1732, 1800.) A gang expert also testified that it was not uncommon for a gang member brag

to another gang member and take credit for a shooting, when he actually was only a backup that assisted another gang member in committing a shooting, for respect and to improve his ranking in the gang. (16RT 2098.)

The jury found both appellants guilty of the murders of Messrs. Skyles and Price in counts IV and V, and after a penalty phase at which neither appellant testified, the jury was deadlocked and the court declared a mistrial as to the penalty as to counts I, IV and V for appellant Soliz and count I as to appellant Gonzales. (3CT 827, 829; 19RT 2768-2769.) The court thereafter fixed the penalty for appellant Gonzales as to counts IV and IV as life without the possibility of parole, and the court imposed the sentence. (3CT 805-806, 827-828, 842-845; 19RT 2770-2771.)

At the second penalty phase, appellant Gonzales testified in his defense that in the taped conversation with Mr. Berber, he was "bragging, boasting" because "I can't look like a coward in front of my -- you know? My fellow gang members." (32RT 4209.) He further testified that he had killed Messrs. Skyles and Price, and that appellant Soliz had remained inside and never got out of the car, and that when he told Mr. Berber that appellant Soliz's fingerprints could not have been found on the telephone pole (Peo. Exh. 157 at 2), he said so because appellant Soliz never got out of the car. (32RT 4209-4210, 4273, 4281-4282, 4291, 4297-4298.)

On cross-examination, appellant Gonzales also testified that: (1) Billy Gallegos was a friend and fellow gang member who he had known had been killed a few weeks before by two Black gang members (32RT 4264-4265); (2) he thought he recognized Messrs. Skyles and Price (32RT 4264); (3) he wanted to talk to them so as to "resolve it before it escalated" (32RT 4267); (4) appellants sat in the backseats of the car driven by Michael Gonzales, with Judith Mejorado in the middle off the front seat and Agustin passed out drunk in the front passenger seat (32RT 4270-4272); and (5) when he saw Messrs.

Skyles and Price, he told appellant Soliz "Let's go talk to them. I think I know them" (32RT 4272).

On further cross-examination, appellant Gonzales further admitted he was "just boasting and bragging" when he told Mr. Berber "I done about three -- two niggers and that old man -- about four motherfuckers when I got out this time." (Peo. Exh. 157 at 7; 32RT 4250.) He further admitted that some of his statements to Mr. Berber were "bullshitting and bragging," that he "put a lot of drama into it" and that it was "like telling a tall tale" to make himself look better than he was. (32RT 4253.)

After the second penalty phase, appellant Soliz filed a motion for a new trial, arguing appellant Gonzales' testimony at the second penalty phase was "newly discovered evidence" justifying a new trial because it *corroborated* appellant Gonzales' taped conversation with Salvador Berber, in which "he alone was responsible for the Lester Eaton, Hillgrove Market murder," and that "he alone shot Mr. Skyles and Mr. Price at the Shell Station in Covina." (4CT 980; 35RT 453.) Appellant Soliz argued "the jury in the guilt phase never had a chance to hear [appellant Gonzales] testify from the stand and corroborate that undercover confession, that undercover taped confession," and that "in a new trial that evidence could very well result in a different verdict as to [appellant Soliz's] credibility in the Price and Skyles murder." (35RT 4536, 4538.)

The prosecuting attorney argued that "[e]ven if it is assumed that section 1181(8) applies where the alleged newly discovered evidence is the testimony of a co-defendant who has a Fifth Amendment right not to testify," appellant Gonzales' testimony at the second penalty phase was not "newly discovered," as it was "essentially the same" as appellant Gonzales' tape-recorded statements to Mr. Berber. (4CT 994.) Moreover, he argued the "newly discovered" evidence -- appellant Gonzales' testimony at the second penalty phase -- was not likely to render a different result on the guilt phase because it was

cumulative and "the jury clearly did not find [appellant] Gonzales the least bit credible since -- contrary to his testimony -- they implicitly found that [appellant] Soliz shot Elijah Skyles and Gary Price." (*Ibid.*)

The trial court first addressed appellant Gonzales' testimony at the second penalty phase, stating as follows:

> THE COURT: Whereas your argument presupposes that Mr. Gonzales' testimony should have erased the testimony of eyewitnesses who made identifications as to Mr. Soliz as having been the shooter in the Skyles/Price murders and as though Mr. Gonzales' testimony, which, after all, at that point, since he had already been found not to suffer the death penalty in those two, he could very well be in the position of wanting to give his friend a lift and take credit for murders which he did not commit simply to avoid the possibility of his friend suffering a death penalty for those murders.
>
> Further, he had a very powerful interest in testifying, because it might be perceived by members of the community of his gang or of other people in prison that because of his confession that he made to the informant in this matter, that he, in fact, was an informer that would be dealt with harshly, and this would be an attempt to mitigate this feeling. I think that the verdicts of the jury would endorse that supposition.

(35 RT 4533-4534.)

The trial court thereafter denied appellant Soliz's motion for a new trial, ruling as follows:

> THE COURT: Of course, the first jury heard the tape. And the first jury did not hear the live testimony of Mr. Gonzales, but I did, and you did, and I found nothing that was added or that was new that was not on the tape. In other words, all he did was reiterate what he said in the tape. And so his live testimony I don't think would carry any more weight

than the tape which was played, not only during the evidence phase, but also during the argument phase, so that the jury certainly had the benefit of that tape and the testimony in the actual words and the demeanor and the attitude of Mr. Gonzales all the way through.

Plus the fact that the jury had the benefit of hearing the gang expert testify that ut was not unusual for someone, in order to elevate his stature in the community, to claim credit for crimes that he did not commit, because he'd be a bigger man if he killed three people than if he killed just one.

So, under the circumstances, I don't feel that that's a basis for a motion for a new trial as to guilt phase. The motion for a new trial as to guilt phase is denied.

(35RT 4538-4539.)

B. Standard Of Review Applicable To A Motion For A New Trial

Penal Code section 1181, subdivision (8), authorizes trial judges to order a new trial when "new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at trial." "A motion for a new trial on the ground of newly discovered evidence is looked upon with disfavor." (*People v. Miller* (1951) 37 Cal.2d 801, 807.) "To grant a new trial on the basis of newly discovered evidence, the evidence must make a different result probable on retrial." (*People v. Ochoa* (1999) 19 Cal.4th 353, 473.)

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could

not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.'"'"

(*People v. Beeler* (1995) 9 Cal.4th 953, 1004.)

"'[T]he trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable.'" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) "'A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion. [Citation.]'" (*People v. Lewis*, *supra*, 26 Cal.4th at p. 364; see also *People v. Guerra, supra*, 37 Cal.4th at p. 1159; *People v. Carter*, *supra*, 36 Cal.4th at p. 1210; *People v. Coffman*, *supra*, 34 Cal.4th at p. 127; *People v. Navarette* (2003) 30 Cal.4th 458, 526; *People v. Hayes*, *supra*, 21 Cal.4th at pp. 1260-1261; *People v. Musselwhite*, *supra*, 17 Cal.4th at pp. 1251-1252.)

C. The Trial Court's Denial Of The New Trial Motion Was Not An Abuse Of Discretion

Appellant Soliz now argues appellant Gonzales' testimony at the second penalty phase "differed fundamentally" from his taped conversation with Mr. Berber because "[t]he taped conversation tended to support the prosecution's theory that the shootings of Skyles and Price were unprovoked," whereas appellant Gonzales' "newly discovered" testimony "completely exculpated" appellant Soliz, and further showed the shootings "involved no planning or premeditation" and were "provoked by an argument," and that appellant Gonzales had been armed "only for protection." (SAOB 118, 121.)

However, appellant Soliz argued below only that his motion for a new trial should be granted because appellant Gonzales' "newly discovered" penalty

phase testimony was critical evidence that *corroborated* his taped pretrial conversation with Mr. Berber. (4CT 980; 35RT 453.) Appellant Soliz never argued to the court below, as he does here, that his motion for a new trial should be granted for precisely the opposite reason -- because appellant Gonzales' new testimony "fundamentally differed" from his taped conversation with Mr. Berber. Thus, this argument is waived by appellant Soliz's failure to argue it below.

