

SUPREME COURT COPY

In the Supreme Court of the State of California

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

Plaintiff and Respondent,

v.

ANTHONY BANKSTON,

Defendant and Appellant.

CAPITAL CASE

Case No. S044739

**SUPREME COURT
FILED**

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Frank A. McGuire Clerk

Deputy

Los Angeles County Superior Court Case No. VA007955
The Honorable Nancy Brown, Judge

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DEATH PENALTY

TABLE OF CONTENTS

	Page
Statement of the Case	1
Statement of Facts.....	3
I. Appellant's first guilt phase trial	3
A. Prosecution evidence	3
1. Appellant murders Benson Jones and attempts to murder Benjamin Jones on May 18, 1991 (counts 2 & 3)	3
2. Eyewitnesses identify appellant as the shooter	5
3. Deputies stop appellant for a traffic violation; he has an AK-47 in his lap and a .38-caliber snub-nosed revolver on the passenger's seat of his gray Audi	7
4. Ballistic evidence	7
5. Threats against potential witnesses	8
6. Additional evidence that the shooting was gang-related.....	9
7. Appellant's propensity for violence	15
B. Defense evidence.....	17
II. Appellant's second guilt phase trial	20
A. Prosecution evidence	20
1. Appellant murders Nicole Sanchez with an AK-47 on May 10, 1991 (count 1)	20
a. The shooting	20
b. Appellant brags to his friend Paul Torrez about shooting Sanchez	22
c. Additional witnesses identify appellant as the shooter	24

TABLE OF CONTENTS
(continued)

	Page
d. After charges were filed, appellant places threatening phone calls to witnesses	25
e. Additional evidence linking appellant to the May 10 shooting	26
2. Appellant assaults Linda Jones with a firearm on May 18, 1991 (count 4)	28
3. Deputies stop appellant for a traffic violation; he has an AK-47 in his lap and a .38-caliber snub-nosed revolver on the passenger's seat of his gray Audi	31
4. Ballistic evidence	32
5. Additional evidence that appellant's crimes were gang-related	32
B. Defense evidence	41
C. The multiple-murder special circumstance allegation	42
III. Penalty phase	43
A. Prosecution evidence	43
1. Circumstances of the crimes	43
2. Victim impact testimony	45
a. Testimony from Benson Jones's family members	45
b. Testimony from Sanchez's family members	48
3. Appellant's prior criminal conduct involving force or violence	49
a. Assault with a firearm on July 9, 1984	49

TABLE OF CONTENTS
(continued)

	Page
b. Possession of seven deadly weapons (shanks) while in custody on November 2, 1985	50
c. Assault of an inmate with a deadly weapon (spear) on June 19, 1986	51
d. Possession of instructions for making weapons while in custody in August 1986	52
e. Attempted possession of an explosive device while in custody in December 1986	52
f. Assault of an inmate with a deadly weapon (shank) on November 28, 1988	53
g. Assault with a firearm conviction in January 1989	53
h. Possession of a firearm by a felon on October 29, 1989	53
i. Possession of a deadly weapon (shank) while in custody on September 20, 1991	54
j. Assault of an inmate with a deadly weapon (shank) on February 26, 1992	55
k. Possession of a deadly weapon (shank) while in custody on March 12, 1993	56
l. Assault of a deputy in Los Angeles County Jail on July 19, 1993	56

TABLE OF CONTENTS

(continued)

	Page
m. Possession of a deadly weapon (shank) while in custody on July 19, 1993	57
n. Threats of violence on February 7, 1994	57
B. Defense evidence	58
Argument	59
Guilt phase	59
I. Appellant's complaint about the court's inquiry into a possible <i>Marsden</i> issue is meritless because appellant never requested substitute counsel; in any event, the court's inquiry was adequate	59
A. Proceedings concerning appellant's appointed counsel	59
1. Defense counsel suggests that a <i>Marsden</i> motion might be forthcoming, but counsel and the court soon determine that appellant actually wants to represent himself	59
2. Appellant repeats his request for self- representation in a confidential hearing	65
B. Appellant never clearly requested appointment of substitute counsel, and therefore may not obtain a reversal based on an allegedly inadequate <i>Marsden</i> inquiry	67
C. Assuming arguendo that appellant requested appointment of substitute counsel pursuant to <i>Marsden</i> , the trial court's inquiry was adequate	72
D. Any error was harmless	77
II. Appellant voluntarily, knowingly, and intelligently waived his right to counsel	78
A. Relevant proceedings	79

TABLE OF CONTENTS **(continued)**

	Page
1. Facts pertaining to appellant's motion to represent himself pursuant to <i>Faretta</i>	79
2. Counsel-related proceedings that occurred after appellant first waived his right to counsel	83
B. Legal principles and standard of review for <i>Farretta</i> waivers	91
C. Appellant's waiver of his right to counsel was voluntary	93
D. Appellant's waiver of his right to counsel was knowing and intelligent	96
III. Appellant's absence from two pretrial discussions with bar panel attorney Borden, if error, was harmless	105
A. Relevant proceedings	105
1. First in-chambers discussion with bar panel attorney Borden (August 30, 1993)	105
2. Second in-chambers discussion with bar panel attorney Borden (September 7, 1993)	107
B. Appellant is not entitled to reversal due to his absence from the pretrial discussions with Mr. Borden	109
IV. The trial court conducted adequate jury voir dire	114
A. The jury selection process	115
1. First guilt phase trial	115
2. Second guilt phase trial	125
B. Appellant forfeited his challenges to the adequacy of voir dire	126
C. The trial court conducted an adequate voir dire	131

TABLE OF CONTENTS **(continued)**

	Page
V. Appellant forfeited his claim that the trial court restricted his use of peremptory challenges when, during selection of the alternates, a member of the accepted but unsworn jury panel needed to be replaced	142
A. Relevant trial court proceedings.....	142
B. Appellant forfeited his complaint about the selection process by failing to object	144
VI. The trial court did not wrongly restrict appellant from using peremptory challenges against alternate jurors; appellant's claim to the contrary is forfeited and meritless.....	149
A. Relevant law and procedure concerning the selection of alternate jurors	149
B. Appellant forfeited any claim of error, and the trial court did not err by deciding to proceed— with the parties' assent—with seven alternates.....	154
VII. The trial court properly removed for cause several prospective jurors who indicated they would not impose the death penalty	160
A. Applicable law.....	161
B. The trial court properly removed for cause prospective jurors who indicated they would not impose the death penalty	162
1. Prospective juror Cruise	164
2. Prospective juror Ortega.....	166
3. Prospective juror Adamos	168
4. Prospective juror Nakamisha	169
5. Prospective juror Whitehead	170
6. Prospective juror Gilstrap.....	171
7. Prospective juror Johnson	174
8. Prospective juror Perez.....	175

TABLE OF CONTENTS
(continued)

	Page
C. Appellant has forfeited his challenge to the adequacy of the voir dire, which in any event was sufficient.....	176
VIII. The trial court did not abuse its discretion by admitting evidence of appellant's prior acts of violence	183
A. No prejudicial error occurred in admitting evidence of appellant's prior acts of violence at the first guilt phase trial.....	184
1. Procedural background.....	184
2. The evidence of appellant's prior violent conduct was properly admitted, and any error in admitting the evidence was harmless.....	190
3. Any error in admitting the prior conduct evidence was harmless	197
B. No prejudicial error occurred in admitting evidence of appellant's 1984 to 1989 arrests at the second guilt phase trial	199
1. Procedural background.....	199
2. The trial court acted within its discretion in admitting the evidence, and any error was harmless	203
C. The use of the rap sheet at appellant's trials did not violate the Confrontation Clause	209
1. Appellant forfeited his Confrontation Clause claim by failing to specifically object at trial.....	209
2. The admission of the rap sheet evidence did not violate appellant's rights under the Confrontation Clause.....	210
IX. The trial court properly allowed the gang experts to rely on appellant's F.I. card and gang database printout....	214

TABLE OF CONTENTS
(continued)

	Page
A. Expert testimony concerning appellant's F.I. cards and gang database printout.....	215
B. Appellant forfeited his Confrontation Clause claim	216
C. There was no error under state evidentiary law	218
D. The admission of evidence from the F.I. card and gang database printout did not violate appellant's rights under the Confrontation Clause	219
E. Any error was harmless	222
X. The trial court properly admitted testimony about the "U.B.N." prison-gang	224
A. Gang evidence in appellant's photo album	225
1. First guilt phase trial.....	225
2. Second guilt phase trial	230
B. Appellant's claim concerning the admissibility of "prison-gang" evidence has been forfeited and is meritless in any event.....	235
XI. The trial court properly refused to sever the assault with a deadly weapon count	240
A. Relevant background	240
B. The trial court did not abuse its discretion	244
1. The trial court applied the correct standard	246
2. Cross-admissibility	246
3. Inflammatory charges.....	248
4. Joining a weak case and a strong case	249
5. Capital case considerations	251
6. Due process	251
Penalty phase	252

TABLE OF CONTENTS
(continued)

	Page
XII. The trial court did not commit prejudicial error in admitting threatening gang graffiti or any other evidence at the penalty phase trial.....	252
A. Evidence concerning gang graffiti on the “out of order” sign.....	253
1. Relevant facts and proceedings	253
2. Appellant forfeited his claim that the sign-related evidence was inadmissible at the penalty phase	256
3. The trial court acted within its discretion in admitting the sign-related evidence at the penalty phase	261
4. Appellant’s First Amendment claim is forfeited and meritless	266
5. Assuming arguendo that the sign-related evidence was erroneously admitted, such error was harmless.....	271
B. The trial court acted within its discretion when it declined to grant a mistrial because of erroneously admitted factor (b) evidence.....	273
1. Relevant proceedings	274
a. Propping open his cell door on March 8, 1992	275
b. Challenging Deputy Orellana on March 25, 1992	276
c. Possession of a handcuff key while in custody on January 7, 1993	277
d. Removal of handcuffs and waist chain on January 28, 1993.....	277

TABLE OF CONTENTS
(continued)

	Page
2. Because the admission of the four noncriminal acts was harmless error, the trial court did not abuse its discretion in denying the motion for mistrial	279
C. Appellant's cumulative error claim fails	282
XIII. Appellant's routine challenges to California's death penalty scheme have been repeatedly rejected by this Court, as appellant concedes, and thus these claims afford no basis for relief	283
XIV. There was no cumulative error	285
Conclusion	286

TABLE OF AUTHORITIES

	Page
CASES	
<i>Adams v. Texas</i> (1980) 448 U.S. 38 [100 S.Ct. 2521, 65 L.Ed.2d 581].....	123
<i>Alcala v. Superior Court</i> (2008) 43 Cal.4th 1205	244, 245, 247
<i>Arizona v. Fulminante</i> (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302].....	109
<i>Ballos v. Natural</i> (1928) 93 Cal.App. 601	237
<i>Belton v. Superior Court</i> (1993) 19 Cal.App.1279	249
<i>Bullcoming v. New Mexico</i> (2011) 564 U.S. ____ [131 S.Ct. 2705, 180 L.Ed.2d 610].....	212, 213
<i>Campbell v. Rice</i> (9th Cir. 2005) 408 F.3d 1166.....	109, 110
<i>Chapman v. California</i> (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].....	passim
<i>Coleman v. Alabama</i> (1970) 399 U.S. 1 [90 S.Ct. 1999, 26 L.Ed.2d 387].....	112
<i>Crawford v. Washington</i> (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].....	passim
<i>Faretta v. California</i> (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].....	passim
<i>Gideon v. Wainwright</i> (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799].....	72
<i>Godinez v. Moran</i> (1993) 509 U.S. 389 [113 S.Ct. 2680, 125 L.Ed.2d 321].....	92

<i>Gray v. Mississippi</i> (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed. 2d 622]	181, 182, 183
<i>Illinois v. Somerville</i> (1973) 410 U.S. 458 [93 S.Ct. 1066, 35 L.Ed.2d 425]	279
<i>In re Banks</i> (1971) 4 Cal.3d 337	76
<i>In re M.S.</i> (1995) 10 Cal.4th 698	267, 268
<i>In re Mendes</i> (1979) 23 Cal.3d 847	144, 145, 146
<i>Lockhart v. McCree</i> (1986) 476 U.S. 162 [106 S.Ct. 1758, 90 L.Ed.2d 137]	183
<i>Melendez-Diaz v. Massachusetts</i> (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314]	211, 212, 213, 214
<i>Morgan v. Illinois</i> (1992) 504 U.S. 719 [112 S.Ct. 2222, 119 L.Ed.2d 492]	135
<i>Mu'Min v. Virginia</i> (1991) 500 U.S. 415 [111 S.Ct. 1899, 114 L.Ed.2d 493]	132, 136
<i>NBC Subsidiary (KNBC-TV), Inc. v. Superior Court</i> (1999) 20 Cal.4th 1178	110
<i>Park v. California</i> (9th Cir. 2000) 202 F.3d 1146	198, 207
<i>People v. Abilez</i> (2007) 41 Cal.4th 472	passim
<i>People v. Alvarez</i> (1996) 14 Cal.4th 155	160
<i>People v. Arias</i> (1996) 13 Cal.4th 92	245
<i>People v. Armendariz</i> (1984) 37 Cal.3d 573	passim
<i>People v. Avila</i> (2006) 38 Cal.4th 491	passim

<i>People v. Ayala</i> (2000) 23 Cal.4th 225	280
<i>People v. Ayala</i> (2000) 24 Cal.4th 243	110
<i>People v. Balderas</i> (1985) 41 Cal.3d 144	244
<i>People v. Barlow</i> (1980) 103 Cal.App.3d 351	92
<i>People v. Barnett</i> (1998) 17 Cal.4th 1044	166, 190
<i>People v. Barrios</i> (2008) 163 Cal.App.4th 270	267
<i>People v. Beeler</i> (1995) 9 Cal.4th 953	110
<i>People v. Bigelow</i> (1984) 37 Cal.3d 731	88
<i>People v. Bittaker</i> (1989) 48 Cal.3d 1046	156, 181
<i>People v. Blair</i> (2005) 36 Cal.4th 686	91, 92, 102, 266
<i>People v. Blanco</i> (1992) 10 Cal.App.4th 1167	191, 193
<i>People v. Bloom</i> (1989) 48 Cal.3d 1194	96, 102
<i>People v. Bolden</i> (2002) 29 Cal.4th 515	passim
<i>People v. Box</i> (1984) 152 Cal.App.3d 461	156, 157, 159
<i>People v. Box</i> (2000) 23 Cal.4th 1153	127, 135, 285
<i>People v. Boyd</i> (1985) 38 Cal.3d 762	261, 274

<i>People v. Boyette</i> (2002) 29 Cal.4th 381	280
<i>People v. Bradford</i> (1976) 17 Cal.3d 8	195
<i>People v. Bradford</i> (1997) 15 Cal.4th 1229	92, 109
<i>People v. Burgener</i> (2003) 29 Cal.4th 833	209, 217
<i>People v. Burton</i> (1989) 48 Cal.3d 843	67, 72, 93
<i>People v. Carasi</i> (2008) 44 Cal.4th 1263	110
<i>People v. Cardenas</i> (1997) 53 Cal.App.4th 240	132
<i>People v. Caro</i> (1988) 46 Cal.3d 1035	passim
<i>People v. Carpenter</i> (1997) 15 Cal.4th 312	141
<i>People v. Catlin</i> (2001) 26 Cal.4th 81	251, 285
<i>People v. Cervantes</i> (2004) 118 Cal.App.4th 162	210
<i>People v. Champion and Ross</i> (1995) 9 Cal.4th 879	239
<i>People v. Chaney</i> (1991) 234 Cal.App.3d 853	132
<i>People v. Chaney</i> (2007) 148 Cal.App.4th 772	209, 217
<i>People v. Chatman</i> (2006) 38 Cal.4th 344	131, 141, 158
<i>People v. Clark</i> (1990) 50 Cal.3d 583	91, 123

<i>People v. Clark</i> (1992) 3 Cal.4th 41	67, 72, 101
<i>People v. Clark</i> (2011) 52 Cal.4th 856	161
<i>People v. Cleveland</i> (2004) 32 Cal.4th 704	136
<i>People v. Cole</i> (1956) 47 Cal.2d 99	204
<i>People v. Coleman</i> (1985) 38 Cal.3d 69	205, 206
<i>People v. Coleman</i> (1988) 46 Cal.3d 749	123, 157
<i>People v. Cook</i> (2006) 39 Cal.4th 566	249, 250
<i>People v. Cook</i> (2007) 40 Cal.4th 1334	passim
<i>People v. Cooper</i> (2007) 148 Cal.App.4th 731	221
<i>People v. Cottle</i> (2006) 39 Cal.4th 246	145
<i>People v. Cox</i> (2003) 30 Cal.4th 916	190, 203
<i>People v. Crandell</i> (1988) 46 Cal.3d 833	passim
<i>People v. Crayton</i> (2002) 28 Cal.4th 346	67
<i>People v. Crowe</i> (1973) 8 Cal.3d 815	158
<i>People v. Cruz</i> (1978) 83 Cal.App.3d 308	94, 95
<i>People v. Cudjo</i> (1993) 6 Cal.4th 585	239

<i>People v. Cunningham</i> (2001) 25 Cal.4th 926	285
<i>People v. Danielson</i> (1992) 3 Cal.4th 691	156
<i>People v. Davis</i> (2005) 36 Cal.4th 510	109, 110, 280
<i>People v. DePriest</i> (2007) 42 Cal.4th 1	131, 132
<i>People v. Dungo</i> (2012) 55 Cal.4th 608.....	221
<i>People v. Dunkle</i> (2005) 36 Cal.4th 861	267
<i>People v. Duran</i> (2002) 97 Cal.App.4th 1448	218, 219
<i>People v. Earp</i> (1999) 20 Cal.4th 826.....	75, 76, 197
<i>People v. Eastman</i> (2007) 146 Cal.App.4th 688	77
<i>People v. Ervin</i> (2000) 22 Cal.4th 48	109, 112
<i>People v. Ferraez</i> (2003) 112 Cal.App.4th 925	218
<i>People v. Foster</i> (2010) 50 Cal.4th 1301	127
<i>People v. Funes</i> (1994) 23 Cal.App.4th 1506.....	195
<i>People v. Gallego</i> (1990) 52 Cal.3d 115	72, 93
<i>People v. Gamache</i> (2010) 48 Cal.4th 347.....	284
<i>People v. Gamez</i> (1991) 235 Cal.App.3d 957.....	219, 221