In any event, the trial court judge did not abuse his discretion when he denied appellant Soliz's motion for a new trial as appellant Gonzales' testimony was not "newly discovered evidence." In this regard, the factual basis for appellant Gonzales' testimony existed long before his actual testimony at the second penalty phase, and thus, as noted by several federal courts, "when a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a codefendant, the evidence is not newly discovered." (See *United States v. Lofton* (8th Cir. 2003) 333 F.3d 874, 875-876; *United States v. Moore* (8th Cir. 1997) 129 F.3d 989, 1058.)

Thus, in *United States v. Reyes-Alvarado* (9th Cir. 1992) 963 F.2d 1184, the defendant moved for a new trial, arguing that two-codefendants who pleaded guilty before trial, but who asserted their Fifth Amendment right not to testify at the defendant's trial, were prevented from testifying by their attorneys, thus making the co-defendants' testimony "newly discovered." The Ninth Circuit "adopted the view that when a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a codefendant, the evidence is not 'newly discovered,'" finding that under such circumstances the testimony was "untrustworthy and should not be encouraged":

> Testifying now, however, is safe for the co-defendants, as they have already been sentenced. It would encourage perjury to allow a new trial once co-defendants have determined that testifying is no longer harmful

> to themselves. They may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on themselves, knowing they are safe from retrial. Such testimony would be untrustworthy and should not be encouraged. We find that the judge did not abuse his discretion in refusing to grant a new trial on the basis of newly discovered evidence.

(*Id.* at p. 1188; see also *United States v. Jasin* (3rd Cir. 2002) 280 F.3d 355, 368 ["we opt to follow the majority rule in concluding that a codefendant's testimony known to the defendant at the time of trial cannot be considered 'newly discovered evidence' under Rule 33, regardless of the codefendant's unavailability during trial because of invocation of his Fifth Amendment privilege."]; *United States v. Moore* (8th Cir. 2000) 221 F.3d 1056, 1058; *United States v. Freeman* (5th Cir. 1996) 77 F.3d 812, 817 ["When a defendant is aware of a codefendant's proposed testimony prior to trial, it cannot be deemed newly discovered."]; *United States v. Jacobs* (2d Cir. 1973) 475 F.2d 270, 286, fn. 33 ["a court must exercise great caution in considering evidence to be 'newly discovered' when it existed all along and was unavailable only because a codefendant, since convicted, had availed himself of his privilege not to testify."]; *United States v. Earles* (N.D. Iowa 1997) 983 F.Supp. 1236, 1251-1253; *United States v. Blount* (E.D. Pa 1997) 982 F.Supp. 327, 329-330 ["The majority of circuits have conclusively held that the requirement that evidence be discovered since trial is not met 'simply by offering the post-trial testimony of a co-conspirator who refused to testify at trial.'" . . . "new trial based on affidavits submitted by co-defendants who had not testified at the petitioner's trial would make for dangerous policy. A co-defendant who has already been convicted of a crime and is languishing away in jail has little to lose by lying to save a friend's hide."].)[68]

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68. But Cf. *People v. Shoals* (1992) 8 Cal.App.4th 475, 487, fn. 5.

Likewise, the trial court judge below did not abuse his discretion when he denied the new trial motion below, as appellant Gonzales had already been sentenced as to counts IV and V, and thus he had little to lose by lying as to counts IV and V to try to save appellant Soliz's life.

Moreover, the part of appellant Gonzales' testimony (like that part of his taped statements to Mr. Berber) as to appellant Soliz remaining inside the car while appellant Gonzales murdered Messrs. Skyles and Price was clearly known by appellant Soliz before trial. "Facts that are within the knowledge of a defendant at the time of trial are not newly discovered." (*People v. Miller*, *supra*, 37 Cal.2d at p. 807.) Further, such testimony from appellant Gonzales was clearly not "new" or "newly discovered" evidence, as it merely corroborated, and was cumulative to, his taped statements to Mr. Berber. (Peo. Exh. 58, at 3 ["He didn't get out. It was just me -- the only one that got out."]; see, e.g., *People v. Ochoa, supra*, 19 Cal.4th at p. 473.)

In sum, appellant Gonzales' testimony at the second penalty phase that appellant Soliz remained inside the car was: (1) offered only after he had already been sentenced on the applicable counts; (2) contradicted by the testimony of several eyewitnesses; and (3) "inherently untrustworthy" and "not worthy of belief." (*People v. Earp, supra*, 20 Cal.4th at p. 890; *United States v. Reyes-Alvarado, supra,* 963 F.2d at p. 1188.) Indeed, as the trial court below recognized, the jurors at the second penalty phase heard both appellant Gonzales' testimony *and* his taped statements to Mr. Berber and nevertheless found appellant Soliz responsible for the death of Messrs. Skyles and Price. In this regard, appellant Gonzales' testimony failed to "diminish the strength of much more damaging testimony" against appellant Soliz, such as -- identification of him as the one who shot Messrs. Skyles and Price. (See, e.g., *People v. Delgado, supra,* 5 Cal.4th at pp. 328-329.)

XXVI.

APPELLANTS' CHALLENGES TO THE 1978 DEATH PENALTY SENTENCING SCHEME LACK MERIT

Appellants allege numerous aspects of the 1978 death penalty sentencing scheme and corresponding jury instructions violate the United States Constitution. (GAOB 493-573; SAOB 246-279, 308.) But, as appellants readily acknowledge (GAOB 493; SAOB 308), most of these claims have been raised and repeatedly rejected in prior capital appeals before this Court. Because appellants fail to raise anything new or significant which would cause this Court to depart from its earlier holdings, their claims should be rejected. Moreover, it is entirely proper to reject appellants' complaints by case citation, without additional legal analysis. (E.g., *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

A. The Special Circumstances In Section 190.2 Are Not Overbroad And Perform The Narrowing Function

Appellants contend the failure of California's death penalty law to meaningfully distinguish those murders in which the death penalty is imposed from those in which it is not is in violation of the Eighth and Fourteenth Amendments and requires reversal of the death judgment. Specifically, appellants argue their death sentences are invalid because section 190.2 is impermissibly broad and fails adequately to narrow the class of persons eligible for the death penalty. (GAOB 495-500; SAOB 308.)

The United States Supreme Court has found that California's requirement of a special-circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by appellants that

California's death penalty law contains so many special circumstances that it fails to perform the narrowing function required under the Eighth Amendment or that the statutory categories have been construed in an unduly expansive manner. (*People v. Avila*, *supra*, 38 Cal.4th at p. __ [43 Cal.Rptr.3d at p. 101]; *People v. Huggins* (2006) 38 Cal.4th 175, 254; *People v. Crew, supra*, 31 Cal.4th at p. 860; *People v. Yeoman* (2003) 31 Cal.4th 93, 164; accord *People v. Pollack* (2004) 32 Cal.4th 1153, 1196; *People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Bolden*, *supra*, 29 Cal.4th at p. 566; see also *People v. Burgener, supra*, 29 Cal.4th at p. 884 ["Section 190.2, despite the number of special circumstances it includes, adequately performs its constitutionally required narrowing function."]; *People v. Kraft* (2000) 23 Cal.4th 978, 1078 ["The scope of prosecutorial discretion whether to seek the death penalty in a given case does not render the law constitutionally invalid."].) Appellants' claim must be rejected.

B. Section 190.3, Factor (A), Is Not Impermissibly Overbroad

Section 190.3, factor (a), allows the trier of fact, in determining penalty, to take into account:

> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

Appellants contend the death penalty is invalid because section 190.3, factor (a), as applied allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (GAOB 500-508; SAOB 308.) Specifically, appellants contend factor (a) has been applied in a "wanton and freakish" manner that almost all features of every murder have been found to be "aggravating" within

the meaning of the statute. (GAOB 500; SAOB 308.) The issue is without merit.

The United States Supreme Court has specifically addressed the issue of whether section 190.3, factor (a), is constitutionally vague or improper. In *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2360, 129 L.Ed.2d 750], the Supreme Court stated:

> We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. 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.

(*Id.* at p. 976.)

This Court recently held in *People v. Guerra, supra*, 37 Cal.4th at p. 1165, that "Section 190.3, factor (a), is neither vague nor overbroad, and does not impermissibly permit arbitrary and capricious imposition of the death penalty." Indeed, this Court has consistently rejected this claim and followed the ruling by the Supreme Court. (See, e.g., *People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Brown, supra*, 33 Cal.4th at p. 401; *People v. Jenkins, supra*, 22 Cal.4th at pp. 1050-1053.) There is no need for this Court to revisit the issue.

C. Application Of California's Death Penalty Statute Does Not Result In Arbitrary And Capricious Sentencing

Appellants also contend California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing and therefore violates the Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution. They raise numerous sub-claims in support of this claim. (GAOB 508-559; SAOB 308.) All of these claims are without merit.

1. The United States Constitution Does Not Compel The Imposition Of A Beyond-A-Reasonable-Doubt Standard Of Proof, In Connection With The Penalty Phase; The Penalty Jury Does Not Need To Agree Unanimously As To Any Particular Aggravating Factor

Appellants assert their death sentences violate the Eighth and Fourteenth Amendments for the following reasons: (1) because their death sentences were not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors, appellants' constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of the death penalty was violated (GAOB 509-532; SAOB 247-260, 308); (2) the penalty jury was not instructed that it could impose a death sentence only if it was persuaded beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that death was the appropriate penalty (GAOB 532-539;SAOB 260-266, 308); (3) even if proof beyond a reasonable doubt was not constitutionally required for finding (a) that an aggravating factor exists, (b) that the aggravating factors outweigh the mitigating factors, and (c) that death is the appropriate sentence, then proof by a preponderance of the evidence is constitutionally compelled as to each such finding (GAOB 539-541; SAOB 270-276, 308); (4) some burden of proof is required at the penalty phase in order to establish a tie-breaking rule and ensure even-handedness (GAOB 541-542; SAOB 266-270, 308); and (5) even if a burden of proof is not constitutionally required, the trial court erred in failing to instruct the jury to that effect (GAOB 542-543; SAOB308). Appellants' contentions are without merit, because this Court has previously rejected them.

Unlike the determination of guilt, the sentencing function is inherently moral and normative, not functional, and thus not susceptible to *any* burden-of-proof qualification. (*People v. Burgener, supra,* 29 Cal.4th at pp. 884-885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Welch, supra,* 20 Cal.4th at p. 767.) This Court has repeatedly rejected claims identical to appellants' regarding a burden of proof at the penalty phase (*People v. Sapp, supra*, 31 Cal.4th at pp. 316-317; see also *People v. Welch*, *supra*, at pp. 767-768; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Holt*, *supra*, 15 Cal.4th at pp. 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"]), and, because appellants do not offer any valid reason to vary from those past decisions, should do so again here. Moreover, California death penalty law does not violate the Sixth, Eighth, and Fourteenth Amendments by failing to require unanimous jury agreement on any particular aggravating factor. Neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1255; *People v. Osband, supra*, 13 Cal.4th at p. 710.)

Appellants argue, however, that this Court's decisions are invalid in light of *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey, supra,* 530 U.S. 466. (GAOB 510-526; SAOB 247-260, 308.) This Court has considered and rejected appellants' argument by finding that neither *Ring* nor *Apprendi* affect California's death penalty law. (*People v. Monterroso, supra*, 34 Cal.4th at p. 796; *People v. Martinez, supra*, 31 Cal.4th at p. 700; *People v. Cox, supra*, 30 Cal.4th at pp. 971-972; *People v. Prieto, supra,* 30 Cal.4th at pp. 262-263, 271-272.) The same is true as to *Blakely v. Washington* (2004) 542 U.S. 296. (*People v. Monterroso, supra,* 34 Cal.4th at p. 796; *People v. Morisson* (2004) 34 Cal.4th 698.)

2. The Jury Was Not Constitutionally Required To Provide Written Findings On The Aggravating Factors It Relied Upon

Appellants maintain California law violates the Sixth, Eighth, and Fourteenth Amendments by failing to require that the jury base any death sentence on written findings regarding aggravating factors. (GAOB 543-548; SAOB 240-241; 308.) This Court has held, and should continue to so hold, that the jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Avila*, *supra*, 38 Cal.4th at p. __ [43 Cal.Rptr.3d at p. 101]; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Bolden, supra*, 29 Cal.4th at p. 566; *People v. Hughes*, *supra*, 27 Cal.4th at p. 405; *People v. Welch*, *supra*, 20 Cal.4th at p. 772.) The above decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 1441, 108 L.Ed.2d 725].)

3. Intercase Proportionality Review Is Not Required By The Federal Or State Constitutions

Appellants contend the failure of California's death penalty statute to require intercase proportionality review violates their Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (GAOB 548-553; SAOB 293-296, 308.) Appellants' point is not well taken. Intercase proportionate review is not constitutionally required in California (*Pulley v. Harris, supra,* 465 U.S. at pp. 51-54; *People v. Wright*, *supra*, 52 Cal.3d 367), and this Court has consistently declined to undertake it (*People v. Avila*, *supra*, 38 Cal.4th at p. __ [43 Cal.Rptr.3d at p. 101]; *People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Lenard* (2004) 32 Cal.4th 1107, 1131).

4. Section 190.3, Factor (B), Properly Allows Consideration Of Unadjudicated Violent Criminal Activity And Is Not Impermissibly Vague

Section 190.3, factor (b), allows the trier of fact, in determining penalty, to take into account:

> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(4CT 921-922 [CALJIC No. 8.85].)

Appellants' claim that consideration of unadjudicated criminal activity at the penalty phase violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, thereby rendering the death sentence unreliable (GAOB 553-555, SAOB 182-183, 229-237, 308), must be rejected because section 190.3, factor (b), has been held by this Court to be constitutional. It is well-settled that the introduction of unadjudicated evidence under factor (b) does not offend the state or federal Constitutions. (*People v. Boyer, supra*, 38 Cal.4th at p. __ [42 Cal.Rptr.3d at p. 737] ["Nor is factor (b) (defendant's other violent criminal activity) unconstitutional insofar as it permits consideration of unadjudicated crimes"]; *People v. Chatman, supra,* 38 Cal.4th at p. __ [42 Cal.Rptr.3d at p. 676]; *People v. Guerra, supra,* 37 Cal.4th at p. 1165; *People v. Hinton, supra,* 37 Cal.4th at p. 913; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Kipp* (2001) 26 Cal.4th 1100, 1138; *People v. Cunningham, supra*, 25 Cal.4th at p. 1042.)

This Court has "long held that a jury may consider such evidence in aggravation if it finds beyond a reasonable doubt that the defendant did in fact commit such criminal acts." (*People v. Samayoa, supra*, 15 Cal.4th at p. 863.) Factor (b) is also not impermissibly vague. Both the United States Supreme Court and this Court have rejected this contention. (*Tuilaepa v. California,*

supra, 512 U.S. at p. 976; *People v. Lewis* (2001) 25 Cal.4th 610, 677.) The Supreme Court stated:

> Factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact.

(*Tuilaepa v. California, supra*, at p. 976.) The Court concluded: "Factor (b) is not vague." (*Ibid.*) And neither *Ring v. Arizona, supra*, 536 U.S. 584, nor *Apprendi v. New Jersey, supra,* 530 U.S. 446, affect these holdings because *Ring* and *Apprendi* "have no application to the penalty phase procedures of this state." (*People v. Martinez, supra*, 31 Cal.4th at p. 700; *People v. Cox, supra*, 30 Cal.4th at pp. 971-972.)

5. Adjectives Used In Conjunction With Mitigating Factors Did Not Act As Unconstitutional Barriers To Consideration Of Mitigation

Appellants contend the inclusion in potential mitigating factors of such descriptions as "substantial" in factor (g) and "extreme" in factors (d) and (g) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (GAOB 555; SAOB 239-240, 308.) Appellants' contention is without merit.