<i>People v. Gardeley</i> (1996) 14 Cal.4th 605.....	218, 219
<i>People v. Geier</i> (2001) 41 Cal.4th 555.....	247, 248
<i>People v. Goldenson</i> (1888) 76 Cal. 328.....	180
<i>People v. Gonzales</i> (2011) 51 Cal.4th 894.....	136
<i>People v. Gonzales</i> (2012) 54 Cal.4th 1234.....	136
<i>People v. Gonzalez</i> (2006) 38 Cal.4th 932.....	218, 239
<i>People v. Gonzalez</i> (2012) 210 Cal.App.4th 724.....	67, 95
<i>People v. Gray</i> (2005) 37 Cal.4th 168.....	161, 181
<i>People v. Griffin</i> (2004) 33 Cal.4th 536.....	passim
<i>People v. Gudger</i> (1994) 29 Cal.App.4th 310.....	264, 267
<i>People v. Guerra</i> (2006) 37 Cal.4th 1067.....	199
<i>People v. Gurule</i> (2002) 28 Cal.4th 557.....	110
<i>People v. Gutierrez</i> (2009) 45 Cal.4th 789.....	190
<i>People v. Hamilton</i> (2009) 45 Cal.4th 863.....	166, 256, 271, 282
<i>People v. Harbolt</i> (1988) 206 Cal.App.3d 140.....	92
<i>People v. Hardy</i> (1948) 33 Cal.2d 52.....	281

<i>People v. Hardy</i> (1992) 2 Cal.4th 86	112
<i>People v. Harris</i> (1978) 85 Cal.App.3d 954	237
<i>People v. Harris</i> (2005) 37 Cal.4th 310	180
<i>People v. Hart</i> (1999) 20 Cal.4th 546	127, 128, 133, 156
<i>People v. Haskett</i> (1982) 30 Cal.3d 841	279
<i>People v. Heard</i> (2003) 31 Cal.4th 946	179
<i>People v. Hill</i> (1983) 148 Cal.App.3d 744	94, 95
<i>People v. Hines</i> (1997) 15 Cal.4th 997	73, 160
<i>People v. Holloway</i> (2004) 33 Cal.4th 96	237
<i>People v. Holt</i> (1997) 15 Cal.4th 619	passim
<i>People v. Homick</i> (2012) 55 Cal.4th 816	284
<i>People v. Hopkins</i> (1983) 149 Cal.App.3d 36	265
<i>People v. Howard</i> (2010) 51 Cal.4th 15	284
<i>People v. Hoyos</i> (2007) 41 Cal.4th 872	131
<i>People v. Jackson</i> (1978) 88 Cal.App.3d 490	92
<i>People v. Jackson</i> (1996) 13 Cal.4th 1164	271, 282

<i>People v. Jackson</i> (2009) 178 Cal.App.4th 590	267
<i>People v. Jackson</i> (2009) 45 Cal.4th 662	76
<i>People v. Jenkins</i> (2000) 22 Cal.4th 900	104, 248, 249, 279
<i>People v. Johnson</i> (1989) 47 Cal.3d 1194	141
<i>People v. Johnson</i> (1992) 3 Cal.4th 1183	156
<i>People v. Johnson</i> (1993) 6 Cal.4th 1	127, 147
<i>People v. Jones</i> (2003) 29 Cal.4th 1229	161
<i>People v. Karis</i> (1988) 46 Cal.3d 612	196
<i>People v. Ketchel</i> (1963) 59 Cal.2d 503	180
<i>People v. Kipp</i> (2001) 26 Cal.4th 1110	217
<i>People v. Koontz</i> (2002) 27 Cal.4th 1041	92, 100, 104, 110
<i>People v. Kraft</i> (2000) 23 Cal.4th 978	245
<i>People v. Lacefield</i> (2007) 157 Cal.App.4th 249	265
<i>People v. Lawley</i> (2002) 27 Cal.4th 102	passim
<i>People v. Ledesma</i> (1987) 43 Cal.3d 171	72
<i>People v. Lewis and Oliver</i> (2006) 39 Cal.4th 970	257, 266

<i>People v. Lewis</i> (2008) 43 Cal.4th 415	279
<i>People v. Lewis</i> (2009) 46 Cal.4th 1255	196
<i>People v. Livingston</i> (2012) 53 Cal.4th 1145	256, 261
<i>People v. Lowery</i> (2011) 52 Cal.4th 419	269, 270
<i>People v. Lucero</i> (2000) 23 Cal.4th 692	109
<i>People v. Lucky</i> (1988) 45 Cal.3d 259	67
<i>People v. Lynch</i> (2010) 50 Cal.4th 693	161, 245
<i>People v. Malone</i> (1988) 47 Cal.3d 1	197, 207
<i>People v. Manriquez</i> (2005) 37 Cal.4th 547	251, 252
<i>People v. Marsden</i> (1970) 2 Cal.3d 118	passim
<i>People v. Marshall</i> (1997) 15 Cal.4th 1	passim
<i>People v. Martinez</i> (2009) 47 Cal.4th 399	67, 161
<i>People v. Mayfield</i> (1997) 14 Cal.4th 668	172, 173
<i>People v. McArthur</i> (1992) 11 Cal.App.4th 619	92
<i>People v. McKinnon</i> (2011) 52 Cal.4th 610	passim
<i>People v. McLain</i> (1988) 46 Cal.3d 97	279

<i>People v. Memro</i> (1995) 11 Cal.4th 786	249
<i>People v. Mendoza</i> (2000) 24 Cal.4th 130	passim
<i>People v. Mills</i> (2010) 48 Cal.4th 158	155
<i>People v. Mincey</i> (1992) 2 Cal.4th 408	282
<i>People v. Monterroso</i> (2004) 34 Cal.4th 743	267
<i>People v. Moore</i> (2011) 51 Cal.4th 1104	271, 272, 273, 280
<i>People v. Morris</i> (1991) 53 Cal.3d 152	133, 157, 158
<i>People v. Morris</i> (2008) 166 Cal.App.4th 363	211, 213, 214
<i>People v. Mullens</i> (2004) 119 Cal.App.4th 648	199
<i>People v. Munoz</i> (1974) 41 Cal.App.3d 62	75
<i>People v. Musselwhite</i> (1998) 17 Cal.4th 1216	244, 245
<i>People v. Myers</i> (2007) 148 Cal.App.4th 546	194, 195
<i>People v. Nelson</i> (2011) 51 Cal.4th 198	283, 284
<i>People v. Nicolaus</i> (1991) 54 Cal.3d 551	204
<i>People v. Nye</i> (1969) 71 Cal.2d 356	181
<i>People v. Ochoa</i> (1998) 19 Cal.4th 353	271, 282

<i>People v. Ochoa</i> (2001) 26 Cal.4th 398	285
<i>People v. Olguin</i> (1994) 31 Cal.App.4th 1355	219
<i>People v. Page</i> (2008) 44 Cal.4th 1	passim
<i>People v. Partida</i> (2005) 37 Cal.4th 428	passim
<i>People v. Pedroza</i> (2007) 147 Cal.App.4th 784	210
<i>People v. Phillips</i> (1985) 41 Cal.3d 29	261, 271, 274
<i>People v. Pinholster</i> (1992) 1 Cal.4th 865	251
<i>People v. Pompa-Ortiz</i> (1980) 27 Cal.3d 519	112
<i>People v. Prather</i> (1901) 134 Cal. 436	281
<i>People v. Prince</i> (2007) 40 Cal.4th 1179	238
<i>People v. Ramirez</i> (2007) 153 Cal.App.4th 1422	219, 220, 221
<i>People v. Ramos</i> (1997) 15 Cal.4th 1133	132
<i>People v. Ramos</i> (2004) 34 Cal.4th 494	130
<i>People v. Redd</i> (2010) 48 Cal.4th 691	209, 217
<i>People v. Riccardi</i> (2012) 54 Cal.4th 758	passim
<i>People v. Riggs</i> (2008) 44 Cal.4th 248	104

<i>People v. Robinson</i> (2005) 37 Cal.4th 592	131, 132, 141, 158
<i>People v. Rodrigues</i> (1994) 8 Cal.4th 1060	195, 197, 207
<i>People v. Rogers</i> (2006) 39 Cal.4th 826	110
<i>People v. Rogers</i> (2009) 46 Cal.4th 1136	127
<i>People v. Roldan</i> (2005) 35 Cal.4th 646	131, 165, 166, 173
<i>People v. Roybal</i> (1998) 19 Cal.4th 481	197
<i>People v. Ruiz</i> (1988) 44 Cal.3d 589	247
<i>People v. Sassounian</i> (1986) 182 Cal.App.3d 361	259
<i>People v. Schmeck</i> (2005) 37 Cal.4th 240	283
<i>People v. Seaton</i> (2001) 26 Cal.4th 598	285
<i>People v. Silfa</i> (2001) 88 Cal.App.4th 1311	100
<i>People v. Sisneros</i> (2009) 174 Cal.App.4th 142	218, 220, 221
<i>People v. Smith</i> (2007) 40 Cal.4th 483	244, 245
<i>People v. Smithey</i> (1999) 20 Cal.4th 936	261, 265
<i>People v. Solomon</i> (2010) 49 Cal.4th 792	161, 171
<i>People v. Soper</i> (2009) 45 Cal.4th 759	244, 245, 247

<i>People v. Stankewitz</i> (1982) 32 Cal.3d 80	76
<i>People v. Stanley</i> (2006) 39 Cal.4th 913	92
<i>People v. Stewart</i> (1985) 165 Cal.App.3d 1050	198, 207
<i>People v. Stewart</i> (2004) 33 Cal.4th 425	177, 178, 179
<i>People v. Stitely</i> (2005) 35 Cal.4th 514	245, 284
<i>People v. Streeter</i> (2012) 54 Cal.4th 205	73
<i>People v. Tafoya</i> (2007) 42 Cal.4th 147	132
<i>People v. Taulton</i> (2005) 129 Cal.App.4th 1218	210, 211, 213
<i>People v. Taylor</i> (1992) 5 Cal.App.4th 1299	132, 136
<i>People v. Taylor</i> (2010) 48 Cal.4th 574	73, 127, 167
<i>People v. Thomas</i> (2005) 130 Cal.App.4th 1202	218, 220, 221
<i>People v. Thomas</i> (2011) 51 Cal.4th 449	162, 170, 175, 176
<i>People v. Toledo</i> (2001) 26 Cal.4th 221	267, 268
<i>People v. Tuilaepa</i> (1992) 4 Cal.4th 569	257
<i>People v. Tully</i> (2012) 54 Cal.4th 952	passim
<i>People v. Valdez</i> (1997) 58 Cal.App.4th 494	218, 219, 224

<i>People v. Valdez</i> (2004) 32 Cal.4th 73	passim
<i>People v. Valdez</i> (2012) 55 Cal.4th 82	110
<i>People v. Virgil</i> (2011) 51 Cal.4th 1210	181
<i>People v. Waidla</i> (2000) 22 Cal.4th 690	109, 110, 112
<i>People v. Walton</i> (1996) 42 Cal.App.4th 1004	193
<i>People v. Watson</i> (1956) 46 Cal.2d 818	passim
<i>People v. Weaver</i> (2001) 26 Cal.4th 876	131
<i>People v. Welch</i> (1999) 20 Cal.4th 701	284
<i>People v. Wharton</i> (1991) 53 Cal.3d 522	112
<i>People v. Whitson</i> (1998) 17 Cal.4th 229	197
<i>People v. Williams</i> (1990) 220 Cal.App.3d 1165	67, 69
<i>People v. Williams</i> (1997) 16 Cal.4th 153	217, 261
<i>People v. Williams</i> (2008) 43 Cal.4th 584	204
<i>People v. Wilson</i> (2008) 44 Cal.4th 758	179, 181
<i>People v. Wright</i> (1977) 72 Cal.App.3d 328	71
<i>People v. Wright</i> (1985) 39 Cal.3d 576	195

<i>People v. Wright</i> (1990) 52 Cal.3d 367	110
<i>People v. Zambrano</i> (2007) 41 Cal.4th 1082	113, 247, 248
<i>People v. Zapien</i> (1993) 4 Cal.4th 929	265
<i>Pulley v. Harris</i> (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29]	284
<i>Rosales-Lopez v. United States</i> (1981) 451 U.S. 182 [101 S.Ct. 1629, 68 L.Ed.2d 22]	132
<i>Ross v. Oklahoma</i> (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80]	182
<i>Shackelford v. Shirley</i> (5th Cir. 1991) 948 F.2d 935	267
<i>Snyder v. Massachusetts</i> (1933) 291 U.S. 97 [54 S.Ct. 330, 78 L.Ed. 674]	112
<i>Tapia v. Superior Court</i> (1991) 53 Cal.3d 282	116, 131
<i>United States v. Baldwin</i> (9th Cir. 1979) 607 F.2d 1295	132
<i>United States v. Chase</i> (9th Cir. 2003) 340 F.3d 978	270
<i>United States v. Cronic</i> (1984) 466 U.S. 648 [104 S.Ct. 2039, 80 L.Ed.2d 657]	72
<i>United States v. Gagnon</i> (1985) 470 U.S. 522, [105 S.Ct. 1482, 84 L.Ed.2d 486]	112
<i>United States v. Jones</i> (9th Cir. 1983) 722 F.2d 528	132
<i>United States v. Kelner</i> (2d Cir. 1976) 534 F.2d 1020	269
<i>United States v. Martin</i> (10th Cir. 1998) 163 F.3d 1212	270

<i>United States v. Martinez-Salazar</i> (2000) 528 U.S. 304 [120 S.Ct. 774, 145 L.Ed.2d 792]	159, 160
<i>United States v. Stewart</i> (9th Cir. 2005) 420 F.3d 1007	270
<i>United States v. Wade</i> (1967) 388 U.S. 218 [87 S.Ct. 1926, 18 L.Ed.2d 1149]	110
<i>Uttecht v. Brown</i> (2007) 551 U.S. 1 [127 S.Ct. 2218, 167 L.Ed.2d 1014]	131, 161, 178
<i>Virginia v. Black</i> (2003) 538 U.S. 343 [123 S.Ct. 1536, 155 L.Ed.2d 535]	268, 269
<i>Wainwright v. Witt</i> (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841]	passim
<i>Watts v. United States</i> (1969) 394 U.S. 705 [89 S.Ct. 1399, 22 L.Ed.2d 664]	267, 268
<i>Witherspoon v. Illinois</i> (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776]	passim

STATUTES

18 U.S.C. § 871	268
Code Civ. Proc., § 222.5	140
Evid. Code,	
§ 351	190
§ 352	passim
§ 353	passim
§ 402	238, 258
§ 801	218, 220, 232, 239
§ 1100	191
§ 1101	190, 245, 247
§ 1103	passim
Gov. Code, § 15151	213

Pen. Code,	
§ 7	131
§ 69	264
§ 71	264, 265, 267
§ 76	passim
§ 187	1
§ 190.2	1
§ 190.3	passim
§ 190.4	2
§ 245	1, 50
§ 664	1
§ 667.5	1
§ 954	243, 244, 246, 247
§ 954.1	248
§ 969b	211
§ 977	110
§ 1043	110
§ 1044	140
§ 1068	145
§ 1089	149, 150, 158, 159
§ 1127b	224
§ 1239	2
§ 4574	1
§ 12021	1
§ 12022.5	1, 2
§ 12022.7	1
Stats. 1994, c. 820 (S.B.1463), § 1	264

CONSTITUTIONAL PROVISIONS

Cal. Const., art. I,	
§ 7	160
§ 15	160
§ 16	160
§ 17	160
Cal. Const., art. VI, § 13	197
U.S. Const.,	
1st Amend.	passim
6th Amend.	passim
8th Amend.	160, 284
14th Amend.	160

OTHER AUTHORITIES

Cal. Stds. Jud. Admin.,	
§ 4.30	133
§ 8.5	117
CALCRIM No. 2650	267
CALJIC	
No. 2.80	223, 224
No. 2.90	273
No. 8.87	passim
No. 8.88	283, 284
Gov. Reorg. Plan No. 1 of 1995, § 42, eff. July 12, 1995	264
Proposition 115.....	115, 116, 131, 172

STATEMENT OF THE CASE

The District Attorney of Los Angeles County charged appellant with the murders of Noel Enrique Sanchez and Benson Jones (Pen. Code,¹ § 187, subd. (a); counts 1 & 2), the attempted murders of Benjamin Jones and Earnest Johnson (§§ 664/187, subd. (a); counts 3 & 6), and one count each of assault with a firearm (§ 245, subd. (a)(2); count 4) and possession of a firearm by a felon (§ 12021, subd. (a); count 5). A multiple-murder special circumstance was alleged (§ 190.2, subd. (a)(3)). It was further alleged that appellant personally used an assault weapon and machine gun in count 1 (§ 12022.5, subd. (b)(2)), personally used a handgun in counts 2, 3, 4, and 6 (§ 12022.5, subd. (a)(1)), and personally inflicted great bodily injury in count 3 (§ 12022.7). (1CT 159-164.)

As to all counts, it was alleged that appellant had suffered prior convictions for assault with a firearm (§ 245, subd. (a)(2)), possession of an explosive device while confined in state prison (§ 4574), and possession of a firearm by a felon (§ 12021, subd. (a)), and had served prior prison terms for those crimes (§ 667.5, subd. (b)). (1CT 163-164.) The prosecution elected to seek the death penalty against appellant. (1CT 256.)

Appellant pleaded not guilty and denied the allegations. (1CT 270.)

Trial was by jury. Following the presentation of evidence at the guilt phase, the jury found appellant guilty of the murder of Benson Jones (count 2), the attempted murder of Benjamin Jones (count 3), and possession of a firearm by a felon (count 5). The jury was unable to reach unanimous verdicts on counts 1, 4, and 6, and the trial court declared a mistrial as to those counts. (3CT 664-668.) The People elected to retry counts 1, 4, and 6. (3CT 666.) The retrial was by jury, and following the

¹ All further statutory references will be to the Penal Code, unless otherwise specified.

presentation of evidence at the guilt phase, the jury found appellant guilty of the murder of Noel Sanchez (count 1) and assault with a firearm (count 4), and not guilty of the attempted murder of Ernest Johnson (count 6). In a bifurcated proceeding, the jury also found the multiple-murder special circumstance allegation to be true. (3CT 869-870.)

A penalty phase trial was held, and the jury fixed the punishment as death. (4CT 927.)

The trial court denied appellant's motions for a new trial, and declined to modify the death penalty verdict pursuant to section 190.4, subdivision (e). (4CT 975, 991-998.) The trial court sentenced appellant to death for the murders of Sanchez and Benson Jones (counts 1 & 2). For the attempted murder of Benjamin Jones (count 3), the court sentenced appellant to a term of life in prison, plus three years for the infliction of great bodily injury. For the assault with a firearm on Linda Jones (count 4), the court sentenced appellant to the high term of four years, plus five years for the firearm enhancement under section 12022.5, subdivision (a). For possession of a firearm by a felon (count 5), the trial court sentenced appellant to eight months (one-third the mid term), to be served consecutively to the sentence in count 4. (4CT 997-998, 1005-1020.)

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

STATEMENT OF FACTS

I. APPELLANT'S FIRST GUILT PHASE TRIAL²

A. Prosecution Evidence

1. Appellant Murders Benson Jones And Attempts To Murder Benjamin Jones On May 18, 1991 (Counts 2 & 3)

Benson, Benjamin, Linda, and Etta Jones were siblings, and Debra Jones was Benson's wife.³ On the afternoon of May 18, 1991, Benson, who was on parole, had an argument with Debra, and the police were called to their house. Concerned that Benson might violate his parole, Benjamin and Linda picked him up from the house before the police arrived. Benson was upset, but Linda calmed him down. (16RT 1882-1884.)⁴ Benjamin drove them in Linda's car toward their mother's house. (15RT 1662-1664; 16RT 1820.) They stopped at the corner of Beach and Firestone, in the Firestone area of Los Angeles, and Linda got out of the front passenger seat to buy tacos at a taco truck. (15RT 1664-1665; 16RT 1820.) The men wanted to get some beer (15RT 1779), so Benjamin pulled forward about

² At the close of the first guilt phase trial, the jury was unable to reach verdicts on counts 1, 4, and 6, and a mistrial was declared on those counts. (3CT 664-668.) Accordingly, respondent does not address the evidence pertaining to those counts in this section of the statement of facts, which concerns only the first guilt phase trial.

³ To avoid confusion, respondent generally refers to the Joneses by their first names. At times, the transcripts from appellant's first guilt phase trial refer to Benson Jones as "Vincent" Jones (see 21RT 2697), but Debra and Benjamin Jones clarified that the correct name was "Benson" (see 22RT 2764; 38RT 4773).

⁴ Benjamin acknowledged that he had felony convictions and had served time in prison. (15RT 1757.) He was on parole at the time of the shooting. (15RT 1771.)

80 feet and parked in front of Griff's liquor store and Walter's market (15RT 1665-1666; 16RT 1821, 1834).

Benson got out and began walking toward the market when appellant and two other Black males stepped out from the side of the adjacent liquor store. (15RT 1667-1668, 1673, 1675-1677, 1691, 1693; 16RT 1835.) Appellant said to Benson, "What's up, Blood?" (15RT 1690-1691, 1700, 1770-1771.) Benjamin had never been a gang member, but Benson was a Crip. (15RT 1773, 1775, 1785.) Benjamin got out of the car and stepped up on the sidewalk. He told Benson, "Forget that, man. Come on, let's roll." (15RT 1701, 1784.) Benjamin and Benson were unarmed. (15RT 1711, 1773; 16RT 1884.) Benson, however, approached the men and came face-to-face with appellant. (15RT 1673, 1701.) Appellant pulled a dark, snub-nosed .38-caliber revolver from his front pocket and shot Benson from about a foot away. (15RT 1673-1674, 1702.) From the sidewalk near the taco truck, Linda saw an object in appellant's hand and heard the shot. (16RT 1827; 1830-1831.) Upon being shot, Benson squatted down and crossed his arms across his chest. (15RT 1704.)

Appellant then turned toward Benjamin and shot him in the torso. (15RT 1705, 1740-1741.) Benjamin staggered to a nearby car and collapsed onto the hood. (15RT 1705-1706; 16RT 1828.) Appellant shot at Benjamin again but missed, and the bullet ricocheted off the car. Benjamin lay still on the hood of the car, pretending to be dead. (15RT 1706, 1712, 1715.) Benjamin could see Linda on the corner; she was "hysterical, screaming and yelling." (15RT 1713-1714.) Linda screamed, "My brothers. Both my brothers are shot." (16RT 1829.) Linda saw appellant point a gun in her direction. (16RT 1832.)

Appellant then turned back to Benson, who was crouching against a wall, and shot him in the neck at point-blank range. (15RT 1715-1716.) According to Linda, appellant "shot one more time and ran" through an

alley. (16RT 1843.) Benjamin saw appellant run west. (15RT 1717-1718.) Linda and an employee of the liquor store called 911. (16RT 1852, 1894.)

Benjamin went to help his brother, and saw that he had been shot in the chest and neck. (15RT 1719; 16RT 1832-1833.) Benjamin helped Benson to his feet and they started walking east, looking for help. (15RT 1719.) But Benson could not walk more than a few feet, and his brother helped him to the ground. (15RT 1719-1720, 1739.) Benjamin gave Linda the car keys so she could get help at their sister Etta's house, which was nearby. (15RT 1769; 16RT 1872, 1881.) Linda left and did not return. (16RT 1846.) Benjamin was bleeding "all over." (16RT 1845.) Police arrived a few minutes later. (15RT 1720.)

Benjamin was transported by police to Martin Luther King hospital where he was treated for a single, through-and-through gunshot wound. (15RT 1740-1741.) Benson was transported to the same hospital and was pronounced dead. (16RT 1859.)

2. Eyewitnesses Identify Appellant As The Shooter

Los Angeles County Sheriff's Sergeant Doral Riggs and his partner, Homicide Detective Judith Gibson, investigated the shootings.⁵ They arrived at the scene around 5:20 p.m. on May 18, 1991, about two hours after the shooting. (16RT 1957-1959.)

Sergeant Riggs interviewed Benjamin at the hospital that night. Benjamin described the gun to police, and described appellant as a Black male with a medium brown complexion, in his late 20's, bald, stocky, about 5'6", and 150 to 170 pounds. (15RT 1741-1744; 16RT 1978.) Benjamin

⁵ Unless otherwise indicated, all law enforcement personnel involved in the investigation were employed by the Los Angeles County Sheriff's Department.

said that appellant had worn a black and gray sweat suit, with the pant legs cut off at the knees. (15RT 1670-1672; 16RT 1857.)

On May 22, 1991, Benjamin and Linda went to the Firestone police station and met again with Sergeant Riggs. (15RT 1744, 1778; 16RT 1978, 1992.) Benjamin identified appellant as the shooter from a six-pack photographic lineup (15RT 1744-1746; 16RT 1980-1981), and again in the courtroom during trial (15RT 1668, 1746). While at the police station, and again in court during trial, Benjamin also identified appellant's sweat suit and snub-nosed revolver as the ones he saw during the shooting. (15RT 1776-1778, 1781-1782.)

Linda gave a similar description of the shooter in her interview with Sergeant Riggs, estimating that appellant was 5'7" or 5'8," in his 20's, "stocky," and around 160 to 170 pounds. (16RT 1839-1840.) Linda, who was 41 at the time of trial, also testified that at the time of the shooting, appellant was younger than she was, had "no hair," and was wearing glasses. (16RT 1836.) Linda also identified appellant as the shooter from a six-pack photographic lineup, and again in the courtroom during trial. (16RT 1847-1849; 16RT 1979-1980.) While at the police station, and again during trial, Linda also identified appellant's sweat suit as the one she saw during the shooting. (16RT 1837, 1849; 1855, 1861-1863.) Linda had a previous conviction for a narcotic offense, and had been released from prison in January 1991. (16RT 1871-1872.) She was not under the influence of any drugs during the shooting. (16RT 1872.)

Detective Gibson interviewed Etta Jones, the sister of Benjamin, Benson, and Linda. (19RT 2396.) Etta said that Linda had driven to Etta's home immediately after the shooting and had described the shooter to her. Etta told Detective Gibson that Linda's description resembled that of a Bishop Bloods gang member she knew as "Ant Dog." (19RT 2396-2397.)

**3. Deputies Stop Appellant For A Traffic Violation;
He Has An AK-47 In His Lap And A .38-Caliber
Snub-Nosed Revolver On The Passenger's Seat Of
His Gray Audi**

Around 7:45 p.m. on May 22, 1991, Deputies Michael Patterson and Liam Gallagher were in their patrol car at the corner of 92nd Street and Compton Avenue. (16RT 1934-1935.) They had been informed that a Black male had been shooting people in the area with an AK-47 and a .38 revolver. (16RT 1951-1952.) Deputy Patterson was driving behind a four-door, gray, 1978 Audi. The Audi stopped at an intersection over the limit line when the light turned red. (16RT 1935-1936, 1975; 17RT 2124; 21RT 2712.) Deputy Patterson initiated a traffic stop, and as he walked toward the driver's side of the Audi, appellant, the driver and sole occupant, put his hands up through the sunroof. Appellant had an AK-47 assault rifle lying across his lap and a .38-caliber, snub-nosed, Titan revolver on the passenger's seat. (16RT 1936-1939, 1942-1943, 1953; 21RT 2700.)

The deputies arrested appellant and confiscated the weapons. The AK-47 had a live round in the chamber and five additional live rounds loaded in an attached magazine. (16RT 1940-1942, 1945-1946.) The revolver was fully loaded with six live rounds. (16RT 1943.) Deputy Patterson also found a box of ammunition for the revolver in the glove compartment. (16RT 1943-1944.) Upon arrest, appellant told Deputy Patterson he was from 9 Deuce Bishop, and his nickname was "Ant Dog." (16RT 1947-1948.) Appellant was the registered owner of the Audi. (17RT 2124; 21RT 2712.)

4. Ballistic Evidence

Deputy Dwight Van Horn testified as a firearms expert. (20RT 2452-2455.) The revolver that appellant had with him upon arrest was a Titan ".38 special." This was a .38-caliber revolver without a safety that was

capable of firing six rounds before reloading. (20RT 2476-2477, 2480-2481, 2484.)

The assault rifle that appellant had with him upon arrest was an operable, semiautomatic Norinco Model 84-S. (20RT 2455, 2490.) The 84-S has an identical function and appearance as AK-47, and is within the “AK-47 series” of assault rifles as described by California law. The rifle is essentially indistinguishable from an AK-47—even to someone very experienced with firearms—and therefore is commonly referred to as such. (20RT 2475, 2486.) The assault rifle will fire one, .223-caliber Remington round every time the trigger is pulled. (20RT 2455, 2460.) The six live rounds that were in the rifle were all .223-caliber Remington rounds. (20RT 2463-2464.) The assault rifle had a pistol grip and a folding stock. When the stock is unfolded, the gun can be fired from the shoulder like a traditional rifle. (20RT 2455-2456.) When the stock is folded, the weapon is much shorter and easier to handle in confined locations. (20RT 2456-2457.) The pistol grip allows the shooter to firmly hold the weapon when the stock is collapsed. (20RT 2457-2458.) The magazine attached to the assault rifle can hold 30 rounds, and the rifle chamber can hold one additional round. (20RT 2458.)

5. Threats Against Potential Witnesses

On August 14, 1991, several months after his arrest for the underlying charges, appellant made a collect call to Benjamin at home. (15RT 1748.) Appellant told Benjamin, “This is Anthony. I’m the one that’s supposed to have shot you and your brother.” When Benjamin asked how appellant got the phone number, appellant said that he had some “paperwork” on Benjamin. (15RT 1749.) Appellant asked, “How’s Linda?” Appellant also told Benjamin that he and Linda should not come to court and that they should instead settle the matter on the street. (15RT 1750-1751.) Benjamin

told appellant, “You did yours on the street, so now we’re going to take it to the system, let the system deal with it.” (15RT 1750.) Benjamin knew that appellant had called his house two other times when he was not there. (15RT 1752-1754.)

During the preliminary hearing, appellant’s attorney asked Benjamin what would happen “[i]f you approached the wrong person and said, ‘What’s up, cuz?’” Detective Judith Gibson, who was seated at counsel’s table with the prosecutor, turned to look at appellant. She saw appellant mouth the words, “And I would kill them,” and then “Fuck you.” (19RT 2375-2377.)

6. Additional Evidence That The Shooting Was Gang-Related

The prosecution’s two gang experts were Deputy Andrew MacArthur, a gang expert assigned to the Operation Safe Streets gang unit (“O.S.S.”), and Compton Police Lieutenant Reginald Wright, a gang expert who had been a Sheriff gang homicide investigator in 1991. (17RT 2003-2004; 20RT 2568-2572.)

Deputy MacArthur was assigned to the O.S.S. in the Firestone station in 1991. (17RT 2032-2034.) The 9 Deuce Bishop Bloods gang claimed territory that spanned from 92nd Street as the predominant southern border, to Nadeau Street as a northern border. (17RT 2071, 2085.) The area between Firestone and Nadeau was an area of shared control between the Bishops and some Hispanic gangs. Griff’s liquor store, the scene of the May 18, 1991 shootings, was “in the heart” of 9 Deuce Bishop territory (17RT 2071, 2083), and was a frequent hangout for 9 Deuce Bishop gang members (17RT 2071). A Metro rail line a block or two away separated 9 Deuce Bishop territory from territory claimed by the East Coast Crips. (17RT 2083-2084.) The area also had a great deal of graffiti affiliated with

the Bloods, including “E.S.B.” and “C.K.,” with the “C” crossed out. (17RT 2072-2073.) The Crips and Bloods were rival gangs in the area, and were feuding in 1991. (17RT 2034.)

Lieutenant Wright testified that “putting in work” for a gang means to commit a violent act on the gang’s behalf—usually a shooting—that is often done in retaliation for a rival gang’s act of violence. (20RT 2593. 2603.) A gang member is an active or “hard-core” participant in the gang. A gang member typically wears tattoos and colors associated with his gang, and is heavily involved in the gang’s criminal activities. (20RT 2594.) A gang “associate” is one who might dress in gang colors, hang around with gang members, and lives within the gang’s territory, but who is less involved in the gang’s activities than a full-fledged member. (20RT 2595.)

Lieutenant Wright testified that Benjamin and Benson were active gang members of the Atlantic Drive Crips. He described them as “O.G.’s,” i.e., “original gangsters” who had been with the gang since its inception. Lieutenant Wright opined that appellant was an active member of the rival 9 Deuce Bishop Bloods. (20RT 2568, 2581, 2587-2588, 2600-2603.) Concerning the shooting of May 18, 1991, Lieutenant Wright acknowledged that if a rival gang member had addressed someone as “cuz” at that location—as Benjamin supposedly had—the speaker would likely be armed and violence might ensue. (20RT 2590-2591.) A gang member who says “cuz” deliberately or by accident—even if only from habit—would still know that the inappropriate use of the term to a rival gang member could have negative consequences. (20RT 2595-2596.)

Part of Deputy MacArthur’s duties was to gather gang intelligence by talking with gang members. (17RT 2038.) He explained that whenever gang members are taken into custody, O.S.S. investigators interview them, photograph them, and complete field identification or “F.I.” cards with the gang member’s information. The gang member’s information is then added

to a computerized gang database called the "G.R.E.A.T." system, which stood for "General Report Evaluation and Tracking." (17RT 2035-2040.) The gang database file is created when someone is determined to be an active gang member. (17RT 2092.) Appellant's gang database file was created on August 21, 1987. (17RT 2088.)

Deputy MacArthur opined that appellant was a hard-core gang member. (17RT 2118.) He knew appellant to be affiliated with the 9 Deuce Bishop Bloods, which was also known as the Eastside Bishops. (17RT 2043.) Deputy MacArthur had personally interviewed and photographed appellant before. Deputy MacArthur had an F.I. card on appellant from October 31, 1984, which Deputy MacArthur then updated following appellant's arrest in October 1989. (17RT 2040-2041, 2073, 2082.) Appellant's F.I. card indicated his gang moniker was "Ant Dog." (17RT 2040-2041.) As noted above, upon his arrest on May 21, 1991, appellant told Deputy Patterson he was from 9 Deuce Bishop, and his nickname was "Ant Dog." (16RT 1947-1948.)

Appellant had a "C.K." earlobe tattoo, which Deputy MacArthur explained stood for "Crip Killer." The "C" had two small lines drawn through it. (17RT 2041, 2077-2078 [stipulation about "C.K." tattoo], 2086-2087; 20RT 2598.) Deputy MacArthur suspected that the lines through the "C" on appellant's tattoo were like "notches on a gunfighter's gun or it could be that he was attempting to make an X to X out the C." (17RT 2078.) Deputy MacArthur opined that such a tattoo meant the wearer was claiming to be a Crip killer. (17RT 2119.)

Benjamin's gang database file suggested to Deputy MacArthur that Benjamin was also an active gang member. (17RT 2095.)⁶ Benjamin and

⁶ Benjamin, however, testified that he had never been a gang member, but that Benson was, in fact, a Crip. (15RT 1773, 1775, 1785.)

Benson lived in an area of Compton that was claimed by the Atlantic Drive Crips gang, or "A.D.C.," which was a subset of the Crips. (15RT 1754-1756.)

One the evening of appellant's arrest, Deputy MacArthur and Detective William Flannery learned from appellant's parole officer that he was staying in a motel room at 2217 East Firestone Boulevard, which was in territory claimed by the 9 Deuce Bishops. (17RT 2043, 2070.) Once appellant was in custody and his parole officer gave them permission to search, the deputies entered the motel room. (17RT 2043-2044.) In the closet, deputies found a photo album and a gray and black striped sweat suit that matched the description of the shooter's clothing. (17RT 2044-2046.)

The inside cover of the photo album had gang writing, including the letters "U.B.N.," which referred to the prison gang United Blood Nation. (17RT 2046, 2061-2062.) Deputy MacArthur believed the author was a Bloods member, in part because the author used a "K" in place of many letter "C's," such as in references to "Afrika." Bloods usually avoid the use of the letter C because of its association with the Crips. (17RT 2062-2065, 2095, 2118.) The album also had several references to "E.S.B. 92," which referred to the East Side Bishops 92nd Street, another name for appellant's gang. (17RT 2043, 2062.) The album also had references to "CV 70," or Compton Vario 70. (17RT 2062.) There were additional references to the Bloods gang, Bloods of Watts, Bishop Bloods of Watts, and appellant's "Ant Dog" moniker. (17RT 2062.) Given the size, placement, and style of the gang writing, Deputy MacArthur opined that the author gave most importance to the United Blood Nation, followed by the East Side Bishops, and then CV 70. (17RT 2064.)

Inside the photo album was an envelope addressed to appellant. (17RT 2065.) There were also additional pages of gang writing—in the same script as the cover—including references to "The U.B.N. Warrior,"

and to warriors, guns, the killing of enemies, and violence to society. (17RT 2063-2070, 2098; see 1CT Supp. II 64-66 [photocopy of album writing], 216 [“U.B.N. Warrior” poem].) Deputy MacArthur read several of the passages aloud, including the following:

I thee true gangster! Shall walk this impoundable earth! I’m the autobiography of man. Now suggest that “I,” thee true gangster “am” in “Afrika” a warrior of exotik quintessence of a universal gangster. Thee true gangster.

I’ve lost by force, my land, my language, and in a sense my life. But so help me, I will sieze [*sic*] it back. If necessary, “I,” thee true gangster, will krush the korners of the earth and the world shall “forever tremble” in fear when “I,” the true gangster, emerge upon society, the most hated, feared, loved & respected Blood gangster the world has ever known.

Mr. Ant Dog, O.G.

(1CT Supp. II 64; 17RT 2068-2069.) Deputy MacArthur explained that “O.G.” refers to “original gangster.” The sign-off was followed by references to CV 70, East Side Bishops, and the 92nd Street Bishop Bloods. (1CT Supp. II 64; 17RT 2069.)