This Court has previously held that the words "extreme" and "substantial" as set forth in the death penalty statute have common sense meanings which are not impermissibly vague. (*People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Jones* (1997) 15 Cal.4th 119, 190.)

Significantly, the trial court instructed the jury pursuant to factor (k):

> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers including his mental state, any evidence of mental illness or

personal background as a basis for a sentence less that death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(4CT 922.) As this Court has noted:

> the catch-all language of section 190.3 factor (k), calls the sentencer's attention to "[a]ny other circumstance which extenuates the gravity of the crime," and therefore allows consideration of any mental or emotional condition, even if it not "extreme." Similarly, factor (k) allows consideration of duress that is less than "extreme" and domination that is less than "substantial."

(*People v. Arias* (1996) 13 Cal.4th 92, 189, citations omitted.)

Thus, appellants' claim that the jury was inhibited from considering mitigating factors should be rejected.

6. The Trial Court Did Not Err In Refusing To Label The Aggravating And Mitigating Factors

Appellants argue the trial court erred in failing to label the factors as aggravating and/or mitigating, thus precluding a fair, reliable, and evenhanded administration of the capital sanction. (GAOB 556-559; SAOB 308.) They are wrong.

Sentencing factors are not unconstitutional simply because they do not specify which are aggravating and which are mitigating. (*People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Crew, supra*, 31 Cal.4th at p. 860.) As this Court has stated, "the trial court's failure to label the statutory sentencing factors as either aggravating or mitigating [i]s not error." (*People v. Williams, supra,* 16 Cal.4th at p. 669.)

In addition, the United States Supreme Court has held that "[a] capital sentencer . . . need not be instructed how to weigh any particular fact in the capital sentencing decision." (*Tuilaepa v. California, supra,* 512 U.S. at p. 979.) Thus, the trial court is not constitutionally required to instruct the jury that certain sentencing factors are relevant only in mitigation. (*People v. Kraft, supra,* 23 Cal.4th at pp. 1078-1079.) Accordingly, "[a]lthough [labeling the factors] would be a correct statement of law [citation], a specific instruction to that effect is not required, at least not until the court or parties make an improper or contrary suggestion." (*People v. Livaditis* (1992) 2 Cal.4th 759, 784; see also *People v. Carpenter, supra,* 15 Cal.4th at p. 420 [although some factors may be only aggravating or mitigating, because it is self-evident, the trial court need not identify which is which]; *People v. Samayoa, supra,* 15 Cal.4th at p. 862 ["[t]he jury need not be instructed as to which sentencing factors are aggravating and which are mitigating"].) Under this well-established authority, the trial court properly instructed the jury.

7. CALJIC No. 8.88 Is Constitutional

Appellants contend CALJIC No. 8.88 (see 4CT 926-927) was constitutionally deficient and violated their Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution because the instruction: (1) failed to inform the jurors that, if they determined that mitigation outweighed aggravation, they were required to impose a sentence of life without the possibility of parole (SAOB 287-291; GAOB 574); (2) used the "so substantial" standard for comparing mitigating and aggravating circumstances (SAOB 281-284; GAOB 574); (3) failed to convey to the jury that the central decision at the penalty phase is the determination of the appropriate punishment (SAOB 284-287; GAOB 574); and (4) failed to inform the jurors that appellants did not have to persuade them the death penalty was inappropriate

(SAOB 291-292; GAOB 574). This Court has repeatedly rejected each of the above claims. (See *People v. Boyer, supra*, 38 Cal.4th at p. __ [42 Cal.Rptr.3d at pp. 739-740]; *People v. Chatman, supra*, 38 Cal.4th at p. __ [42 Cal.Rptr.3d at p. 675]; *People v. Perry* (2006) 38 Cal.4th 302, 320; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Levont* (2004) 32 Cal.4th 1107, 1134-1135; *People v. Cleveland, supra,* 32 Cal.4th at p. 765; *People v. Crew, supra,* 31 Cal.4th at p. 858; *People v. Boyette, supra,* 29 Cal.4th at pp. 464-466; *People v. Farnam* (2002) 28 Cal.4th 107, 192; *People v. Hughes, supra*, 27 Cal.4th at p. 405; *People v. Hawkins* (1995) 10 Cal.4th 920, 965; *People v. Marshall* (1990) 50 Cal.3d 907, 936-937.)

Many of the issues raised by appellants were rejected by this Court in *People v. Boyette, supra*, 29 Cal.4th at pages 464-465, when this Court stated:

> Defendant next claims CALJIC No. 8.88 is unconstitutional for a variety of reasons. He admits we have rejected all these claims in prior cases and asserts he is raising them in this court to exhaust his state remedies to permit him to renew these claims in federal court. We agree none of the claims has merit and that no reason appears to reconsider our past decisions. We list defendant's claims here to ensure a future court will consider them fully exhausted:
>
> — . . . .
>
> — The instruction's use of the phrase "so substantial" is vague and violates the Eighth Amendment to the United States Constitution.
>
> — The instruction's use of the term "warrants" is so overbroad it misleads the jury to believe it may impose the death penalty even when it concludes it is not the appropriate penalty.
>
> — The instruction fails to specify that the prosecution has the burden of persuasion.

— The instruction fails to require the jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating ones and that death is the appropriate penalty.

— The instruction fails to require that the jury unanimously find which aggravating circumstances are true.

— The instruction fails to require a statement of reasons supporting the death verdict.

Likewise in *People v. Hughes, supra*, 27 Cal.4th at page 405, this Court stated:

> Defendant also asserts that CALJIC No. 8.88 given here, is constitutionally inadequate to "channel the jury's discretion and provide a non-arbitrary, non-capricious sentencing decision" by informing the jury, consistently with section 190.3, that if, in weighing the factors in aggravation and mitigation, the jury finds that the former do not outweigh the latter, the jury must return a verdict of life imprisonment. We rejected a similar challenge in *People v. Duncan* (1991) 53 Cal.3d 955, 978 [281 Cal.Rptr. 273, 810 P.2d 131], and do so here as well.

And, in *People v. Farnam, supra*, 28 Cal.4th at page 192, this Court stated the following regarding CALJIC No. 8.88:

> The capital sentencing scheme is not unconstitutional insofar as it does not require the jury to render a statement of reasons or to make unanimous written findings on the aggravating factors supporting its verdict. There is no constitutional requirement that the jury, in order to return a verdict of death, must unanimously find that aggravating factors outweigh the mitigating factors beyond a reasonable doubt or that death is the appropriate remedy beyond a reasonable doubt. Defendant's arguments fail to convince us to revisit any of these holdings.

Finally, in *People v. Taylor* (2001) 26 Cal.4th 1155, 1181, this Court observed:

> Defendant faults the sentencing instructions (CALJIC No. 8.88) for failing to direct the jury to impose a life imprisonment without parole sentence if it concluded the mitigating circumstances outweighed the aggravating ones. We have repeatedly rejected the claim in light of other language in this instruction, allowing a death verdict only if aggravating circumstances outweighed mitigating ones.
>
> Defendant also faults CALJIC No. 8.88 for calling on the jury to impose death if they find "substantial" aggravating factors, implicitly compelling a death verdict if aggravating circumstances outweighed mitigating ones. Defendant observes that under our case law, the jury may reject a death sentence even if mitigating circumstances do not outweigh aggravating ones. Our reading of the instruction discloses no compulsion on the jury to impose death under such circumstances. Instead, the instruction simply explains that no death verdict is appropriate unless substantial aggravating circumstances exist which outweigh the mitigating ones. This instruction was proper under our case law.
>
> Defendant also argues CALJIC No. 8.88 was deficient for failing expressly to inform the jurors they could vote against the death penalty even if they believed the aggravating circumstances outweighed the mitigating ones. We have rejected the argument in past cases.

Even though appellants acknowledge this Court has repeatedly rejected the claims they raise, they nonetheless argue this Court's prior decisions should be reconsidered. Because this Court has repeatedly declined such an invitation, it should do so here. (See *People v. Moon* (2005) 37 Cal.4th 1, 42-43; *People v. Boyette, supra*, 29 Cal.4th at p. 464 ["We agree none of the claims has merit

and that no reason appears to reconsider our past decisions."]; *People v. Taylor, supra*, 26 Cal.4th at p. 1183 ["Once again, as defendant acknowledges, we have repeatedly rejected similar arguments, and we see no compelling reason to reconsider them here."].)

8. CALJIC No. 8.85 Is Constitutional

Appellants contend that CALJIC No. 8.85 (see 4CT 921-922) was flawed in several respects including, but not limited to, the following: it failed to delete the inapplicable sentencing factors; it failed to delineate between the aggravating and mitigating circumstances; it contained factors that were vague and ill-defined; it limited other mitigating factors with the words "extreme" or "substantial;" and it failed to specify a burden of proof as to aggravation or the penalty decision. (SAOB 221-245; GAOB 574.) This claim is without merit.

This Court has consistently held that CALJIC No. 8.85 is not unconstitutionally vague and does not allow the penalty process to proceed arbitrarily or capriciously. (*People v. Perry, supra,* 38 Cal.4th at p. 319; *People v. Farnam, supra,* 28 Cal.4th at pp. 191-192; *People v. Lucero, supra,* 23 Cal.4th at p. 728; *People v. Earp, supra,* 20 Cal.4th at p. 899.) More specifically, this Court has repeatedly held that: a trial court has no obligation to modify the instruction to delete inapplicable aggravating and mitigating factors (*People v. Perry, supra*, 38 Cal.4th at p. 319; *People v. Farnam, supra,* 28 Cal.4th at pp. 191-192; *People v. Earp, supra,* 20 Cal.4th at p. 899); the instruction did not need to specifically identify the sentencing factors as either aggravating or mitigating circumstances since their natures are clear (*People v. Perry, supra*, 38 Cal.4th at p.319; *People v. Earp, supra,* 20 Cal.4th at p. 899; *People v. Frye, supra*, 18 Cal.4th at p. 1026); the aggravating factors described in CALJIC No. 8.85 are not impermissibly vague (*People v. Earp, supra,* 20 Cal.4th at p. 899; *People v. Arias, supra*, 13 Cal.4th at pp. 188-189); the use of

the adjectives "extreme" and "substantial" to modify two of the mitigating factors is not unconstitutionally vague and does not erroneously suggest to the jury that such evidence could not be considered if less than extreme or substantial (*People v. Perry, supra*, 38 Cal.4th at p. 319; *People v. Frye, supra,* 18 Cal.4th at p. 1029; *People v. Stanley, supra*, 10 Cal.4th at p. 862); and, the federal Constitution does not require the jury to be instructed to find the existence of aggravating circumstances or the appropriateness of the death penalty beyond a reasonable doubt (*People v. Earp, supra,* 20 Cal.4th at p. 899; *People v. Frye, supra,* 18 Cal.4th at p. 1029). Appellants offer no valid reason for revisiting these decisions and the instant claim should therefore be rejected.

9. Instruction On Presumption Of Life Imprisonment Without Parole Not Required

Appellants contend the trial court was constitutionally required to instruct the jury that the law favors life and presumes life imprisonment without the possibility of parole to be appropriate sentence in a capital case. (SAOB 278-279; GAOB 574.) This Court rejected this identical claim ten years ago in *People v. Arias*, *supra*, 13 Cal.4th at p. 190:

> Defendant also claims the statute is constitutionally deficient because it "fails to require a presumption that life without parole is the appropriate sentence." No authority is cited for the proposition, and it lacks merit. If a death penalty law properly limits death eligibility by requiring the finding of at least one aggravating circumstance beyond murder itself, the state may otherwise structure the penalty determination as it sees fit, so long as it satisfies the requirement of individualized sentencing by allowing the jury to consider all relevant mitigating evidence. (Citations omitted.)

(See also *People v. Coffman, supra,* 34 Cal.4th at p. 129.)

Appellants' claim is meritless.

D. The Death Penalty Law Does Not Violate The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants

Appellants claim the absence of intercase proportionality review at trial or on appeal violates their rights to equal protection of the law under the Fourteenth Amendment to the United States Constitution. Appellants maintain it is unfair to afford non-capital inmates such review under former section 1170, subdivision (f), of the Determinate Sentencing Law, but not to allow such review to capital defendants. Appellants acknowledge that this Court rejected this claim in *People v. Allen* (1986) 42 Cal.3d 1222. (GAOB 559-568; SAOB 243-244, 293-297, 308.)

This Court, however, has consistently rejected the claim that equal protection requires that capital defendants be provided with the same sentence review afforded felons under the determinate sentencing law. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1165; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 589; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Harris, supra*, 37 Cal.4th at p. 366; *People v. Cox, supra,* 30 Cal.4th at p. 970; *People v. Lewis, supra,* 26 Cal.4th at p. 395; *People v. Anderson, supra,* 25 Cal.4th at p. 602; *People v. Ramos*, *supra*, 15 Cal.4th at p. 1182.) As aptly noted by this Court in *People v. Cox* (1991) 53 Cal.3d 618, 691:

> . . . [I]n *People v. Allen, supra*, 42 Cal.3d 1222, we rejected "the notion that equal protection principles mandate that the 'disparate sentencing' procedure of section 1170, subdivision (f) must be extended to capital cases." (*Id.*, at pp. 1287-1288.) Section 1170, subdivision (f), is intended to promote the uniform-sentence goals of the Determinate Sentencing Act and sets forth a process for implementing that goal by

which the Board of Prison Terms reviews comparable cases to determine if different punishments are being imposed for substantially similar criminal conduct. (42 Cal.3d at p. 1286.) "*[P]ersons convicted under the death penalty are manifestly not similarly situated to persons convicted under the Determinate Sentencing Act and accordingly cannot assert a meritorious claim to the 'benefits' of the act under the equal protection clause [citations].*" (*People v. Williams, supra*, 45 Cal.3d at p. 1330, emphasis added.)

Thus, appellants' equal protection claim must be rejected since they are not similarly situated to defendants sentenced under the Determinate Sentencing Law.

E. International Law

Appellants assert California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments. (GAOB 569-573; SAOB 297-302, 308.) This claim was specifically rejected in *People v. Ghent* (1987) 43 Cal.3d 739, 778-779 (discussing the 1977 death penalty statute). Moreover, the use of the death penalty in California does not violate international norms where, as here, the sentence of death is rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; see *People v. Avila, supra,* 38 Cal.4th at p. __ [43 Cal.Rptr.3d at p. 102]; *People v. Boyer, supra,* 38 Cal.4th at p. __ [42 Cal.Rptr.3d at p. 742]; *People v. Perry, supra,* 38 Cal.4th at p. 321; *People v. Guerra, supra,* 37 Cal.4th at p. 1164; *People v. Bolden, supra,* 29 Cal.4th at p. 567.) Appellants do not provide sufficient reasoning to revisit the issue here, and thus, it should be rejected.

XXVII.

THE SECOND PENALTY PHASE JURY WAS PROPERLY INSTRUCTED

Appellants raise several instructional issues related to the second penalty phase. First, they contend the trial court erred in refusing to give several of their requested instructions on lingering doubt, mercy and sympathy, and age. (GAOB 374-400, 475-476, 476-485; SAOB 190-203; 204-209, 308.) Second, they contend the trial court failed to adequately and properly instruct the penalty jury on its consideration of violent criminal activity as aggravating evidence. (SAOB 210-220; GAOB 574.) Third, appellants contend the trial court prejudicially erred in failing to instruct the penalty jury with certain guilt-phase instructions on how the jury should evaluate the evidence. (SAOB 210-220; 574.) And fourth, appellant Gonzales argues the court erred in failing to sua sponte instruct the jury as to the elements of one of the "other crimes" alleged as an aggravating circumstance. (GAOB 453-466, 574.)

Respondent submits (1) the trial court properly refused to instruct the penalty jury on lingering doubt, mercy and sympathy, and age; (2) the trial court properly and adequately instructed the jury on its consideration of violent criminal activity as aggravating evidence; (3) the failure to instruct the penalty jury with certain guilt-phase instructions was nonprejudicial; and (4) trial court was not required to sua sponte instruct the jury as to the elements of possession of a shank by an inmate.