At trial, Lieutenant Wright viewed the writings in the photo album. (20RT 2599.) After doing so it, he opined, “Without a doubt, [appellant is] an active Blood member.” He said that the author had deeper ties than merely the 9 Deuce Bishops, noting, “One of the boldest acronyms within this particular book on the cover is U.B.N. . . ., which is a prison gang basically which composes of the United Bloods from all Blood sets that are within the institution basically. So if he authored this, that being Mr. Bankston, it would show his commitment to – to being a Blood.” (20RT 2600.) Lieutenant Wright opined that the references to “CV 70” showed that appellant was indicating “his association or giving some recognition to that particular set.” (20RT 2600.) Lieutenant Wright further opined that the page of writings in the album entitled “Poison of The Blood Streme”

[sic] (see 1CT Supp. II 66) strengthened his opinion that appellant was an active Blood member, and that appellant had put a lot of thought and care in the writings, which contained rhymes and substitutions for many letter C's. (20RT 2601-2602.) As Lieutenant Wright summarized, "This [author] is a devoted Blood gang member with a lot of feelings about the superiority within the Blood Nation or the need for it." (20RT 2602.)

Lieutenant Wright acknowledged on cross-examination that the substitution of "C's" with "K's" could also reflect a Black author's connection to his "heritage or his Blackness." (20RT 2605.) Lieutenant Wright believed that while the writings reflected some such sentiments, "I also can see within these writings the commitment to the Blood Nation and the commitment to Bloods in itself as far as unity and strength." (20RT 2604-2605.) Lieutenant Wright also opined that the writings reflected the "forcefulness of this person's Blackness," "and the need for Black men to come together," but that it also reflected a commitment to the gang. (20RT 2606.) Lieutenant Wright noted that the writings also suggested the Crips gang was an enemy. (20RT 2608.)

Under hypothetical facts based on appellant mouthing threatening words in court in response to testimony about the term "cuz," Lieutenant Wright opined that such conduct supported his opinion that appellant was a hard-core gang member with the 9 Deuce Bishop Bloods. (20RT 2602-2603.)

Upon the People's request, the trial court took judicial notice of the pro per defense motions that appellant had filed in the case,⁷ and the court

⁷ Appellant represented himself at both guilt phase trials and the penalty phase trial. Mark Borden, Esq., served as appellant's advisory counsel.

read the dates of each motion and the time that the motion was set for hearing. The dates and times as read by the trial court were as follows:

- May 3, 1993; no time requested.
- May 3, 1993; 8:30 a.m. requested.
- May 3, 1993; no time requested.
- May 17, 1993; 8:30 a.m. requested.
- May 17, 1993; 8:30 a.m. requested.
- August 2, 1993; 9:02 a.m. requested.
- August 2, 1993; 9:02 a.m. requested.
- August 30, 1993; 9:02 a.m. requested.
- September 13, 1993; 9:02 a.m. requested.
- October 13, 1993; 9:02 a.m. requested.
- Undated motion filed between October 13, 1994 and March 1994; 9:02 a.m. requested.
- Undated motion filed between March 1994 and April 29, 1994; 9:02 a.m. requested.
- April 29, 1994; 9:02 a.m. requested. (21RT 2693-2694.)

Deputy MacArthur testified that the numbers “9-2” were associated with the 9 Deuce Bishops. (17RT 2079.) Deputy MacArthur opined that a 9 Deuce Bishops gang member who wrote “9:02 a.m.” where one would normally write 8:30 or 9:00 a.m., would be doing so as a reference to his gang. (17RT 2079.)

7. Appellant’s Propensity For Violence

Based on a review of appellant’s criminal history—which involved only “crimes with weapons and violence” and no theft or drug offenses—Sergeant Riggs opined that appellant had a propensity for violence. (21RT

2683-2685, 2691.) To explain the basis for his opinion, Sergeant Riggs read the following entries from appellant's "rap sheet":

- On December 5, 1980, appellant was detained for having a firearm at a public school, being a minor in possession of a concealed firearm with live ammunition, and carrying a concealed weapon on his person. (21RT 2685, 2687.)
- On November 23, 1983, appellant was charged with robbery and carrying a loaded firearm in public. Appellant was convicted for carrying the firearm. (21RT 2687.)
- On March 12, 1985, appellant was charged for assault with a firearm on a person. Appellant was convicted and sentenced to three years in prison. (21RT 2688.)
- On November 2, 1985, appellant was detained while in prison for being a prisoner in possession of a weapon. (21RT 2688.)
- On June 19, 1986, appellant was detained while in prison for assault by a prisoner, and possession of a weapon. (21RT 2689.)
- On August 28, 1987, appellant was detained while in prison for possession of a weapon (tear gas) in prison. He was convicted and sentenced to four years. (21RT 2689.)
- On November 28, 1988, appellant was detained while in prison for assault by a prisoner. (21RT 2690.)
- On October 29, 1989, appellant was detained for being a felon in possession of a firearm. (21RT 2690.)
- On January 10, 1990, appellant was detained for carrying a concealed weapon on his person, carrying a loaded firearm in a public place, and being a felon in possession of a firearm. (21RT 2690.)

- On January 29, 1990, appellant was detained for being a felon in possession of a firearm. (21RT 2690.)

B. Defense Evidence

Debra Jones was Benson's wife. (22RT 2764.) She and Benson had an argument at home on May 18, 1991. The police were called because, as Debra explained, "We always call the police on each other when we argue." (22RT 2764.) Etta Jones arrived after the police left. (22RT 2768-2769.) At the time, Debra was pregnant and "Nate" was the father. (22RT 2765.) Debra had told Benson about this while Benson had been in jail. Benson had been released from jail in March 1991. (22RT 2766.) "Nate" lived somewhere on Normandie Avenue (22RT 2766), but hung around in the Firestone neighborhood where the Jones families lived (22RT 2769-2770).

Shortly after her brothers were shot, Etta went to the scene. She then took deputies to her house on Holmes Avenue, which was about two blocks away, because Linda had driven there after the shooting. (22RT 2771-2773, 2787.) Linda had described the shooting to Etta, but they had not discussed any names of the people who might have been involved. (22RT 2774-2775.) Etta did not have any problems with Bishop Bloods gang members. (22RT 2772.) Etta, however, had seen appellant in a gray Audi a couple of weeks before the shooting, and appellant matched Linda's description of the shooter. (22RT 2775-2776, 2779-2780.) Etta told police that appellant, whom she knew as "Ant Dog," may have been the shooter. (22RT 2777-2778, 2781-2782.) Etta believed that someone she knew as "Psycho Mike" was one of the men with the shooter. (22RT 2779.) Etta later identified appellant three times from three six-pack photographic lineups as the person that Linda had described to her. (22RT 2776.) After Etta spoke with deputies on the day of the shooting, she spoke to Gregory McCloud,

who lived across the street from the liquor store. McCloud told Etta, "Ant Dog did it." (22RT 2783-2784, 2786-2787.)

Sergeant John Babbitt went to the scene of the shooting on May 18, 1991, and interviewed Etta Jones. (22RT 2811-2812.) He arrived within five minutes of the 911 call. (22RT 2827.) Etta took Sergeant Babbitt to her house where he interviewed Linda, who had been present at the shooting. (22RT 2812-2813.) Linda described the shooting in a manner consistent with her testimony in the People's case-in-chief. (See 22RT 2820-2826.) She said the shooter was a 20 to 25-year-old Black man with black hair, about 5'9" to 5'11," about 170 pounds. She said the shooter wore a black striped sweat suit that was cut off at the knees, a white T-shirt, black shoes, and black glasses. She said that one of the two men with the shooter wore a powder blue hat, powder blue jacket, blue jeans, and a white T-shirt. She said the third man was a 25 to 30-year-old Black man with a mustache and black braided hair, about 5'9" to 5'11," about 170 pounds, and he wore a blue and yellow checkered shirt. (22RT 2816-2819.) Sergeant Babbitt took Linda to the Firestone station. When she learned that her brother Benson had died, she became extremely upset and ran from the station in the direction of Martin Luther King Hospital. Sergeant Babbitt then drove Linda to the hospital. (22RT 2813-2814.)

Deputy Ernest Magana interviewed Benjamin Jones at the scene of the shooting. (23RT 2892.) Benjamin described the shooting in a manner consistent with his testimony in the People's case-in-chief. (See 23RT 2897-2899.) Benjamin described the shooter as a 20 to 25-year-old Black male with short black hair, wearing a gray sweat suit that was cut off at the knees. (23RT 2894.)

Deputy James Warner, a firearms examiner in the Los Angeles Sheriff's crime lab, testified for the defense as a firearms expert. (23RT 2848.) Deputy Warner examined the firearms and ammunition presented

by the prosecution. (23RT 2848-2850.) Due to the condition of the expended .38-caliber bullets, Deputy Warner could not determine if they had been fired from the 38-caliber revolver. (23RT 2850-2852.)

After waiving any potential conflict of interest, appellant called his advisory counsel, Mark Borden, to testify. (23RT 2859-2860.) Mr. Borden was in the courtroom during jury selection on May 16, 1994. (23RT 2861.) Benjamin Jones had been in the courtroom, and the trial court ordered him to return on a future date to testify. (23RT 2862.) After escorting Benjamin from the courtroom, Bailiff Mark Giardina told Borden that Benjamin was "loaded" and smelled of alcohol. (23RT 2862.)

Bailiff Giardina confirmed that a potential prosecution witness had been escorted from the courtroom that day, that Giardina had spoken spoke to Mr. Borden, and that alcohol may have been mentioned during the conversation. (23RT 2854.) Giardina, however, did not personally escort Benjamin from the courtroom. (23RT 2853-2855.)

II. APPELLANT'S SECOND GUILT PHASE TRIAL⁸

A. Prosecution Evidence

1. Appellant Murders Nicole Sanchez With An AK-47 On May 10, 1991 (Count 1)

a. The Shooting

Florentino Melendez and Jesus "Chuy" Sanchez were walking near the intersection of Thorson and Laurel Streets in Compton around 5:30 in the afternoon on May 10, 1991. (35RT 4294-4297, 4316-4318.)⁹ Melendez was not under the influence of any drugs. (36RT 4371.) Melendez heard six to nine gunshots, and the men ran for safety. Melendez ran toward Laurel and ducked behind a Volkswagen; Sanchez ran back up Thorson. (35RT 4297.) Melendez then turned to see who was shooting, and he could see clearly over the top of the car. (35RT 4325.) From about 45 feet away, Melendez saw appellant driving what looked like a gray Volvo in the middle of the intersection. (35RT 4298-4300, 4319, 4321-4322.) Melendez saw and heard appellant cocking a rifle, and saw the barrel of the rifle above the edge of the driver's door. (35RT 4300-4301, 4348; 36RT 4368, 4370.) The motion and clicking sound were the same as

⁸ The first jury could not reach unanimous verdicts on counts 1 (murder of Sanchez), 4 (assault with a firearm on Linda), and 6 (attempted murder of Ernest Johnson). Ten jurors voted for a guilty verdict and two voted for a not guilty verdict on those counts. (3CT 665.) The People elected to retry those counts. (3CT 666.) The jury in the second guilt phase trial found appellant guilty of counts 1 and 4, and not guilty of count 6. (3CT 861-863.)

⁹ The information and verdict forms refer to Sanchez as "Noel Enrique Sanchez." (See 1CT 160 [amended information]; 3CT 863 [verdict form].) Sanchez's family members, however, testified that his name was "Jesus," and that he went by the nickname "Chuy." (See 51RT 6290-6292.) For clarity, respondent uses the surname "Sanchez" in the description of the guilt phase evidence.

when the prosecutor cocked the AK-47 (People's Exh. 1) in the courtroom. (35RT 4300-4301, 4349.)

After appellant cocked the assault rifle, he looked toward Melendez and they made eye contact. (35RT 4302.) Appellant then put the car in reverse and drove away from the intersection heading east on Laurel. (35RT 4302.) Melendez ran to Sanchez and found him mortally wounded on the ground. (35RT 4303.) Sanchez said he could not feel his legs. Melendez pulled up Sanchez's shirt and saw holes in the side of his chest. (35RT 4303.) Sanchez closed his eyes and did not speak again. (35RT 4303.)

Maria Lopez was driving her sister Catalina Franco on Thorson at the time, and both women described the shooting. (37RT 4516-4517; 39RT 5005.) A Black male was driving a gray car directly in front of them. (37RT 4517; 39RT 5006.) The car was similar in shape and color to appellant's gray 1978 Audi depicted in People's Exhibit 5. (37RT 4527; 39RT 5016.) The man stopped the car in the middle of the street at Thorson and Laurel, and Lopez stopped her car directly behind him. (37RT 4518-4519; 40RT 5043-5044.) The driver was alone in the car, and two Hispanic men—later identified as Sanchez and Melendez—were walking on Thorson. (37RT 4519-4520; 39RT 5007-5008.) The driver pulled out a large gun and, from the driver's side window, fired three shots at the men, striking Sanchez. (37RT 4521; 39RT 5008-5009; 40RT 5044, 5049-5050.) Sanchez fell to the ground. (40RT 5050.) The driver then turned onto Laurel and drove away heading east. (40RT 5050-5051.) Lopez stayed in the car and Franco, who was a nurse, got out to try to help Sanchez. Franco began CPR and tried to stop the profuse bleeding. (37RT 4522-4523; 39RT 5011-5012.) Franco later reported what she had seen to police and to a deputy district attorney. (40RT 5057, 5059-5062.)

John Aguilera was related to Melendez and was Sanchez's friend. (36RT 4386-4387.) Melendez and Sanchez had been at Aguilera's house for a Mother's Day barbeque shortly before the shooting. (36RT 4387.) Soon after Melendez and Sanchez left the barbeque, Aguilera heard the gunshots and went outside to investigate. (36RT 4387-4388.) After waiting about five minutes, Aguilera went down to the street where he found Melendez and Sanchez. Paramedics and police had already arrived. (35RT 4303.) Sanchez was not breathing and was turning purple. (36RT 4388.)

On May 12, 1991, the Los Angeles County Coroner's Department conducted an autopsy on Sanchez. (36RT 4472-4475.) Sanchez had two gunshot wounds. One wound was a through-and-through gunshot that entered his back and exited his chest. The second wound was to the back of his right thigh, and the bullet remained lodged in his body. (36RT 4480-4482.) Both wounds were consistent with being caused by a high velocity firearm. (36RT 4482.) The cause of death was the gunshot wound to the chest. (36RT 4477.) The slug was removed from Sanchez's leg during the autopsy and given to the police. (37RT 4644, 4665.)

**b. Appellant Brags To His Friend Paul Torrez
About Shooting Sanchez**

In 1991, Paul Torrez was a CV 70 gang member who lived on Muriel Street in Compton. (37RT 4557-4558, 4561.) He had a felony conviction for possession of cocaine base for sale. (37RT 4583.) Torrez had known appellant, or "Ant Dog," for several months before the shooting, and knew that appellant drove the gray Audi depicted in People's Exhibit 5. (37RT 4557, 4560, 4573, 4603-4604.) Appellant was a member of the 9 Deuce Bishop Bloods, but he also hung out with CV 70 gang members, and he came to Torrez's house every two or three days. (37RT 4560-4561, 4566.)

Appellant had a girlfriend who lived nearby on White Street. (37RT 4561.) Torrez described appellant's appearance in 1991 as medium height, 20 to 30 years old, bald, light-skinned, and "kind of husky." At that time, appellant wore gray or gold-rimmed glasses, and had a "C.K." tattoo on his right ear lobe that stood for Crip Killer. (37RT 4570-4571.)¹⁰

On May 11, 1991, the day after Sanchez was shot, appellant arrived in his car at Torrez's house around 5:30 or 6:00 p.m. (37RT 4558-4560, 4573.) Appellant told Torrez he had "shot a C.C.G.," i.e., a member of the Compton Chicano Gang, a CV 70's rival. (37RT 4562, 4589.) Appellant said he had put in work for the gang, meaning he had shot or killed someone for the gang. (37RT 4574.) Appellant said he had shot the C.C.G. member on Thorson, which was in C.C.G.'s territory, and had used an AK-47 assault rifle. (37RT 4562-4563.) Appellant had the AK-47 with him, which Torrez identified as the same assault rifle shown in court. (37RT 4584 [People's Exh. 1], 4608-4609.)

Appellant explained to Torrez that he saw two men while driving near Linsley and Thorson. (37RT 4564.) Appellant said he "caught them slipping," meaning the men were looking around as if they had been caught. (37RT 4573.) Appellant described one of the men he had shot at as being medium height with a gray spot on his hair. (37RT 4563.) Torrez was familiar with Melendez, who had a distinctive white streak in his hair and who fit the description. (37RT 4563-4534, 4588; 38RT 4717.) Appellant said that after shooting one of the men—who fell to the ground and was yelling—he shot the man a second time. Appellant "just smiled at the other guy [Melendez] and took off." (37RT 4564, 4582-4583.) When Torrez asked why he did not shoot Melendez too, appellant answered, "To

¹⁰ Appellant's "C.K." earlobe tattoo was visible in the courtroom and was described for the jury. (38RT 4728.)

save bullets.” (37RT 4564-4565.) Appellant said that after the shooting he drove around with the AK-47 in his lap to “patrol the area” for Crips and other rival gangs. (37RT 4565-4566.)

**c. Additional Witnesses Identify Appellant As
The Shooter**

As Sanchez lay dying, Melendez told Aguilera what had happened, and he described the shooter as a Black male with light brown skin, bald, stocky, about 23 to 26 years old, and wearing clear prescription glasses. (35RT 4304-4306; 36RT 4389-4390.) Aguilera believed that Melendez was describing appellant, whom Aguilera knew as “Ant Dog.” (35RT 4306, 4338; 36RT 4391, 4395-4396, 4443.) Aguilera had seen appellant a few days earlier standing near the corner of White and Myrrh. (36RT 4391-4392.) Aguilera had driven by appellant, and when Aguilera made a U-turn back toward him, appellant ran to a silver or gray Volvo or Audi that was similar to the one appellant drove during the shooting. (36RT 4392-4393.) Aguilera spoke to police after the shooting and relayed what Melendez had said. (36RT 4394-4395.) Aguilera also described appellant to police, and said that appellant hung out near 900 North Muriel, and was a possible cousin of a CV 70 gang member called “Capone.” (36RT 4443-4445.) Aguilera also told police that appellant hung out with “Dice,” a Black male from the CV 70 gang. (36RT 4445.) Aguilera later identified appellant as the man he knew as “Ant Dog” from a six-pack photographic lineup, and again in the courtroom during trial. (36RT 4397-4398.)

Melendez spoke to Compton Police Detective Ladd at the police station shortly after the shooting. (36RT 4379-4380.) Melendez gave a description to police that was similar to the one given by Aguilera, noting that the shooter was a bald, Black male with a medium complexion, about 25 years old, wearing a tan long-sleeved dress shirt and a gold loop earring

in one ear. (35RT 4306, 4344; 36RT 4383-4384.) Melendez later identified appellant as the shooter from a six-pack photographic lineup (35RT 4309, 4338), and in the courtroom during trial (35RT 4298, 4309).

Melendez explained why he did not identify appellant during the first guilt phase trial. Melendez was a Chicano Compton gang member, and his fellow gang members had pressured him not to be a “snitch.” (35RT 4299-4300, 4336-4337; 36RT 4367, 4372.) Although Melendez had not been a member of the gang since 1991, his family still lived in the area, and he still feared reprisals from the gang for his testimony. (35RT 4336-4338.)