A. The Trial Court Properly Refused The Instructions Requested By The Defense

1. Lingering Doubt

Appellants argue the court erred when it refused to instruct the jury at the second penalty phase as he requested below on the issue of lingering doubt.

(GAOB 374-400; SAOB 190-203.) This Court has "repeatedly [] rejected claims that, under either state or federal law, a trial court must instruct concerning lingering doubt, whether on the court's own motion or in response to a specific request." (*People v. Robinson, supra*, 37 Cal.4th at p. 635, citing cases.) In *Robinson*, this Court could "perceive no reason to reconsider those determinations here," and observed that "consistent with defense counsel's closing arguments, the jury was allowed under the factor (k) instruction to consider in mitigation any lingering doubt it may have had." (*Id.*)

Appellants have put forward no basis in law, fact or logic which would distinguish the instant case, or suggest that the Court should revisit this issue and come to a contrary conclusion to that result repeatedly reached in every other case in which this issue has been consistently rejected. (See also *People v. Avila, supra,* 38 Cal.4th at p.__ [43 Cal.Rptr.3d at p. 101]; *People v. Boyer*, 38 Cal.4th at p. __ [42 Cal.Rptr.3d at p. 740]; *People v. Huggins*, *supra*, 38 Cal.4th at p. 251; *People v. Harris, supra*, 37 Cal.4th at p. 579; *People v. Gray, supra,* 37 Cal.4th at pp. 231-233; *People v. Ward*, *supra*, 36 Cal.4th at pp. 219-221; *People v. Panah*, *supra*, 35 Cal.4th at p. 497; *People v. Valdez, supra*, 32 Cal.4th at p. 129, fn. 28.)

2. Mercy And Sympathy

Appellants contend the court erred when it refused to instruct the penalty jury concerning consideration of mercy and sympathy as a mitigating factor. (GAOB 467-475; SAOB 204-209.)

This Court has held that a court does not err when it refuses such an instruction:

> we have held that "'a jury told it may sympathetically consider all mitigating evidence need not also be expressly instructed it may exercise mercy.' [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 344, 75

Cal.Rptr.2d 412, 956 P.2d 374.) Because defendant's jury had been instructed in the language of section 190.3, factor (k), we must assume the jury already understood it could consider mercy and compassion; accordingly, the trial court did not err in refusing the proposed mercy instruction.

(*People v. Brown, supra,* 31 Cal.4th at p. 570; see also *People v. Smith* (2003) 30 Cal.4th 581, 637; *People v. Taylor, supra*, 26 Cal.4th at p. 1180; *People v. Bolin* (1998) 18 Cal.4th 297, 343-344; *People v. Stanley*, *supra*, 10 Cal.4th at p. 840; *People v. Montiel* (1993) 5 Cal.4th 877, 943.)

Appellants have put forward no basis in law, fact or logic which would distinguish the instant case, or suggest that the Court should revisit this issue and come to a contrary conclusion to that result repeatedly reached in every other case in which this issue has been consistently rejected.

3. Age

Appellants argue that court erred when it refused to instruct the penalty jury with his proposed special instruction on the defendants age at the time of the offenses as a mitigating factor. (GAOB 476-485; SAOB 308.)

This Court has repeatedly rejected this and other similar claims. (See, e.g., *People v. Brown, supra,* 31 Cal.4th at pp. 564-565; *People v. Mendoza, supra*, 24 Cal.4th at p. 190; *People v. Smithey, supra,* 20 Cal.4th at pp. 1004-1006; Cf. *People v. Arias, supra,* 13 Cal.4th at pp. 187-188; *People v. Mayfield, supra,* 5 Cal.4th at p. 184.)

Appellants have put forward no basis in law, fact or logic which would distinguish the instant case, or suggest that the Court should revisit this issue and come to a contrary conclusion to that result repeatedly reached in every other case in which this issue has been consistently rejected.

B. The Trial Court Properly And Adequately Instructed The Penalty Jury On Its Consideration Of Uncharged Criminal Activity As Aggravating Evidence

Evidence was introduced at the penalty phase that each appellant had committed several uncharged violent criminal acts. The prosecution introduced evidence that appellant Gonzales had participated in a 1990 robbery of a Shell gas station and possessed a jail-made shank inside the Men's Central Jail in 1998. The prosecution also introduced evidence that appellant Soliz had possessed razor blades while inside the Men's Central Jail and assaulted a deputy while attempting to put out a fire started by appellant Soliz. (31RT 4083-4138.)

The trial court instructed the penalty jury pursuant to CALJIC No. 8.87, requiring proof beyond a reasonable doubt for proof of other criminal activity to be used as an aggravating circumstance. (33RT 4496-4499.) As to the prior violent criminal activity, the trial court instructed the jurors that before they could consider such evidence as an aggravating circumstance they "must be satisfied beyond a reasonable doubt that the defendant did, in fact, commit the criminal activity" and that "a juror may not consider any evidence of any other criminal activity as an aggravating circumstance." (33RT 4498-4499.)

The trial court also instructed the jurors on the portion of CALJIC No. 2.90 which defined reasonable as follows:

> Reasonable doubt is defined as follows: It's not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(33RT 4497.)

Appellants contend the trial court erred in instructing the jury on consideration of the "other crimes" evidence as aggravating evidence because the trial court omitted from CALJIC No. 2.90, the reasonable doubt instruction, the paragraph relating to the presumption of innocence and that the prosecution had the burden of proof in proving the other crimes evidence. (SAOB 210-217; GAOB 574.) Respondent submits the jury was properly instructed.

A penalty juror may consider evidence of other violent criminal activity as an aggravating circumstance only if it is proved beyond a reasonable doubt that the defendant has engaged in such activity. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-55, 60-62; see *People v. Hawkins*, *supra*, 10 Cal.4th at pp. 962-963; *People v. Champion* (1995) 9 Cal.4th 879, 949; *People v. Davenport, supra*, 41 Cal.3d at pp. 280-281.) Here, as mentioned above, the trial court instructed the jury pursuant to CALJIC No. 8.87 and the definition of reasonable doubt from CALJIC No. 2.90. These instructions made clear that the evidence of the prior criminal activity could be considered as a circumstance in aggravation only if the prosecution proved beyond a reasonable doubt that appellant Gonzales and/or appellant Soliz engaged in such activity. No more was required. (See *People v. Hawkins, supra*, 10 Cal.4th at p. 963; *People v. Pinholster, supra*, 1 Cal.4th at p. 965; *People v. Holt, supra*, 15 Cal.4th at pp. 683-685.) And, to the extent there may have been a technical error in the reading of the reasonable doubt instruction, which respondent does not concede, "small errors in the reasonable doubt instruction that are not likely to confuse or mislead the jury are harmless." (*People v. Hawkins, supra,* 10 Cal.4th 920, 963.) When the instructions are read together, there is no reasonable possibility the jury was confused or mislead as to who bore the burden of proof in proving the "other crimes" before it could be considered as aggravating evidence.

Finally, appellants argue the trial court had a sua sponte duty to instruct the jury on the elements of the "other crimes" charged as aggravating circumstances. (GAOB 455- 462; SAOB 183-188.)

As appellants recognize (GAOB 457; SAOB 185-186), this Court has specifically addressed and repeatedly denied such claims, finding such instructions "are not required by logic or by the constitutional guarantees of due process, fundamental fairness, right to a fair trial, equal protection, or reliability of penalty." (*People v. Lewis*, *supra*, 25 Cal.4th at pp. 667-338; see also *People v. Guerra, supra,* 37 Cal.4th at p. 1147 ["Instructions on the elements of the offenses presented under section 190.3, factor (b) are not required in the absence of a request by counsel."]; *People v. Coffman, supra,* 34 Cal.4th at p. 123 ["When the prosecution has introduced evidence, during the penalty phase, of a defendant's other violent criminal conduct, the trial court is not required, absent a request, to instruct on the elements of specific crimes that such evidence tends to prove."]; *People v. Carter, supra,* 30 Cal.4th at p. 1227; *People v. Maury, supra,* 30 Cal.4th at p. 443; *People v. Hughes, supra,* 27 Cal.4th at p. 383 ["[W]e repeatedly have held that a trial court has no duty to instruct the penalty phase jury concerning such other crimes on the court's own motion"]; *People v. Anderson, supra*, 25 Cal.4th at pp. 587-588; *People v. Hart* (1999) 20 Cal.4th 546, 651; *People v. Barnett, supra*, 17 Cal.4th at p. 1175 ["There is no obligation under state law or federal or state constitutional law to instruct the jury sua sponte on the elements of the crimes presented under factor (b)."]; *People v. Osband, supra*, 13 Cal.4th at p. 704; *People v. Memro, supra*, 11 Cal.4th at pp. 880-881; *People v. Johnson, supra*, 6 Cal.4th at pp. 48-49; *People v. Tuilaepa, supra*, 4 Cal.4th at pp. 591-592 ["[A]s defendant seems to concede, it was settled even before the penalty trial in this case that the trial court has no sua sponte duty to instruct in the manner now urged."]; *People v.*

Mitcham (1992) 1 Cal.4th 1027, 1075; *People v. Price* (1991) 1 Cal.4th 324, 489.)

Despite overwhelming authority from this Court definitively rejecting this precise claim, appellants suggest these holdings are either inapplicable or should be reconsidered. (GAOB 457-466SAOB 185-188.) Their arguments are both unpersuasive and unsupported.[69/] In any event, there is no indication that even if the penalty phase jury had been differently instructed it would have changed the penalty phase jury's assessment of the evidence or would have affected the outcome of the trial. (*People v. Hart, supra,* 20 Cal.4th at p. 651 ["There is no indication that an instruction on the specific crimes and elements would have changed the jury's assessment of the evidence or would have affected the outcome of the trial."].)

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69. Appellant Gonzales additionally argues such an instruction was required because he testified in his defense that the jail-made shank found in his one-man cell was not his. (GAOB 455- 462; 32RT 4260-4261.) Appellant Gonzales' suggestion that the Court should adopt a new rule -- that a trial court is required to override counsel's decision not to have the jury instructed as to the individual elements of the crimes proven when a defendant takes the stand and denies the crime -- finds no support in law or logic. There was more than sufficient evidence to establish appellant Gonzales' possession of the shank, despite his denial. (See, e.g., *People v. Jurado, supra*, 38 Cal.4th at pp. 138-139; *People v. Martinez, supra*, 31 Cal.4th at pp. 693-694; *People v. Williams, supra*, 16 Cal.4th at pp. 237-238; *People v. Hines, supra,* 15 Cal.4th at pp. 1056-1057; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187.) Respondent additionally notes that while appellant Gonzales highlights the fact that the criminal charges associated with this conduct were subsequently dismissed (GAOB 453), he fails to reveal the reason for the dismissal -- because appellant Gonzales "was already facing an enormous amount of years in prison for he crimes he had already committed." (31RT 4113.)

C. The Trial Court's Failure To Instruct The Penalty Jury With Certain Guilt Phase Instructions Was Nonprejudicial

It appears, as noted by appellants, that the trial court did not instruct the penalty jury with the applicable evidentiary instructions from CALJIC Nos. 1.00 through 2.92. (See 33RT 4491-4503; SOAB 210-217; GAOB 574.) Specifically, appellants complain the trial court did not instruct the penalty jury on credibility of witnesses (CALJIC No. 2.20), sufficiency of circumstantial evidence (CALJIC No. 2.01), weighing conflicting testimony (CALJIC No. 2.22), testimony of one witness sufficient for proof of a fact (CALJIC No. 2.27), and principles guiding evaluation of expert testimony (CALJIC No. 2.80). (SAOB 210-219; GAOB 574.) Although it appears appellants are correct (see 33RT 4491-4503), any error in the omission of the evidentiary instructions was nonprejudicial under state and federal standards of prejudice.

The recommendation in the Use Note to CALJIC No. 8.84.1 indicates that trial courts should instruct the penalty jury with the applicable evidentiary instructions from CALJIC Nos. 1.00 through 3.31. And, this Court has recently cautioned trial courts "not to dispense with penalty phase evidentiary instructions in the future." (*People v. Carter, supra,* 30 Cal.4th at p. 1222.) However, this Court has repeatedly found such error nonprejudicial. (See *id.* at pp. 1220-1222; *People v. Wharton* (1993) 53 Cal.3d 522, 600; *People v. Daniels*, *supra*, 52 Cal.3d at p. 885.)

Appellants, however, argue that a harmless error analysis is inappropriate in this case because different juries decided guilt and penalty. Appellants reason that since the "same jury" was not involved in the guilt and penalty determinations that a harmless error analysis is inappropriate. This is so, argue appellants, because unlike the situation where the same jury would receive the instructions at the guilt phase, the penalty jury in the instant case never received "any instructions" for the evaluation of the evidence. (SAOB 213-214.)

Unfortunately for appellants, this Court recently applied a harmless error analysis to a nearly-identical situation as that presented in this case: the trial court instructs the jury at the penalty phase to disregard the guilt phase instructions and fails to re-instruct the jury with the evidentiary instructions contained in CALJIC Nos. 1.00 through 3.31. (*People v. Carter, supra*, 30 Cal.4th at pp. 1220-1222.) Indeed, in *Carter*, this Court distinguished the prior cases of *People v. Wharton, supra*, 53 Cal.3d at page 600 and *People v. Daniels, supra*, 52 Cal.2d at pages 884-885 -- cases "where the trial court failed to re-instruct the jury at the penalty phase with certain evidentiary instructions given at the guilt phase, but did not direct the jury to disregard the earlier instructions." (*People v. Carter, supra*, 30 Cal.4th at p. 1219, fn. 19) -- and still applied a harmless error analysis even where the trial court instructed the penalty jury to disregard the guilt phase instructions. (*Id.* at pp. 1218-1222.) Respondent submits that for purposes of a harmless error analysis there is no functional difference between the situation in *Carter* (where the penalty jury is instructed to disregard the guilt phase instructions, which the jury is presumed to have done, and the trial court fails to re-instruct the jury with the evidentiary instructions) and the instant case (where a new penalty jury does not receive the evidentiary instructions). Thus, it is appropriate to apply a harmless error analysis to the instant case.

Here, appellants have failed to demonstrate that the omission of the evidentiary instructions resulted in prejudice. Appellants speculate that if the evidentiary instructions had been given the penalty jury might have reached a different penalty determination. (SAOB 217-220; GAOB 574.) Appellants' speculation, however, cannot serve as a basis for establishing prejudice. (See *People v. Carter, supra*, 30 Cal.4th at pp. 1220-1222.)

For example, in an effort to demonstrate prejudice, appellant Soliz cites in his opening brief the failure to give CALJIC No. 2.20 on the credibility of

witnesses. Appellant Soliz maintains that the failure to give this instruction left the jury in a quandry as to how to evaluate the testimony of Gonzales, especially since the trial court took judicial notice of the impossibility of his testimony. (SAOB 215-216.) But, the jury never expressed any uncertainty or confusion as to how to evaluate Gonzales' credibility and/or testimony. And, the jury never requested any clarification as to how it should evaluate Gonzales' testimony. (See *People v. Carter, supra*, 30 Cal.4th at pp. 1220-1221.) Other than speculation, appellant Soliz does not explain or demonstrate how the absence of CALJIC No. 2.20 prejudiced him in this regard. The same can be said as to the other complained-of instructions: appellants have failed to affirmatively demonstrate prejudice by the failure to give any of the instructions.

Indeed, it can be said with certainty that in this case the absence of the evidentiary instructions at the penalty phase made absolutely no difference. As set forth above, the prosecution presented a mountain of aggravating evidence against each appellant.

Since the lack of the evidentiary instructions at appellant's penalty phase was of absolutely no consequence, it can be said with confidence that the alleged instructional error was harmless under the state reasonable possibility standard of prejudice (*People v. Brown* (1986) 46 Cal.3d 432, 446-448) or the more stringent federal standard of harmless beyond a reasonable doubt (*Chapman, supra*, 386 U.S. at p. 24). Appellants' claim must be rejected. (*People v. Carter, supra*, 30 Cal.4th at pp. 1220-1222.)