In 1994, Lopez looked at a six-pack photographic lineup, and selected appellant and another man as individuals who looked like the shooter. Given the passage of time, however, Lopez did not clearly remember the shooter’s face. (37RT 4524, 4530.) At trial in 1995, Lopez testified that appellant looked like the shooter, but again indicated that she was not sure. (37RT 4524-4525.)

Franco also identified appellant as a man who looked like the shooter from a six-pack photographic lineup in 1994, and again in the courtroom during trial. Franco indicated that appellant looked “a lot” like the shooter—especially his eyes, which “[she] could not forget,” and which were “kind of out of orbit”—and that she was “95 percent” sure of her identification. (39RT 5012-5016; 40RT 5054-5055, 5063, 5065-5066.)

**d. After Charges Were Filed, Appellant Places
Threatening Phone Calls To Witnesses**

Lopez gave a statement to police after the shooting and provided a phone number. She later received phone calls at that number from a male caller. Lopez, who spoke primarily Spanish, did not understand everything the caller said. She did understand the words “You are there. I know

you're there." Lopez then had the number changed because she was afraid. (37RT 4525-4526.)

Several weeks or months after Melendez identified appellant from the six-pack photographic lineup, appellant called Melendez at home. Appellant told Melendez not to come to court, and warned him that "we could handle this out in the street." Melendez hung up. (35RT 4323; 36RT 4460.)

After Aguilera identified appellant to the police, appellant called him too, warning him not to come to court to testify about the shooting. Appellant said that he and Aguilera could "take care of it like men out in the street." (36RT 4400, 4458.) Aguilera was positive that appellant made the calls (36RT 4404, 4452), and the calls bothered Aguilera (36RT 4454). Aguilera did not report the calls to police because he did not want any "problems" at his family's house. (36RT 4402.) Sometime after the calls from appellant, someone shot at the house where appellant had called Aguilera. (36RT 4434, 4446-4447.)

The parties stipulated that as part of ongoing discovery, appellant had possession of Melendez's and Sanchez's addresses and phone numbers as of June 1991. (36RT 4433.)

**e. Additional Evidence Linking Appellant To
The May 10 Shooting**

Compton Police Officer Timothy Brennan was assigned to the department's gang detail and responded to the scene of the shooting. (38RT 4715, 4719.) C.C.G. and CV 70 were rival gangs, and the shooting occurred in C.C.G. gang territory. (38RT 4719-4720.) Officer Brennan recognized Melendez, who had a distinctive white streak in his hair, as a C.C.G. gang member. (38RT 4717.) Officer Brennan interviewed Aguilera and eyewitnesses Lopez and Franco. Lopez and Franco described

the shooting, and Aguilera described the incident with appellant that had occurred several days earlier. In both incidents, appellant had been seen driving a gray Volvo or Audi. (38RT 4715-4717, 4731, 4743, 4745-4746.)

Compton Homicide Detective Johnny Lee Swanson spoke to Torrez on June 4, 1991. (37RT 4639-4641, 4643, 4648, 4664.) Torrez described appellant and relayed appellant's account of the shooting. (37RT 4648.) Detective Swanson showed Torrez pictures of appellant's Audi. (37RT 4648-4649, 4668.) Torrez recognized the car—which he called a Volvo—as “Ant Dog’s.” (37RT 4660.) Torrez, said, “Audi, Volvo, doesn’t make any difference, that’s his car.” (37RT 4668-4669.) Torrez identified appellant from a six-pack lineup as the person who had confessed to him about shooting Sanchez. (37RT 4645.)

Torrez, who was a registered narcotics offender and on probation at the time, was arrested by Officer Brennan on May 24, 1991, for possession of drugs and a sawed off rifle. (37RT 4567-4568, 4585; 38RT 4720; 38RT 4720, 4723. Torrez claimed at trial that the police had offered him immunity in exchange for information. (37RT 4569, 4610.) According to Officer Brennan, he had asked Torrez if he knew about the C.C.G. member who had been killed, and Torrez said that he did. Contrary to Torrez’s claim, however, no promises had been made to Torrez in exchange for his testimony. (37RT 4610.) Officer Brennan testified that the police did not make any deals with Torrez, but indicated that they could let the prosecutor know he was a cooperating witness. (38RT 4721.) In a tape-recorded interview, Torrez told police what appellant had relayed it to him, and described what he knew about the shooting in a manner consistent with his trial testimony. (37RT 4571-4572.) Torrez also described appellant for police and said appellant drove a gray four-door Audi or Volvo with a sunroof. (38RT 4723-4727.) Torrez believed that appellant was related to “Capone” from CV 70. (38RT 4737.)

Ballistics tests showed that the slug removed from Sanchez's leg was fired from an AK-47. (37RT 4644, 4665-4666.)

**2. Appellant Assaults Linda Jones With A Firearm
On May 18, 1991 (Count 4)**

On May 18, 1991, a week after Sanchez was murdered, Benjamin Jones was driving his sister Linda and his brother Benson in Linda's car on Firestone Boulevard. (38RT 4774-4775, 4804.)¹¹ Benjamin stopped the car near Firestone and Beach, and Linda got out to buy food from a taco truck. (38RT 4772, 4805.) Benjamin pulled the car ahead, and parked on the street in front of a liquor store, where appellant and two other Black men were hanging out. (38RT 4775-4776, 4805-4806.) Appellant wore a black-and-gray jogging suit. (38RT 4786.) Benson got out of the car first and began walking toward a market adjacent to the liquor store; Benjamin soon followed. (38RT 4777-4778, 4806.) Benjamin heard someone from appellant's group say, "What's up, Blood?" (38RT 4778.) Benson turned around and walked toward the men, and appellant approached him. (38RT 4778-4779.)

When appellant was two or three feet from Benson, appellant pulled out a snub-nosed .38-caliber revolver from his pocket and shot Benjamin in the chest. (38RT 4780, 4787, 4807.) Benson fell into a squatting position. Appellant then turned to Benjamin, aimed the gun with both hands, and shot Benjamin. (38RT 4780-4781, 4808, 4810.) Benjamin fell onto the hood of a parked car and played dead. Appellant fired at Benjamin a

¹¹ Both Benjamin and Linda Jones testified at the second guilt phase trial. Benjamin had felony convictions for first degree robbery in 1975, second degree burglary in 1981, and sales of PCP in 1981, and had served time in prison. (38RT 4797-4798.) Linda had been convicted of a felony narcotics offense in 1988. (39RT 4856.)

second time but the bullet missed Benjamin and struck the car. (38RT 4781-4782, 4792-4793, 4809-4810.)

Linda saw what was happening and started to dial 911 from a pay phone by the taco truck. (38RT 4782, 4812; 39RT 4972.) She got “hysterical,” shouted for help, and started beating the pay phone with the receiver. (38RT 4782, 4812.) Appellant then walked back to Benson and shot him a second time. (38RT 4783, 4811.)

Appellant then pointed the gun with both hands toward Linda. She and another person by the taco truck “jumped into the street.” (38RT 4811-4812; 39RT 4865-4866.) Appellant fired, and Linda “almost got hit.” (38RT 4811.)

Appellant and his companions then left, and Linda came to Benjamin’s aid. (38RT 4783, 4812-4813.) He gave her the car keys and told her to go around the corner to their sister Etta’s house to call for help. Linda got in the car and drove away. (38RT 4783, 4813-4814; 41RT 5232.)

Deputy Ernest Magana was the first to arrive on the scene, and he interviewed Benjamin. (41RT 5249-5250.) Benjamin described the shooting in a manner consistent with his testimony in the People’s case-in-chief. (41RT 5251-5252, 5261.) Benjamin described the shooter as a 20 to 25-year-old Black male with short black hair, wearing a gray sweat suit. Benjamin said the shooter had used a .38-caliber revolver. (41RT 5251, 5254-5255.)

According to Etta, Linda was “hysterical” when she arrived at Etta’s house. (41RT 5232.) Linda told Etta what had happened, and Etta drove alone to the scene of the shooting. (38RT 4814; 41RT 5232-5233.) Later that day back at Etta’s house, Linda described the shooter to deputies. She said he was husky, bald, and wore glasses and a gray sweat suit that was cut off at the knees. (38RT 4815-4816, 4830; 39RT 4854, 4865; 41RT 5234.)

Upon hearing Linda's description of the shooter, Etta "went to pieces," and said, "I think I know who it is." (38RT 4830; 41RT 5234-5235.) Etta told the deputies that the shooter was the 9 Deuce Bishop Bloods gang member known as "Ant Dog," and that one of his companions might have been "Psycho Mike." (38RT 4831; 39RT 4975-4976; 41RT 5235, 5237, 5240.) During trial, Etta identified appellant in the courtroom as the person she thought was the shooter. (41RT 5235.) Etta had seen appellant and "Psycho Mike" in the neighborhood a few days before the shooting, and appellant had asked her, "Hey, you got a man?" (41RT 5235-5236, 5240.) Etta had seen appellant one other time, sitting in the gray Audi depicted in People's Exhibit 5 near Firestone Boulevard. (41RT 5236, 5243.) Benjamin did not see anything happen to Linda while appellant was shooting him and Benson. (38RT 4798-4799.)

Linda identified appellant as the person who had shot at her from a six-pack photographic lineup, and again in the courtroom during appellant's preliminary hearing and at trial. (38RT 4806, 4816-4817, 4819, 4826-4828.) At trial, Linda also identified appellant's sweat suit as the one she saw during the shooting. (38RT 4818-4819.)

Several days after the shooting, Benjamin told deputies what had happened. Benjamin identified appellant as the shooter from a six-pack photographic lineup, and again in court during trial. (38RT 4777, 4784-4785.) Benjamin also identified at trial appellant's sweat suit and snub-nosed revolver as the ones he saw during the shooting. (38RT 4786-4787.)

On cross-examination, Linda testified that she did not recall telling Detective Judith Gibson that appellant had shot at her, even though such a statement was reflected in the police report. (39RT 4858-4859.) Linda testified that at the preliminary hearing that the gun had been pointed in her direction. (39RT 4860.)

On cross-examination, Detective Gibson testified that she had interviewed Linda Jones after the shooting, and that Linda had indicated that appellant had "shot at her" after shooting her two brothers. (39RT 4965.) Detective Gibson wrote in her report, "It was the impression of Linda Jones that the man then shot at her once." (39RT 4965-4966.) Detective Gibson's recollection was that Linda described hearing four shots in all: one at Benson, one at Benjamin, one at her, and a second at Benson. (39RT 4970-4971.) The police found nothing at the scene that would indicate a bullet had been fired toward the taco truck. (39RT 4972.)

**3. Deputies Stop Appellant For A Traffic Violation;
He Has An AK-47 In His Lap And A .38-Caliber
Snub-Nosed Revolver On The Passenger's Seat Of
His Gray Audi**

Around 7:45 p.m. on May 22, 1991, Deputies Michael Patterson and his partner were in their patrol car at the corner of 92nd Street and Compton Avenue. (41RT 5269-5270.) Deputy Patterson was driving behind appellant's four-door, gray, 1978 Audi. (41RT 5270-5271.) Deputy Patterson initiated a traffic stop. (41RT 5272.) As Deputy Patterson walked toward the driver's side of the Audi, appellant, the driver and sole occupant, put his hands up through the sunroof. (41RT 5272.) Appellant had what appeared to be an AK-47 assault rifle lying across his lap and a .38-caliber, snub-nosed, Titan revolver on the passenger's seat. The deputies arrested appellant and confiscated the weapons. (41RT 5272-5275.) Deputy Patterson checked the guns, and found that the AK-47 had a live round in the chamber and five additional live rounds loaded in an attached magazine. (41RT 5274.) The revolver was fully loaded with six live rounds. (41RT 5274.) Deputy Patterson also found a box of ammunition for the revolver in the glove compartment. (41RT 5275.) Appellant was the registered owner of the Audi. (41RT 5271.)

4. Ballistic Evidence

Deputy Richard Catalani testified as a firearms expert. (41RT 5306-5307.) The revolver that appellant had with him upon arrest was a Titan Tiger “.38 special.” (41RT 5312.) This was an operable .38-caliber revolver that was capable of firing six rounds before reloading. (41RT 5316-5318.) The 38-caliber ammunition found in appellant’s glove compartment would fit the revolver. (41RT 5318.)

The assault rifle that appellant had with him upon arrest was an operable, short-barrel, semiautomatic Norinco Model 84S-1, also called an “AK-47.” (41RT 5319 5321, 5331-5332.) The assault rifle fires one .223-caliber Remington round every time the trigger is pulled. (41RT 5319-5320.) The assault rifle had a pistol grip and a collapsible shoulder stock. (41RT 5343, 5345.) The six live rounds that were in the rifle upon appellant’s arrest were all .223-caliber Remington rounds. (41RT 5322.)

Deputy Catalani fired some test rounds with the revolver and the assault rifle, and compared it to the .38 and .223 rounds that were removed during the autopsies of Benson and Sanchez. The test-fired rounds were consistent with—and had the same general characteristics—as the expended rounds, but the expended rounds were too deformed to make a conclusive positive identification. (41RT 5322-5323, 5327, 5337.)

5. Additional Evidence That Appellant’s Crimes Were Gang-Related

After Etta Jones said the shooter’s description sounded like gang member “Ant Dog” from the Bishop Bloods, Etta and Linda were shown photo books of Bishop Bloods gang members. (39RT 4977-4978, 4982, 4986; 41RT 5241.) They separately reviewed the photo books. (41RT 5242.) Etta identified three pictures of appellant as the man she knew as “Ant Dog.” (39RT 4982; 41RT 5242-5243.)

Homicide Detective Judith Gibson investigated the May 18, 1991 shootings. The liquor store owner told Detective Gibson that area was a hangout for the Bishop Bloods. (39RT 4986.)

Detective Gibson also attended appellant's preliminary hearing. (39RT 4950.) During the hearing, appellant's attorney asked Benjamin Jones about using the term "cuz," and whether using that word around certain people would elicit a certain response. (39RT 4954-4955.) Detective Gibson, who was seated at counsel's table with the prosecutor, turned to look at appellant. Appellant mouthed the words, "And I would kill them," and then "Fuck you." (39RT 4955, 4964.) Detective Gibson informed the prosecutor and made a police report about what she had seen. (39RT 4956.)

The prosecution called the same two gang experts who testified at appellant's first guilt phase trial: Deputy Andrew MacArthur, a gang expert assigned to the Operation Safe Streets at the time of the crimes, and Compton Police Lieutenant Reginald Wright, a gang expert who had led the Sheriff's gang homicide unit in 1991. (40RT 5127-5131; 41RT 5356-5357.) The gang experts' testimony at the second guilt phase trial was largely a repetition of their testimony from the first guilt phase trial.

Lieutenant Wright testified that appellant was a member of the 9 Deuce Bishop Bloods, and was affiliated with the "Cheeko" group of the Compton Sententas. (41RT 5365.) "C.K." tattooed on a Blood's body—such as appellant's earlobe tattoo—stood for "Crip Killer." Sanchez was associated with the C.G.C. gang, and his moniker was Chuy. (40RT 5136-5137; 41RT 5372-5373; 43RT 5557.)¹²

¹² Melendez's friend Aguilera testified that Melendez and Sanchez were not gang members. (36RT 4399-4400.)

Lieutenant Wright testified that “putting in work” for a gang means to commit a violent act on the gang’s behalf—usually a shooting or fight—that is often done in retaliation for a rival gang’s act of violence. (41RT 5367-5368.) Under hypothetical facts based on the May 10, 1991 shooting of Sanchez, Deputy Wright testified that the shooter had driven to the area to “put in some work” for his gang. (41RT 5369.)

Lieutenant Wright knew Benson Jones to be a gang member and an “O.G.” with the Atlantic Drive Crips. (41RT 5367-5368.) He described an “O.G.,” or “original gangster,” as one who had been with the gang since its inception. The Crips and Bloods were rival gangs in the Firestone area, and were feuding in 1991. (40RT 5131, 5368.) Bloods and Pirus were synonymous, although the Bishop Bloods were a particular group of Bloods. (43RT 5541-5542.) “U.B.N.” stands for United Blood Nation, a compilation of Blood members in the prison system that “are united under one umbrella” (43RT 5542.)

Part of Deputy MacArthur’s duties was to gather gang intelligence by talking with gang members. (40RT 5130.) Deputy MacArthur had interviewed and photographed appellant before. He explained that whenever gang members were contacted on the streets or taken into custody, police would complete field identification or “F.I.” cards with the gang member’s information. (40RT 5133.) Deputy MacArthur personally photographed and completed an F.I. card on appellant. The F.I. card was first created on October 31, 1984, and Deputy MacArthur updated it after arresting appellant in October 1989. Appellant’s F.I. card indicated that his gang moniker was “Ant Dog,” (40RT 5133-5135, 5189), and that he was a member of 92nd or “9 Deuce” Bloods, a clique or sub-set of the Bishop Bloods gang. (40RT 5134.)

Starting in the late 1980’s, when police gather information on a gang member, the information is then added to a computerized gang database

called the "G.R.A.T.E." system, which stood for "General Report Evaluation and Tracking." (40RT 5135-5136.)¹³ A gang database file for appellant was opened on August 21, 1987. (40RT 5191.) Consistent with appellant's F.I. card, his gang database file also showed that he was a Bishop Bloods gang member with the moniker "Ant Dog." The file also reflected appellant's "C.K." earlobe tattoo, which stood for "Crip Killer." (40RT 5136-5137; 43RT 5557.) The "C" had two lines drawn through it. (40RT 5137.) Deputy MacArthur opined that the lines through the "C" on appellant's earlobe were akin to marking an X to cross out the C. This is typical of Bloods members, who avoid the use of the letter C in writing or in conversation. (40RT 5137-5138.) The tattoo bolstered Deputy MacArthur's opinion that appellant belonged to the 9 Deuce Bishop Bloods. (40RT 5138.)

The F.I. card and gang database file indicated to Deputy MacArthur that appellant was an active gang member between 1984 and 1987. The records would continue to reflect his active membership until law enforcement learned otherwise. (40RT 5197-5198.) Appellant's rap sheet showed he had the following arrests between 1984 and 1988:

- January 1984: carrying a loaded firearm in a public place, a misdemeanor. (41RT 5215.)
- March 1985: assault with a deadly weapon, at a correctional facility in Chino. (41RT 5215-5216.)
- November 1985: being a prisoner in possession of a weapon at Soledad prison. (41RT 5216.)

¹³ At the first guilt phase trial, the acronym used in the reporter's transcript was "G.R.E.A.T." (See 17RT 2035-2040.) Respondent generally refers to this system as a "gang database."

- June 1986: assault by a prisoner and possession of a weapon at Folsom prison. (41RT 5216.)
- August 1987: possession of a weapon or tear gas by a prisoner. (41RT 5216-5217.)
- November 1988: assault by a prisoner at Tehachapi prison. (41RT 5217.)
- October 1989: possession of a weapon by an ex-felon. (41RT 5217.)

Deputy MacArthur opined that appellant had remained an active Bishop Bloods gang member for this entire time, regardless of whether he was in or out of prison. (41RT 5218.)