XXVIII.

PENAL CODE SECTION 190.4, SUBDIVISION (B), IS NOT UNCONSTITUTIONAL TO THE EXTENT IT PERMITS THE RETRIAL OF THE PENALTY PHASE FOLLOWING A HUNG JURY

Penal Code section 190.4, subdivision (b), provides, in part: "If the trier of fact is a jury and has been unable to reach a unanimious verdict as to what the penalty shall be, the Court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be." Following a second hung jury, the trial court has the discretion to order a new jury or sentence the defendant to life imprisonment without the possibility of parole. (Pen. Code, § 190.4, subd. (b).) Here, the first penalty jury was unable to reach a unanimous verdict as to the appropriate penalty for each appellant and thus a second penalty jury was impaneled which did reach verdicts.

Appellants maintain that permitting the retrial of a penalty phase following a hung jury is unconstitutional because 27of the 36 states which permit capital punishment, as well as two federal statutes, do not permit such a penalty retrial. Appellants argue that since only 9 of the 36 states (or 25%) permit retrial of the penalty phase following a hung jury that California is out of step with the rest of the nation. Accordingly, appellants reason, that California's death penalty scheme is "an anomaly" and in violation of the Eighth Amendment's bar against cruel and unusual punishment since the scheme is contrary to the "'evolving standards of decency that mark the progress of a maturing society.'" Appellants also argue that a penalty phase retrial after the original jury was unable to reach a unanimous verdict violated their federal and state constitutional rights to a fair jury trial, to a reliable penalty determination, to be free of cruel and unusual punishments, and to due process as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the federal Constitution as well as the state constitutional protections in Article I,

sections 7, 15, and 17 of the California Constitution. (GAOB 401-416; SAOB 127-132.) Respondent submits this claim fails for several reasons.

First, as appellants candidly acknowledge, they never presented this claim in the trial court. (GAOB 404, fn. 24; SAOB 128, fn. 33.) Although a motion was filed pursuant to section 1385 seeking to bar the retrial and dismiss the death penalty from the case "in the furtherance of justice" (see Supp. II, CT 236-240), the grounds appellants raise on appeal were not presented to the trial court. Thus, appellants have waived the issue for appellate review.

Second, the "evolving standards of decency" have not, in fact, evolved far enough to shield a convicted first-degree murder with special circumstances from a retrial of a penalty phase following a hung jury. When 25% of the states permit a penalty phase retrial it cannot be said as a matter of law that a "national consensus" has been reached that such a retrial is contrary to the "evolving standards of decency that mark the progress of a maturing society" and thus violative of the Eighth Amendment's ban on cruel and unusual punishment. Moreover, the examples provided by appellants where the death penalty is barred as cruel and unusual punishment under the Eighth Amendment (i.e., individual under the age of 18, mentally retarded individual, insane person, accomplice in a robbery, and person convicted of rape) miss the mark. (See GAOB 405-406.) Unlike the cited examples, appellants were lawfully subject to the death penalty for their crimes. And, appellants do not contend otherwise. But, attempting to compare the penalty phase retrial of a lawfully convicted first-degree murderer with special circumstances who is subject to the death penalty to individuals where the death penalty is barred in the first instance as cruel and unusual punishment is like comparing apples and oranges.

The case law is also against appellants. The United States Supreme Court has recently addressed the propriety of a penalty phase retrial in the context of a double jeopardy claim. In *Sattazahn v. Pennsylvania* (2003) 537

U.S. 101, 107-110 [123 S.Ct. 732, 154 L.Ed.2d 588], the high court rejected the claim that the Double Jeopardy Clause of the federal Constitution barred a state from retrying a penalty phase after the first jury was unable to reach a verdict. According to the Supreme Court, "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" (*Sattazahn*, *supra*, 537 U.S. at p. 109); accord *Poland v. Arizona* (1986) 476 U.S. 147, 155-57 [106 S.Ct. 1749, 90 L.Ed.2d 123] [holding no double jeopardy violation in seeking death penalty upon retrial when defendant was not acquitted in the first capital-sentencing proceeding]; Cf. *United States v. Perez* (1824) 22 U.S. (9 Wheat) 579, 579-80 [6 L.Ed. 165] [holding discharge of hung jury without consent of defendant and without acquittal does not bar retrial].) Although *Sattazahn* did not address the precise issue raised by appellants, it is significant that the United States Supreme Court did not invalidate penalty phase retrials as unconstitutional.

Moreover, this Court has consistently held penalty phase retrials are constitutional. For example, in *People v. Davenport* (1995) 11 Cal.4th 1171, 1192-1194, this Court rejected the claim "that penalty-phase only retrials are unconstitutional per se, depriving him due process, equal protection of the law, his Sixth Amendment right to a fair trial, Eighth Amendment right to a reliable and proportional sentence, and 'analagous provisions' of the California Constitution. . . ." (See also *People v. Hawkins, supra,* 10 Cal.4th at p. 966.) This Court recently reached the same result in *People v. Gurule* (2002) 28 Cal.4th 557, 645. (See *People v. Desantis* (1992) 2 Cal.4th 1198, 1240.)

Appellants' claim should thus be rejected.

XXIX.

APPELLANTS RECEIVED A FAIR TRIAL

Appellants contend the cumulative effect of the guilt phase errors requires reversal of the guilt judgment and that the cumulative effect of the guilt and penalty phase errors requires reversal of the penalty. (GAOB 268-270, 486-492; SAOB 303-307.) Respondent disagrees with both contentions. As set forth above, many of appellants' claims were waived from failure to object below. Moreover, there were no multiple guilt pr penalty phase errors to accumulate. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of either phase of the trial. (*People v. Burgener, supra*, 29 Cal.4th at p. 884; *People v. Seaton, supra,* 26 Cal.4th at pp. 675, 691-692.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Box, supra,* 23 Cal.4th at pp. 1214, 1219.) The record shows each appellant received a fair trial. This Court should, therefore, reject appellants' claim of cumulative error.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the judgment of conviction and the penalty of death be affirmed in its entirety as to each appellant.

Dated: June 12, 2006

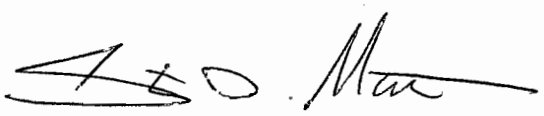
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

JOHN R. GOREY
Deputy Attorney General



STEVEN D. MATTHEWS
Supervising Deputy Attorney General

Attorneys for Respondent

SDM:mol
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50098052.wpd

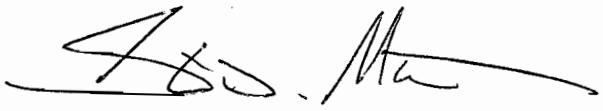
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 113217 words.

Dated: June 12, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



STEVEN D. MATTHEWS
Supervising Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. John Anthony Gonzales & Michael Soliz***

No.: **S075616**

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 and 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 that same day in the ordinary course of business.

On JUN 13 2006, I served the attached **Respondent's Brief (Capital Case)** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, 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:

Joseph F. Walsh
Attorney at Law
316 West 2nd Street, Suite 1200
Los Angeles, CA 90012
[Attorney for Appellant Gonzales]

Jay Colangelo
Assistant State Public Defender
Michael J. Hersek, State Public Defender
801 K Street, 11th Floor
Sacramento, CA 95814
[Attorney for Appellant Soliz]

Michael G. Millman, Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3672

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

Hon. Steve Cooley, District Attorney
Los Angeles District Attorney's Office
210 West Temple Street, Suite 18000
Los Angeles, CA 90012-3210

John A. Clarke, Clerk of the Court
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012
For delivery to:
Hon. Robert W. Armstrong, Judge

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 JUN 13 2006, at Los Angeles, California.

M. O. Legaspi
Declarant

Signature

SDM:mol
LA1999XS0027
50099322.wpd