Deputy MacArthur testified that the 9 Deuce Eastside Bishops claimed a “good sized area by my gang territory standards.” (40RT 5138.) That territory spanned from 92nd Street on the southern border to Nadeau Street on the northern border. Graham Avenue was the western border, and Alameda was the eastern border. (40RT 5138-5139; 41RT 5227-5228.) Griff’s liquor store, the scene of the May 18, 1991 shootings, and appellant’s motel room on Firestone Boulevard, were both in 9 Deuce Bishop territory. (40RT 5139, 5187.)

The immediate vicinity of Griff’s liquor store was a frequent hangout for 9 Deuce Bishops gang members. There was a great deal of graffiti affiliated with the Bloods in that area, including “Bishops,” “E.S.B.,” and “C.K.,” with the “C” crossed out. (40RT 5184-5186; 41RT 5214.)

On the evening of appellant’s arrest, Deputy MacArthur searched appellant’s motel room in the 2200 block of Firestone Boulevard. (40RT 5139-5140.) Deputy MacArthur found a gray and black-striped sweat suit that matched the description of the clothing appellant wore during the May 18, 1991 shootings. (40RT 5140-5142.) Deputy MacArthur also found a red “notebook-type photo album.” (40RT 5140.) The photo album

contained photographs, writings, and a bill addressed to appellant. (40RT 5143.) The cover of the photo album had gang writing, including the letters “U.B.N.,” which referred to the prison gang United Blood Nation. (40RT 5144, 5146, 5167.) The album also had the words “92nd Street Bishop Bloods gang of Watts,” and additional references to the Blood gang, Bloods of Watts, Bishop Bloods of Watts, appellant’s “Ant Dog” moniker, and “Harry with OG.” (40RT 5144-5145, 5169.) The album also had several references to “E.S.B. 92,” which also referred to appellant’s gang, and to the East Side Bishops, 92nd Street, and CV 70, or Compton Vario 70. (40RT 5145, 5170, 5172.) Deputy MacArthur believed the author was a Bloods member, in part because the author used a “K” in place of many letter “C’s” throughout the album, such as references to “Afrika.” Hard-core Bloods usually avoid the use of the letter C because of its association with the Crips. (40RT 5138, 5145-5146, 5167-5169, 5176-5177.)

Inside the photo album was the statement, “A warrior does what he has to do. A soldier does what he’s told.” (40RT 5171.) Deputy MacArthur explained that the most hard-core gang members refer to themselves as warrior or soldiers, and that such gang members are “often used to do shootings of rival gangs and they have a higher status in that gang, by doing these types of crimes.” (40RT 5171.)

Writings inside the album included “I, thee true gangster” (40RT 5172.) Deputy MacArthur explained that a gang member can reach that “true gangster” status by “shooting or killing many rival gang members.” (40RT 5172.) Deputy MacArthur also read several of the passages aloud, including the following:

I’ve lost by force, my land, my language, and in a sense my life.
But so help me, I will sieze [*sic*] it back. If necessary, “I,” thee
true gangster, will krush the korners of the earth and the world
shall “forever tremble” in fear when “I,” the true gangster,

emerge upon society, the most hated, feared, loved & respected Blood gangster the world has ever known.

Mr. Ant Dog, O.G.

(1CT Supp. II 64; 40RT 5173-5174.) Deputy MacArthur explained that “O.G.” refers to “original gangster.” (40RT 5145.) The sign-off was followed by references to CV 70, East Side Bishops, and 92nd Street Blood gang. (40RT 5174-5175.)

Deputy MacArthur further opined that the page of writings in the album entitled “Poison of The Blood Streme” [*sic*] was another reference to the Bloods. (40RT 5175; 1CT Supp. II 66 [photocopy].) In another part of the album were the words Ant Dog, followed by “CK” with two lines drawn through the “C.” (40RT 5178.) This writing—like appellant’s “CK” earlobe tattoo—was typical of the writing of Bloods members. (40RT 5178.) All of this evidence, along with a photograph of appellant wearing a red handkerchief, strengthened Deputy MacArthur’s opinion that appellant was a 9 Deuce Bishop Bloods member. (40RT 5180-5181.)

Under hypothetical facts based on appellant mouthing threatening words in response to testimony about the term “cuz,” Deputy MacArthur opined that such conduct supported his opinion that appellant was Blood gang member. (40RT 5181-5182.) Lieutenant Wright rendered an identical expert opinion. (43RT 5557.)

Concerning the notebook found in appellant’s motel room, Lieutenant Wright also opined that the author had put a lot of thought and care in the writings, which contained rhymes and substitutions for many letter C’s. (41RT 5375.) As Lieutenant Wright summarized, the author was “not the average Blood gang member,” and was someone “very committed.” (41RT 5375; 43RT 5551.) A “hard-core” gang member is actively involved in the criminal activities of the gang. (43RT 5552.) A gang “associate” is one who might hang around with gang members and claim gang membership,

but who is less involved in the gang's activities than a full-fledged member. (43RT 5552-5553.) Lieutenant Wright opined the author was definitely associated with CV 70 and the 9 Deuce Bishops, was a hard-core gang member, and was "very committed" to Blood gang culture. (43RT 5551-5553.)

Lieutenant Wright acknowledged on cross-examination that the substitution of "C's" with "K's," along with the references to Africa and "Blackness" could also reflect a Black author's connection to his African heritage. (41RT 5381-5385.) Lieutenant Wright believed that while the writings reflected such sentiments, "in my interpretation . . . he still relates those commitments, achievements and still comes back to the Blood, which gives – My thinking is still he has that street gang Blood mentality within it." (41RT 5386-5387; 43RT 5547-5548, 5555, 5567-5568.) Lieutenant Wright opined that the author wanted to strengthen his position in the Bloods gang. (43RT 5546.)

Upon the People's request, the trial court took judicial notice of the pro per defense motions filed in the case, and the court read the dates of each motion and the time that the motion was set for hearing. The dates and times as read by the trial court were as follows:

- May 3, 1993; no time requested.
- May 3, 1993; 8:30 a.m. requested.
- May 3, 1993; no time requested.
- May 17, 1993; 8:30 a.m. requested.
- May 17, 1993; 8:30 a.m. requested.
- August 2, 1993; 9:02 a.m. requested.
- August 2, 1993; 9:02 a.m. requested.
- August 30, 1993; 9:02 a.m. requested.
- September 13, 1993; 9:02 a.m. requested.

- October 13, 1993; 9:02 a.m. requested.
- Undated motion filed between October 13, 1994 and March 1994; 9:02 a.m. requested.
- March 1994; 9:02 a.m. requested.
- Undated motion filed between March 1994 and April 29, 1994; 9:02 a.m. requested.
- April 29, 1994; 9:02 a.m. requested. (43RT 5601-5603.)

Deputy MacArthur opined that if someone had prepared motions for court and had indicated the time of the hearing was “9:02,” that would mean the person was from 92nd Street and was identifying himself as such. (40RT 5182-5183.)

In 1994, Deputy John Baylis was assigned to the North County Correctional Facility, where appellant was in custody awaiting trial. (39RT 4887.) He testified that appellant was using the copy room at the law library, where an “out of order” sign hung on the Xerox machine. After appellant used the room, gang writing was discovered on the sign. (39RT 4887-4889.) The writing included the words, “C.K.”—which stands for Crip Killer—as well as references to “92nd Watts Street Gang,” and “East Side Bishops Bloods” and appellant’s moniker, “Ant Dog.” (43RT 5557-5558.) Sergeant Baylis—who was near appellant’s cell—turned to appellant, showed him the sign, and said, “Nice art work.” Appellant said, “Thank you,” and later told the sergeant that he was expressing himself. (39RT 4890.) Appellant also admitted making the writings in a subsequent disciplinary hearing. (39RT 4890.) Lieutenant Wright opined that “without a doubt,” the author of the sign was an East Side Bishop Bloods member. (43RT 5557-5559.)

Legal deputy Maurice Kempner also worked at the North County Correctional Facility, and was familiar with appellant. (40RT 5082.) Deputy Kempner testified about the rules and regulations pertaining to mail

for inmates housed in Los Angeles County jail facilities. (40RT 5084-5085, 5090, 5092-5093.) The rules prohibit inmates from receiving numerous items of “contraband.” (40RT 5084.) A picture of a male’s face is considered contraband because inmates had used such pictures to make fake identification badges, which in turn were used in escape attempts. (40RT 5084.) Gang writing is also considered contraband because any type of gang paraphernalia can potentially incite gang-related violence. (40RT 5085.) Pictures mailed out of the jail depicting gang graffiti or men displaying gang signs are also contraband, and would be confiscated if discovered. (40RT 5085.)

About six months before trial, appellant told Deputy Kempner that “he was Blood affiliated.” (40RT 5091.) While in custody in 1994, appellant tried to mail a photograph of himself holding a red scarf—which indicated Blood gang affiliation—and flashing a gang sign with both hands. The photograph had been developed in February 1994, and had gang graffiti on the back. The photograph was intercepted by jail authorities and confiscated as gang-related contraband. (40RT 5085-5088, 5091.)

B. Defense Evidence

Timothy Glover was a customer service representative with Pacific Bell Telephone Company, and testified as a custodian of certain telephone records pertaining to Irene Jones and Florentino Melendez. (42RT 5418, 5420-5422.) The records that Glover reviewed showed that one collect call was placed on August 14, 1991, from the Los Angeles County Jail to the phone number registered to Irene Jones—Benson’s mother—and that the call lasted six minutes. (42RT 5422-5424.)

Glover also reviewed phone records for Melendez from 1991. (42RT 5424-5425.) Concerning records dated July 11 and September 11, 1991, Glover could not be sure whether any collect calls had been placed to

Melendez's phone number during that timeframe. Glover also did not recognize any calls as having originated from a Los Angeles County Jail during that period. (42RT 5425-5427.) Concerning records from May and June, 1991, Glover testified that several collect calls had been placed to Melendez's number between May 10 and June 5, 1991. The calls were placed on May 10 and 13 from Downey; from May 19 through 25 from Los Angeles; on May 26 from Downey; on May 27 from Chino; on May 29 from Los Angeles; on May 31 from Los Angeles; on June 2 from Los Angeles and from Newhall Castaic; and on June 3 and 5 from Los Angeles. (42RT 5428.) From these records, Glover did not recognize any collect calls being placed to Melendez's number from the Los Angeles County Jail, but he could not be sure. (42RT 5429, 5431.)

On cross-examination, Glover testified that his review of the records was limited to those appellant had requested, and Glover had no idea if collect calls had been placed during any other times. (42RT 5430.) Appellant did not ask for any records pertaining to Maria Lopez or John Aguilera. (42RT 5434.) Glover also explained that non-collect calls and three-way calls would not appear on the phone bills. (42RT 5432.) Glover also testified on cross-examination that the June 1991 records showed that a collect call had been placed to Melendez from the "Wayside Honor Ranch." (42RT 5432-5433.)

C. The Multiple-Murder Special Circumstance Allegation

After the second jury returned verdicts of guilty on counts 1 (murder of Sanchez) and 4 (assault with a firearm on Linda), and not guilty on count 6 (attempted murder of Ernest Johnson), a separate proceeding was held concerning the multiple-murder special circumstance. The prosecution presented the jury with the judicially-noticed verdict forms from appellant's first guilt phase trial, which showed that on June 10, 1994, appellant had

been convicted of the first degree murder of Benson Jones. (45RT 5771-5774.) Appellant did not present any evidence or argument on the matter. (45RT 5774.) The jury found the special circumstance allegation to be true. (45RT 5786-5787; 3CT 870.)

III. PENALTY PHASE

A. Prosecution Evidence

1. Circumstances Of The Crimes

At the penalty phase, Benjamin Jones described the May 18, 1991 shooting again, and provided additional details. Benjamin stopped the car at the corner and Linda got out. (47RT 5923-5924.) Benjamin pulled the car ahead and parked at the curb by the liquor store. (47RT 5924.) Benson got out of the car first and walked by appellant and two other men. Benjamin soon followed. (47RT 5924.) Benjamin heard someone from appellant's group say, "What's up, Blood?" (47RT 5924.) Benson turned around and faced appellant from a distance of one or two feet. (47RT 5924-5925.) Benjamin did not hear Benson say anything to appellant. (47RT 5926.) On cross-examination, Benjamin said he was under the impression that Benson had approached appellant's group to see who had asked, "What's up Blood?" (47RT 5960-5961.)

Within seconds of coming face-to-face with Benjamin, appellant pulled a handgun "out of his pocket, stuck it into [Benson's] body, . . . and shot him" in the upper chest. (47RT 5926-5927.) Benjamin said it happened very quickly, and described appellant's actions as "One motion, pow!" (47RT 5927.) Benson fell into a kneeling position with his arms across his chest. (47RT 5927-5928.) Appellant then turned to Benjamin, who was about five to six feet away. Appellant aimed the gun with both hands, and shot Benjamin in the left side of the chest. (47RT 5928-5929, 5942.) Benjamin fell onto the hood of a parked car and played dead.

(47RT 5929-5930.) Appellant fired at Benjamin a second time but the bullet missed Benjamin and struck the car. (47RT 5930.)

Appellant then walked back to Benson, who was still kneeling. (47RT 5930-5931.) Appellant appeared intent on “finish[ing] what he started.” (47RT 5933.) Appellant pointed the gun down toward Benson and shot him in the left side of the neck. (47RT 5930-5931.) Appellant did not appear to be afraid or panicked at any time. Benjamin felt that appellant “was on a mission.” (47RT 5931.) He showed no remorse, and did not act as if he were defending himself. (47RT 5931-5932.) Appellant acted calmly and deliberately. (47RT 5932.) It appeared to Benjamin that appellant was “out to kill” him and Benson. (47RT 5932-5933.)

Benjamin went to help his brother, who had a visible hole in his neck. (47RT 5934-5935.) Benjamin helped Benson to his feet and they started walking, looking for help. (47RT 5935.) But Benson could not walk more than a few feet, and Benjamin helped him to the ground. (47RT 5935.) Apparently realizing that he was dying, Benson—who had five sons—told Benjamin, “Take care of my boys.” (47RT 5935-5936, 5940.) Benson then vomited mucous. (47RT 5941.) Paramedics soon arrived and transported both men to the hospital. Benjamin was in an adjacent bed to Benson at the hospital when Benson died. (47RT 5941, 5943-5944.)

Benjamin acknowledged on cross-examination that he regularly used the word “cuz,” a term associated with the Crip gang. But Benson denied being a Crip, and said the term was merely “part of [his] vocabulary.” (47RT 5950-5951, 5953.) Benjamin did not refer to appellant as either “cuz” or “Blood” at the time of the shooting. (47RT 5951-5952.) Benson, who was 36 years old when appellant murdered him, had been a Crip member 14 or 15 years earlier. (47RT 5955, 5958-5959.)

On May 23, 1991, the Los Angeles County Coroner’s Department conducted an autopsy on Benson. (47RT 5962-5963.) The cause of death

was multiple gunshot wounds. (47RT 5964, 5967.) One wound was a fatal gunshot that entered the left side of his torso, just below the rib cage. The bullet pierced Benson's abdominal wall, lower intestine, and the abdominal portion of the aorta, before lodging in his spine. (47RT 5965.) The wound caused Benson to bleed to death. (47RT 5967.) The second gunshot wound was less serious; that bullet entered the base of Benson's neck and lodged in a muscle above his larynx. (47RT 5965-5966.) Benson's body also showed evidence of a prior gunshot wound and surgery, from which he had healed. (47RT 5967-5969.)

2. Victim Impact Testimony

a. Testimony From Benson Jones's Family Members

Debra Jones was Benson's wife. She had known Benson for more than 20 years, and they were married around Christmas in 1987. By 1991, they had five sons, ranging in age from four to 17 years old. (51RT 6315, 6318.) On the day appellant shot Benson, a woman knocked on her door and asked, "You know your husband is dead?" Debra answered, "No he's not. He just left here with his sister and brother to go over to their mother's house." The woman said, "I'm telling you he's dead at the liquor store." (51RT 6136.) Debra got nervous and contacted her sons, who confirmed that their father had been shot. (51RT 6316.)

Debra walked around the corner, and saw an ambulance by Griff's liquor store. Debra ran to Benson, who was being put into an ambulance. (51RT 6136-6137.) Foam was coming out of his mouth, and Debra prayed that he would be okay. (51RT 6137.) Their sons Charrell and Benson Jr. were at the scene. (51RT 6319.) Debra went in the ambulance to the hospital, and was later told that Benson was dead. (51RT 6318.) Debra did

not believe it; she said she “was just sitting there watching my sons go all crazy.” (51RT 6318.)

Debra explained that Benson’s murder was hard on the family. (51RT 6319.) His five sons had been straight-A students before he was killed, and their teachers had talked about how smart they were. As soon as Benson was killed, however, they began to struggle. (51RT 6318-6319, 6328.) The oldest son, Benson Jr., no longer wanted to live in Los Angeles; he moved away, got into trouble with the law, and was incarcerated at the time of trial. (51RT 6318-6319.) Their son Byron also began having problems after his father’s murder, and was also incarcerated at the time of trial. (51RT 6318-6320.) Byron had spoken to Debra about talking and laughing with his dad the day before the shooting. (51RT 6327.) Afterwards, Byron adopted an attitude of “I don’t care. I don’t care about living. My daddy gone.” (51RT 6327.) The boys missed their father, and were “just in their own little world.” (51RT 6320.)

Their son Benzeon, who was 18 at the time of trial, was affected “a lot.” Sometimes Debra “catches [Benzeon] sitting back staring at the ceiling thinking about it.” (51RT 6321.) He never finished school, and now wanted “to try to gang bang.” (51RT 6321.)

Debra missed Benson every day, and said he was her best friend. (51RT 6326.) Debra was particularly affected by Benson’s death on Christmas and Mother’s Day. Christmas was their anniversary, and on Mother’s Day, Benson always fixed breakfast and dinner, and would take the family to his mother’s house. (51RT 6321.)

On cross-examination, Debra testified that she and Benson had been arguing at their house shortly before the shooting, and that when they argue, they “always call the police on each other.” (51RT 6324.) Benjamin and Linda had picked up Benson, and said they would go to their mother’s house “‘til he cool down.” (51RT 6324.) She did not know if Benson had

been drinking. (51RT 6324.) She had previously told Benson that she was pregnant by another man, and that Benson had missed Mother's Day "a couple of times" because he had been incarcerated. (51RT 6324-6325.) She denied that Benson had been a gang member, and testified that everyone had liked Benson, Bloods and Crips alike. (51RT 6329.)

Benson's son Brian testified that he was in shock when he learned his father had been shot. He went to the hospital and his mother and brothers were there. (51RT 6330-6331.) At the hospital, his mother and brothers were crying. Brian felt "mad" that his father had died, and he had cried that night. (51RT 6331-6332.) Brian continued to think about Benson, missed him, and was affected by his death. Brian was reluctant to testify, and did not want people to see him cry. Brian explained that he no longer had anybody to look up to but his brothers. (51RT 6320, 6332-6333.) Brian had been an honor roll student, but now, according to his mother, "he don't really speak either." (51RT 6320.)

Benson's mother Irene testified that she had eight adult children in 1991. (51RT 6350.) Benson was 36 when he was killed. (51RT 6350.) Irene had flown to Denver the day Benson was shot, and one of her children called to tell her. (51RT 6351.) She was "at a loss," and "couldn't believe it." (51RT 6351.) She had just seen Benson at her house the night before. (51RT 6351.) Irene explained, "I guess I must have went into shock." (51RT 6352.) She flew home to Los Angeles the next day. (51RT 6352.)

Irene testified that Benson had seven children in all, and that his boys started getting into trouble after his murder. (51RT 6352-6353.) Plans for Benzeon to take pre-college courses "went down the drain because he just seemed to give up." (51RT 6353.) Irene, who drove a bus for disabled people, would find herself crying as she drove down the street. (51RT

6353.) According to Irene, "Nothing is the same, especially around the holidays when all the kids would be at my house." (51RT 6353.)

b. Testimony From Sanchez's Family Members

Edilberto Enriquez was Jesus "Chuy" Sanchez's younger brother. Chuy was 21 and Enriquez was 20 at the time of the shooting. (51RT 6290-6292, 6295-6296.) On the day of the shooting, the family lived on Locust Street, just two blocks from where appellant shot and killed Sanchez. (51RT 6292.) Enriquez had just come home from work when he received a telephone call that something had happened to his brother. His sister, who was 17 or 18 at the time, asked what had happened, and Enriquez told her "nothing." He threw the phone down and ran outside to the corner where he saw his brother lying on the ground. The paramedics had not yet arrived. Chuy was turning purple, and could not talk. (51RT 6292-6293.) Enriquez's sister followed him to the scene, and when she saw Chuy, she started crying. (51RT 6294.) Enriquez was scared, and did not know what had happened. (51RT 6294.)

Enriquez thought of Chuy as his father, and they had always been together. (51RT 6294.) Chuy was the oldest brother; he had cared for Enriquez, was in charge of the family, and had supported Enriquez "financially and everything." (51RT 6294-6295, 6297.)

When Enriquez got to the hospital, he was told that his brother had not survived the surgery and had died. Enriquez did not want to believe it. (51RT 6296.) Chuy's death affected Enriquez and his family "a lot," especially since Chuy was essentially in charge of the house. (51RT 6296.) After appellant murdered Chuy, Enriquez began to have financial problems. He could not concentrate at work and had to take days off. Enriquez was concerned about their father, Jesus Sr., who was sick with cancer at the time. (51RT 6296-6297.) Enriquez eventually had to look for another job

because "it was just too much for me." (51RT 6297.) Enriquez missed his brother a lot, especially at the holidays. (51RT 6298.) Once Chuy was killed, Enriquez felt "very alone." (51RT 6298.)

Jesus Enriquez Sanchez was Chuy's father, and Chuy was his eldest of six children. (51RT 6300-6302.) Mr. Sanchez and his wife were in Mexico when their daughter Patricia called and told them that his son had been shot. (51RT 6302, 6306.) Mr. Sanchez felt "bad," at the loss of his eldest son. He was too ill to travel to the United States for a funeral, so Chuy's body was brought to Mexico. (51RT 6303, 6308.) In Mexico, Mother's Day is celebrated on the 10th of May, i.e., the anniversary of Chuy's murder, and the day was very hard on the family. (51RT 6303.) Mr. Sanchez also felt bad each year on his son's birthday. (51RT 6303-6304.)

Imelda Sanchez was Chuy's mother. She was also deeply affected by the loss of her eldest son. (51RT 6305-6306.) She was with her husband in Mexico when their children called around midnight and told them that Chuy had been shot and killed. (51RT 6306-6307.) She felt "really bad," especially since she was so far away. She was concerned about how their other children in Los Angeles would cope. (51RT 6307.) As the eldest, Chuy had been caring for his siblings and supporting them financially. (51RT 6307-6308.) Chuy's death affected the family a lot. As his mother explained, Chuy was "very thoughtful for all of us, with my other children. And he was like our right arm." (51RT 6308.)

3. Appellant's Prior Criminal Conduct Involving Force Or Violence

a. Assault With A Firearm On July 9, 1984

Around 10:45 p.m. on July 9, 1984, Frizell Williams and Andre Connors boarded a bus at the Los Angeles County Jail where they had

visited some friends. (50RT 6226-6228, 6230.) Williams and Connors were both 89 East Coast Crips gang members. (50RT 6247-6248.) Shortly after boarding, five or six Bishop Bloods gang members, including appellant and Harry Barkus, boarded the bus. They yelled Williams's name, and appellant said, "Blood, we gonna kill you all wherever you all get off this bus at." (50RT 6228, 6230, 6244-6245, 6248, 6250-6251) Appellant and one of his cohorts were carrying guns which they showed to Williams. (50RT 6228-6229, 6234-6235, 6237, 6244.) Williams got off the bus at 83rd Street and began to run. (50RT 6230.) But the men called after him, "Blood, you better come and get your homeboy." (50RT 6230.) Williams ran back to the bus, grabbed Connors by the arm, and both men took off running. Appellant and the other armed man started shooting. (50RT 6231-6233.) One bullet struck Williams and lodged in his right forearm. (50RT 6233.)

Based on this shooting, appellant was convicted on January 29, 1985, in Los Angeles County Superior Court case A463209, of assault with a firearm, in violation of section 245, subdivision (a)(2). (1CT 163; 50RT 6263.)

**b. Possession Of Seven Deadly Weapons
(Shanks) While in Custody On November 2,
1985**

Appellant was sent to state prison on March 12, 1985. (50RT 6258.) Correctional Officer Rickey Shaw was on duty at the Soledad state prison on November 2, 1985, and was assigned to the wing where appellant was housed. (49RT 6136-6137.) During a search of all the cells on the wing, Officer Shaw went to open appellant's cell and saw him on the top bunk bed "fidgeting around with the light fixture." (49RT 6137-6138.) Officer Shaw was concerned that appellant was hiding something in the light fixture, and told Officer Timothy Steele to search it. (49RT 6138-6140,

6143-6145.) Officer Steele looked in the light fixture and found seven shanks. The seven shanks were each fashioned from pieces of metal that had been taken from the bedsprings and sharpened to a point. They ranged in length from 8" to 10½" long, and were ⅛" wide. (49RT 6145-6146.) Such weapons were dangerous and were prohibited. (49RT 6146-6148.)

When appellant's probation officer later interviewed appellant about the incident, appellant said that he had a knife, and that he had hidden it in the light fixture in his cell. (50RT 6265-6267.)

**c. Assault Of An Inmate With A Deadly
Weapon (Spear) On June 19, 1986**

Correctional Officers Martin Romary and Corey McKay were on duty at the Folsom state prison on June 19, 1986, and were assigned to the security housing unit ("S.H.U.") where appellant was housed alone in a single-man cell. (49RT 6149-6151, 6166.) As an inmate walked down the tier in front of appellant's cell, appellant reached out and stabbed him in the chest with a spear. (49RT 6152, 6160.) The man suffered a puncture wound. (49RT 6163-6164.) As appellant tried to pull the spear back into his cell, the officers went to appellant's cell and confiscated the weapon. (49RT 6153-6154, 6167-6168.) The spear was 46" long and 3" wide, with a 2½" metal tip. The shaft of the spear was made from a tight roll of newspaper that had been wrapped in torn sheets, and the tip was made from a straightened bedspring that had been sharpened. (49RT 6154-6155.) Such weapons were dangerous and were prohibited. (49RT 6155-6156.)

Appellant later told his probation officer that the matter involved stabbing another convict, and that the matter had been addressed internally at the prison through the loss of conduct credits. (50RT 6267.)

**d. Possession Of Instructions For Making
Weapons While In Custody In August 1986**

Around August 15, 1986, following the stabbing of two officers with spears, all the cells on appellant's S.H.U. were searched and the inmates' personal property was confiscated and placed in sealed boxes. (49RT 6168-6169.) On August 25, 1986, Officer McKay looked in the box of appellant's property and found instructions on how to make a pipe bomb and a "zip gun," i.e., a prisoner-made gun that shoots fragments. (49RT 6169-6171.)

**e. Attempted Possession Of An Explosive
Device While In Custody In December 1986**

Appellant was transferred from Folsom state prison to Tehachapi state prison in 1986. Appellant's property was inventoried, sealed in a box, and then sent to Tehachapi. (50RT 6201-6203.) When appellant requested his property after being transferred, the property officer inventoried the box and searched it for contraband. A Jergens lotion bottle belonging to appellant was x-rayed, and was found to contain shavings of match heads that had been wrapped tightly in plastic. (50RT 6203-6204, 6207-6209.) A chemical analysis confirmed that the substance was extremely flammable and could be ignited with heat or friction. If confined, the substance would be a type of explosive, and could be used to make a pipe bomb. (50RT 6211-6212, 6214.)

Based on this conduct, appellant was convicted on August 21, 1987, of attempted possession of an explosive device while confined in state prison, a felony. (50RT 6263.) Appellant later told his probation officer that he had possessed explosives, which appellant described as a "mixture of sulfur and TNT, gunpowder." (50RT 6268.)

**f. Assault Of An Inmate With A Deadly
Weapon (Shank) On November 28, 1988**

Correctional Officer Nathan Tucker was on duty at the Tehachapi state prison on November 28, 1988, and was assigned to the S.H.U. where appellant was housed. (49RT 6124.) While appellant and about 10 other inmates were in the exercise yard, appellant struck another inmate in the face. (49RT 6124-6126.) Officer Tucker ordered all the inmates to get on the ground, and they complied. (49RT 6126-6127.) From the same hand that he used to strike the other inmate, appellant threw a shank that had been made from a melted and sharpened toothbrush. The shank had a string attached and had feces on it, indicating that appellant had hidden it in his anal cavity. (49RT 6127-6128, 6129.) The inmate appellant had struck had blood on his face, but Officer Tucker did not know whether the bleeding was caused by appellant's fist or the shank. (49RT 6128-6129.) Officer Tucker considered appellant a disciplinary problem. (49RT 6134.)

**g. Assault With A Firearm Conviction In
January 1989**

On January 29, 1989, appellant pleaded guilty in Los Angeles County Superior Court case A463209 to assault with a deadly weapon with an enhancement for the personal use of a firearm. (50RT 6175-6180.) He was sentenced to three years in prison. (50RT 6178.)

**h. Possession Of A Firearm By A Felon On
October 29, 1989**

Appellant was paroled from prison on August 28, 1989. (50RT 6260.) At that time, Deputy Michael Reynolds was assigned to a gang enforcement detail from the Firestone station. On the afternoon of October 29, 1989, he and his partner were patrolling an area claimed by the 92 Bishop Bloods. (49RT 6100-6102.) As they were driving, they saw

appellant and about five other men standing on the side of Elm Street. (49RT 6101-6103.) Appellant held a small-caliber handgun in his left hand, and appeared to be showing it to someone in the group. (49RT 6103-6104.) When appellant turned and saw the deputies, he put the gun in his left front pocket and jumped over a nearby fence. (49RT 6103-6104.) The deputies yelled at appellant to stop, and he complied. (49RT 6104.) The gun was recovered from appellant's pocket and he was arrested. (49RT 6104, 6107.) Deputy Alexander MacArthur photographed appellant and filed a case against him for being an ex-felon with a gun. (49RT 6106-6108.)

On January 10, 1990, appellant was convicted of possession of a firearm by a felon, a felony, in Los Angeles County Superior Court case VA010432. (1CT 164; 50RT 6262) Appellant was sentenced to 12 months for violating his parole, and was sent to Pelican Bay prison on March 27, 1990. (50RT 6261.) He was paroled again on March 12, 1991 (50RT 6261), and was arrested for the underlying crimes on May 22, 1991 (41RT 5269-5270, 5272-5275).

**i. Possession Of A Deadly Weapon (Shank)
While In Custody On September 20, 1991**

Deputy Donald Johnson worked at the Men's Central Jail in September 1993, where appellant was in custody awaiting trial on the underlying capital charges. (48RT 6040.) His duties included supervising the inmates in appellant's module, and conducting periodic searches of inmates and cells. (48RT 6040.) Before an inmate is checked into a cell, the cell is searched for contraband and graffiti. The inmate then signs a form acknowledging the condition of the cell and the absence of contraband. (48RT 6041-6042.)

Appellant was placed alone in a one-man cell on September 14, 1991. (48RT 6042, 6047.) Beforehand, the cell was searched and no contraband was found. (48RT 6050-6051.) Upon searching appellant's cell on September 20, 1991, Deputy Johnson found a jail-made knife hidden in a gap between the toilet and the cement floor. (48RT 6042-6043, 6048.) The knife was metal, about 6" or 7" long, and about ½" wide. (48RT 6043.) The grip end of the knife was wrapped in cloth. There were scratch marks on the floor, which appellant apparently used to sharpen the knife. (48RT 6043-6044.)

**j. Assault Of An Inmate With A Deadly
Weapon (Shank) On February 26, 1992**

Deputy Ylysses Cruz was on duty working at the Men's Central Jail on February 26, 1992, and was assigned to appellant's module. (48RT 6080.) Around 9:40 a.m., inmate Hearn and Deputy Cruz were about six feet away from each other, separated by a barred gate on one of the cell rows. (48RT 6080-6081.) As Hearn was about to close the gate, appellant came up from behind and hit Hearn in the back of the neck two or three times. (48RT 6081-6082.) Appellant ignored the deputy's commands to stop. (48RT 6082.) Hearn turned and started to defend himself and hit appellant back. (48RT 6082.) The men ended up wrestling each other to the ground, and Deputy Cruz called for backup. (48RT 6082.) Deputy Cruz started to intervene, but heard another inmate yell that appellant had a shank. Deputy Cruz saw a shank in appellant's hand and ordered him to drop it. Appellant threw it to the ground. (48RT 6083-6084.) The shank was about 6" long, and was fashioned from two toothbrush handles that had been combined and sharpened to a point. The grip end of the shank was wrapped with a rag. (48RT 6084, 6088-6089.) Inmate Hearn had two

puncture wounds on the back of his neck, and was sent for medical treatment. (48RT 6084.)

**k. Possession Of A Deadly Weapon (Shank)
While In Custody On March 12, 1993**

Deputies John Hunter and Mark Trainor were on duty at the Men's Central Jail on March 12, 1993, where appellant was in custody. (47RT 6007-6008, 6012.) As part of their duties, the deputies conducted daily searches of the cells as part of an ongoing effort to remove prohibited items, weapons, and other contraband. (47RT 6008-6009, 6013.) Upon searching appellant's cell that day, the deputies found a jail-made knife hidden in a slit on the side of appellant's mattress. (47RT 6009-6010, 6014.) The knife was metal, about 5½" long, and had a grip at one end made from a bed sheet. (47RT 6010, 6014.) The knife blade was made from a metal shoe support that had been sharpened at one end. Appellant was the sole occupant of the cell. (47RT 6010.)

**l. Assault Of A Deputy In Los Angeles County
Jail On July 19, 1993**

On July 19, 1993, Deputy Mitchell Disylvio was on duty at the Men's Central Jail, where appellant was in custody. (47RT 5970-5971.) Around 6:45 p.m., while a group of about 40 Blood gang members were outside in the "yard," Deputy Disylvio was walking toward a perimeter gate to provide extra security. (47RT 5971-5972.) As he approached a blind spot near the gate, he heard quick footsteps, and appellant "jumped [him] from behind." (47RT 5972-5973.) Appellant tackled the deputy and wrapped his arms around him—first around his neck and then around his torso. (47RT 5974.) Appellant pinned Deputy Disylvio against a wall where they could not be seen by other deputies in a nearby guard booth. (47RT 5974-5975.) Deputy Disylvio thought appellant was trying to kill or seriously

hurt him. (47RT 5975.) As the deputy struggled, another inmate joined in and grabbed his shoulders to keep them from being seen. (47RT 5975.) Appellant then pulled the deputy to the ground, and they fought. (47RT 5976-5977.)

Deputy Jeff Barnes saw appellant and Deputy Disylvio struggling and rolling on the ground, and his partner called for backup. (47RT 5998, 6001-6002.) Other deputies came to help and detained appellant. Appellant was hostile and physically resisted being searched. (47RT 5978, 6003-6004.) Deputy Barnes described appellant's demeanor as "very aggressive" and "very agitated." (47RT 6003.) Several deputies—and pepper spray—were required to keep appellant still enough to search him. (47RT 5979.)

**m. Possession Of A Deadly Weapon (Shank)
While In Custody On July 19, 1993**

Upon searching appellant after the attack on Deputy Disylvio, Deputy Barnes found a jail-made knife in appellant's pocket. (47RT 5980, 6004.) The knife was metal, about 8" long, and had a grip at one end fashioned from a torn bed sheet. (47RT 5980, 6004-6005.) The knife was made from sharpened wire mesh that had been removed from one of the air vents that were in the inmates' cells. (47RT 6005.)

n. Threats Of Violence On February 7, 1994

Deputy MacArthur, a gang expert, testified about the copy machine "out of order" sign that appellant had defaced while in custody in 1994. (49RT 6108.) He described additional gang graffiti on the sign that had not been presented at the guilt phase trial. (49RT 6108-6109.) That writing included "Ant Dog, C.K.," referring to Crip Killer, and "92nd Street Watts Gang East Side Bishops Blood." Below that was the word "Sheriff" that had been "X'd" out with a "K." Next to that was the word "Judge" "X'd"

out with a “K.” Next to that was the word “D.A.” “X’d” out with a “K.” Below that was the word “Anybody” “X’d” out with a “K.” Near that was the word “Killa” with the dot over the “i” replaced with a “2.” (49RT 6108-6109.) Deputy MacArthur opined that this writing—like appellant’s reference to being a Crip Killer—meant “Sheriff Killer,” “Judge Killer,” “D.A. Killer,” and “Anybody Killer.” (49RT 6109-6110.) Appellant had personally admitted to Deputy MacArthur that he was a 92 East Side Bishop Blood, and that his moniker was Ant Dog. (49RT 6118.) Deputy MacArthur opined that the author “had graduated or been affected by the criminal justice system somehow and has graduated to sheriff, judge, D.A., and anybody killer. . . . What used to be a Crip Killer mentality has now branched into anybody.” (49RT 6110-6111.) Deputy MacArthur testified that his opinion would be strengthened if the author had attacked a deputy while in county jail, under facts similar to appellant’s attack on Deputy Disylvio. (49RT 6111, 6118.)

On cross-examination, Deputy MacArthur testified that his opinion would not change if the inmate had attacked a deputy because the inmate was being denied pro per privileges, law library privileges, or any other important privileges. (49RT 6111-6112.)

B. Defense Evidence

Appellant did not present any affirmative evidence in mitigation. (52RT 6464.)

ARGUMENT

GUILT PHASE

I. APPELLANT'S COMPLAINT ABOUT THE COURT'S INQUIRY INTO A POSSIBLE *MARSDEN*¹⁴ ISSUE IS MERITLESS BECAUSE APPELLANT NEVER REQUESTED SUBSTITUTE COUNSEL; IN ANY EVENT, THE COURT'S INQUIRY WAS ADEQUATE

Appellant contends that his judgment should be reversed because the trial court conducted an inadequate *Marsden* inquiry into the existence of an irreconcilable conflict between appellant and his trial counsel. (AOB 64-75.) The claim is baseless. Appellant never actually made a *Marsden* motion, never asked for substitute counsel, and never alleged that his appointed counsel was ineffective or had an irreconcilable conflict. Nonetheless, when appointed counsel indicated that appellant might have complaints to relay, the trial court—in an abundance of caution—held a confidential hearing in which appellant was able to fully express any concerns. That inquiry revealed that the only “conflict” between appellant and defense counsel was over trial tactics, and that appellant’s true wish was to represent himself—a request that was ultimately granted.

A. Proceedings Concerning Appellant's Appointed Counsel

1. Defense Counsel Suggests That A *Marsden* Motion Might Be Forthcoming, But Counsel And The Court Soon Determine That Appellant Actually Wants To Represent Himself

Deputy Public Defender Jerry Seiberling represented appellant for two years of pretrial proceedings, including the October 1991 preliminary hearing, the subsequent arraignment, hearings concerning the admissibility of evidence, and numerous appearances through March 1993. (See

¹⁴ *People v. Marsden* (1970) 2 Cal.3d 118, 123 (*Marsden*).

generally 1CT 1-124 [preliminary hearing], 189 [not guilty plea]; 1RT 1-200 and 2RT 202-221 [pretrial appearances].) On March 25, 1993,¹⁵ during the second appearance before Commissioner Peter Espinosa, Mr. Seiberling was asked if he was ready, and he answered, "Yeah. He is talking about having a *Marsden* motion." (2RT 222.)¹⁶ The following colloquy occurred:

The Court: Well, that's fine. We can't have a *Marsden* motion right now. We can have it at another time.

Appellant: When?

The Court: Well, I understand there was a need to trail this case until next week.

Mr. Seiberling: The 31st [of March 1993] to see why the Sheriffs are not responding to the subpoenas.

The Court: Well, would the 31st be a good day to conduct a *Marsden* motion?

Mr. Seiberling: That's okay with me. Is that okay?

Appellant: I can't do it no sooner than that?

The Court: No, sir. I cannot conduct the *Marsden* motion this morning because I have a jury I have to bring in and I will not be here tomorrow and I will not be here Monday. But I will be here the 31st.

Appellant: I've got no choice, man.

¹⁵ Appellant's Opening Brief mistakenly states this hearing occurred on March 11, 1991. (AOB 64; but see 2RT 222; 1CT 213.)

¹⁶ Appellant appeared before numerous judicial officers in the superior court before the case was ultimately sent to Judge Nancy Brown for trial. For clarity, respondent at times identifies by name the judicial officers who presided over the pretrial proceedings.

(2RT 222-223.) After discussing unrelated scheduling matters, the court stated, “Let’s call [today] 15 of 60 since that’s the clerk’s recollection, and it will be 21 of 60 on the 31st. Mr. Bankston is to be brought back for the purpose of further determination as to his readiness for trial and for a *Marsden* motion that I am told is going to be made on the 31st.” (2RT 223.)

When the court reconvened on the afternoon of March 31, 1993, Lance Wong, the prosecutor at appellant’s first guilt phase trial, indicated in chambers that he had been instructed not to stipulate to having Commissioner Espinosa hear pretrial matters. (2RT 225.) Commissioner Espinosa stated, “That doesn’t surprise me,” and explained, “I am going to call master calendar and ask them to reassign it for a hearing tomorrow on the defendant’s request to go pro per or for -- it is either a *Marsden* or *Faretta*¹⁷ [motion]. I don’t know what the problem is for the request. Okay?” (2RT 226.)

Within an hour, the case was transferred to Judge Robert Armstrong and a new hearing was held. (2RT 227.) Judge Armstrong heard that the case was on day 21 of 60, and asked Mr. Seiberling, “[W]hat is your position in this case as far as what you would like this court to resolve or determine today?” (2RT 227.) The following colloquy then occurred, with emphasis added:

Mr. Seiberling: Well, Mr. Bankston had previously advised Commissioner Espinoza that, I believe, *he wanted to go pro per*. ¶ *Is that correct?*

Appellant: *Yes*.

Mr. Seiberling: I spoke to [appellant] today, and *he advises me he would like to go pro per*. [¶] In addition, when this – well,

¹⁷ *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] (*Faretta*) [motion for self-representation].

for some reason, the D.A. felt inclined not to stipulate to the commissioner; and that's why this case was sent down here. [¶] That's the status of the case.

Mr. Wong: That's correct, Your Honor. We did not stipulate to the commissioner in Department M.

Mr. Seiberling: The commissioner had set this case over for the purpose of trying to determine why the Sheriff is not responding to subpoena duces tecums *and also for Mr. Bankston's pro per motion.*

(2RT 227-228.)

Although the court accepted Mr. Seiberling's characterization, Judge Armstrong took extra care to explore the nature of the request directly with appellant, and to inquire as to whether there was some conflict between appellant and his attorney. (2RT 228.) As the court said, "Just to straighten out what the motion is, I assume from what you have said, Mr. Seiberling, so far, that it's the defendant's desire to represent himself; but have you, in your handling of this case so far, your investigation, discovered any reason why, if you have a conflict of interest, that would prevent you from continuing as Mr. Bankston's attorney?" Mr. Seiberling answer, "No." (2RT 228.) The court then addressed appellant directly about the dire implications and "foolish" choice of self-representation in a capital trial, and inquired whether there might be some conflict with Mr. Seiberling that could be addressed through other means:

All right. [¶] Mr. Bankston, there are two ways that we can handle this. One is to have the court find a conflict of interest between you and your attorney. The fact that you don't approve of him or the way he is handling the case is not a basis for conflict. A conflict is a situation where an attorney represents someone whose interests are opposed to yours.

For instance, supposing that your attorney was the attorney of record for a witness who was scheduled to testify against you. Well, the attorney would be in the position where it would be difficult for him to tear into his own client, to cross-examine him

vigorously in your behalf, because of his loyalty to the client and the case on which he represents him.

That would be a conflict. In that kind of situation, Mr. Seiberling would instantly appreciate that conflict and remove himself from the case and say not only he but his office could not continue to represent you. That's why I made the preliminary inquiry of him. So I can't find from what he said that there is any conflict.

Now, a separate question is, first, you don't have to accept what he is saying or what I am saying. If you feel there is a conflict that you want to present, you just want to let me know what the nature of it is, I would ask the district attorney to leave the courtroom so you could tell me privately what you felt the conflict was without disclosing anything to the prosecution.

However, if there isn't any conflict, you have a constitutional right to represent yourself. But it's been presented that this is a possible capital case. Apparently, the decision has not been made yet whether or not the People are going to seek the death penalty, but it's one of the options.

Even if they chose not to seek the death penalty, it would still be a matter where if there are special circumstances proved, you would be subject to the possible penalty of life without the possibility of parole. So, therefore, in either case, naturally, if you were found guilty -- in other words, I don't have to tell you the case is about as serious as it can get.

While you have a right to represent yourself, I don't want you to make a foolish choice. Because unless you have some experience in this field, unless you know the law and are able to properly prepare such a serious case, you would be at a tremendous disadvantage. Because whether the case is tried before me or some other judge, I or no one else sitting on the bench can be your attorney.

All we can do is try to see that you get a fair trial, but we can't be in an adversarial position with the district attorney just to help you. That's why you need an attorney at your side who is able to look out for your rights and protect you at all stages of the proceedings.

(2RT 228-230.) The court then confirmed that appellant had never represented himself before, and was untrained and uneducated in the practice of law. (2RT 230.)

Appellant, however, made clear that he disagreed with the trial court's recommendations, and, in fact, did not want the assistance of any attorney. As appellant stated, "If I could ask the D.A. to be removed, I could express myself *why I would choose to represent myself*." (2RT 231, italics added.) As the court explained, however, "Well, that's not an excuse where we exclude the D.A. In other words, if you want to represent yourself, you have a right to represent yourself. That doesn't have anything to do with the prosecution. It's not a basis for excluding him, you see, from the proceedings." (2RT 231.) Appellant, therefore, continued to explain his position in open court:

Appellant: I am opting to represent myself because there is a lot of things that's irrelevant to my case that been asked that I feel have no basis [for] me being found not guilty, or whatever. I have to choose to represent myself. That's what I'm saying.

The Court: But there is no better person to evaluate that, to keep out the irrelevant and immaterial material, than an experienced attorney.

Appellant: But relevancy of the questions being asked by the attorney to my family.

Mr. Seiberling: What he is saying, some of the questions I asked his family, he doesn't like me asking those questions. He wants to relate to the court what those questions were that so offended him.

(2RT 227-231.)

At this point, appellant had not asked the court to discharge Mr. Seiberling and substitute another attorney, and had not asserted that Mr. Seiberling had rendered inadequate representation or that they had an irreconcilable conflict. The only request articulated to the court was that

appellant wanted to represent himself at trial. Nonetheless, when Mr. Seiberling indicated that appellant wanted to relay specific concerns about questions that counsel had asked his family members, the trial court decided to hold a confidential hearing. The court explained, “All right. [¶] We will call this a modified *Marsden*. I will ask the prosecutors to leave the room so we can see what Mr. Bankston has to say.”

2. Appellant Repeats His Request For Self-Representation In A Confidential Hearing

At the outset of the confidential hearing, Judge Armstrong asked appellant to explain, inquiring, “What’s your problem?” (2RT 233.) Appellant’s answer indicated that he was unhappy with Mr. Seiberling’s tactics, and that “nobody” would do a better job at trial than appellant himself. As appellant explained:

Due to the case’s very heavy gang tones to them and questions being asked of my family where I get the notion that I want to overthrow the U.S. government, et cetera, I feel, to me, has no basis having me being found guilty. In questions like that being asked, where is the investigation to the fact-finding mission if I am guilty or not guilty being applied to? [¶] *I feel nobody is going to fight more for my freedom than me.*

(2RT 233, italics added.) The court then discussed at greater length the severe disadvantages appellant would face if he represented himself. The court also noted that Mr. Seiberling was a “capable and experienced attorney” who had tried many important cases. The court then contrasted how poorly appellant—instead of an experienced attorney—would fare defending the case against a trained prosecutor like Mr. Wong. (2RT 234-235.)¹⁸

¹⁸ Judge Armstrong’s advisements against self-representation are discussed in detail below in Argument II, in response to appellant’s claim
(continued...)

But appellant opined to the court that he could defend himself better than Mr. Seiberling could, stating:

I been with Mr. Seiberling fighting this case, and it's a capital case. My views I presented to him maybe how these cases could have occurred. I am saying I am not the suspect, period. And the murders are attempted murders. [¶] I am saying through all the discussions we had so far, I am not satisfied right now. I feel that I have a better chance of fighting this myself. Even if I do get the death penalty or life without parole, I be more comfortable sitting here every night wondering why did I let him defend me.

(2RT 236.) Judge Armstrong then discussed that the case had been pending for some time. The court noted that if appellant chose to proceed in pro per, it would grant appellant several months to prepare but that appellant would not be able to “get a legal education” in time for trial. (2RT 236-239.) Appellant assured the court he could get ready in two or three months. (2RT 238.) As appellant explained in closing—without any request for new appointed counsel—“I just hoping with my strong desire to prevail in this case, I can research adequately to present some kind of defense that's going to be favorable to me -- more favorable than what I been getting with Mr. Seiberling.” (2RT 239.) Judge Armstrong closed the hearing by ruling, “The motion to represent yourself is granted. You are given pro per status. Mr. Seiberling is relieved.” (2RT 239.) Appellant represented himself for the remainder of trial.

(...continued)

that he did not make a voluntary, knowing, or intelligent waiver of his right to counsel. (See AOB 76-102.)

B. Appellant Never Clearly Requested Appointment Of Substitute Counsel, And Therefore May Not Obtain A Reversal Based On An Allegedly Inadequate *Marsden* Inquiry

Appellant claims his judgment must be reversed because the trial court failed to conduct a proper *Marsden* inquiry. (AOB 67-75.) However, “[a] request for self-representation does not trigger a duty to conduct a *Marsden* inquiry [citation] or to suggest substitution of counsel as an alternative. [Citation].” (*People v. Clark* (1992) 3 Cal.4th 41, 105.) A trial court’s duty to conduct a *Marsden* inquiry arises only if the defendant gives a “clear indication” that he wants a substitute attorney. (*People v. Martinez* (2009) 47 Cal.4th 399, 418; see also *People v. Valdez* (2004) 32 Cal.4th 73, 97, quoting *People v. Mendoza* (2000) 24 Cal.4th 130, 157.) “‘The mere fact that there appears to be a difference of opinion between a defendant and his attorney over trial tactics does not place a court under a duty to hold a *Marsden* hearing.’” (*Valdez, supra*, at p. 97, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 281.) Furthermore, requests under both *Marsden* and *Faretta* must be clear and unequivocal; the one does not imply the other. (See *People v. Crandell* (1988) 46 Cal.3d 833, 854-855, abrogated on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364; *People v. Williams* (1990) 220 Cal.App.3d 1165, 1170; see also, e.g., *People v. Gonzalez* (2012) 210 Cal.App.4th 724, 739 [defendant’s statement—“Your honor, if you don’t grant the pro per could I get another lawyer to represent me?”—was not a clear indication that the defendant was requesting a substitute appointed attorney so as to require the court to conduct a *Marsden* hearing].)

Here, the trial court did not err in failing to hold a more thorough *Marsden* inquiry because appellant’s oral statements did not provide a clear indication he wanted substitute counsel. (See *People v. Burton* (1989) 48 Cal.3d 843, 855 [defendant’s “expressed dissatisfaction with his attorney”

did not require a *Marsden* inquiry where he “never suggested he would like a different attorney”].) As in the above cases, there was no “clear indication by defendant that he want[ed] a substitute attorney.” (*People v. Valdez, supra*, 32 Cal.4th at p. 97.) Appellant never “sought to discharge his appointed counsel and substitute another attorney.” (*People v. Abilez* (2007) 41 Cal.4th 472, 487-488.) Rather, when the nature of appellant’s concerns was actually explored—first in open court and then in a confidential hearing—it was revealed that appellant felt that “nobody” could present a better defense than appellant himself, and that his complaints about counsel were simply tactical disagreements that appellant offered to explain his decision to act as his own attorney. Indeed, appellant expressly and repeatedly requested to exercise his *Farretta* right to self-representation. But a review of the record shows no clear and unequivocal request for a substitute attorney, and appellant’s complaints about the adequacy of any *Marsden* inquiry are therefore baseless.

In this case, “talk” of a possible *Marsden* motion was first discussed on March 25, 1993 before Commissioner Espinosa, when Mr. Seiberling indicated, “Yeah. [Appellant] is talking about having a *Marsden* motion.” But despite this speculation, no *Marsden* motion was made—on this day or any other. The matter was put over until March 31, 1993, due to scheduling conflicts, at which point the People declined to stipulate to the commissioner’s jurisdiction. The case was then immediately transferred and recalled by Judge Armstrong. (2RT 226-227.)

Being new to the case, Judge Armstrong asked Mr. Seiberling, “[W]hat you would like the court to resolve or determine today?” (2RT 227.) Mr. Seiberling did not repeat his previous suggestion that appellant might wish to make a *Marsden* motion. Rather, Mr. Seiberling clarified—and appellant personally confirmed—that appellant “*wanted to go pro per.*” (2RT 227, italics added.) And whatever previous “talk” Mr. Seiberling

may have heard from his client about a possible *Marsden* issue was apparently no longer an issue. As Mr. Seiberling explained, after obtaining appellant's confirmation, "I spoke to [appellant] today, and he advises me he would like to go pro per." (2RT 227-228.)

Judge Armstrong accepted Mr. Seiberling's characterization of appellant's request. (2RT 228.) Without a request for substitute counsel pending, the court was under no duty to conduct any *Marsden* inquiry, and could have immediately turned to appellant's request for self-representation. As noted, requests under both *Marsden* and *Faretta* must be clear and unequivocal, and the one does not imply the other. (See *People v. Crandell*, *supra*, 46 Cal.3d at pp. 854-855; *People v. Williams*, *supra*, 220 Cal.App.3d at p. 1170.) Nonetheless, the court took extra care to explore the matter further directly with appellant. (2RT 228.) The court discussed with appellant his absolute right to self-representation, but also informed appellant that he had an alternative to self-representation. The court suggested how appellant could make a successful *Marsden* motion if he could "have the court find a conflict between you and your attorney." (2RT 228-229.) The court also seemed to steer appellant back to an available *Marsden* option when appellant indicated, "If I could ask the D.A. to be removed, I could express myself *why I would choose to represent myself*." (2RT 231, emphasis added.) The court noted that a confidential hearing was not available for appellant's *Faretta* request, but offered, "If you feel there is a conflict that you want to present, just want to let me know what the nature of it is, I would ask the district attorney to leave the courtroom so you could tell me privately what you felt the conflict was without disclosing anything to the prosecution. However, if there isn't any conflict, you have a constitutional right to represent yourself." (2RT 231.) Appellant, however, never indicated a desire other than what Mr. Seiberling had described—to proceed in pro per.

Nonetheless, the court took appropriate, cautionary action when Mr. Seiberling interjected, “What he is saying, some of the questions I asked his family, he doesn’t like me asking those questions. *He wants to relate to the court what those questions were that so offended him.*” (2RT 231, italics added.) Despite the absence of any request for new counsel, the court—apparently out of abundance of caution—decided to explore Mr. Seiberling’s assertion in a “modified *Marsden* hearing.” (2RT 231.) But appellant stayed the course. Despite having the opportunity to express himself fully and to explain any “problem” however he liked, appellant remained firm in his unequivocal request to represent himself at trial. If anything, the “modified *Marsden*” hearing removed any speculation that appellant might have wanted a different attorney on his case. When appellant explained his decision to represent himself, he made clear to Judge Armstrong his unwavering view that “*nobody* is going to fight more for my freedom than me.” (2RT 233, italics added.) In short, neither appellant nor Mr. Seiberling ever indicated that appellant wanted appointment of a substitute attorney to assume control of appellant’s defense.

This Court has repeatedly rejected similar claim under similar facts, finding that a trial court had no duty to hold a formal *Marsden* hearing for capital defendants who had complained about appointed counsel and had requested to proceed in pro per. (See *People v. Valdez*, *supra*, 32 Cal.4th at p. 97; *People v. Mendoza*, *supra*, 24 Cal.4th at p. 157; *People v. Crandell*, *supra*, 46 Cal.3d at p. 854.) In *Mendoza*, the defendant “expressed dissatisfaction with counsel because he was ‘not getting a defense.’” (*Mendoza*, *supra*, at p. 157.) However, as in the instant case, there was no clear indication by the defendant that he wanted a substitute attorney, and instead, he “expressed in no uncertain terms to the trial court his desire to act as his own attorney.” (*Ibid.*)

Since we conclude that defendant's comments were insufficient to indicate that he was requesting a *Marsden* hearing, "the trial court was under no obligation to conduct an inquiry into any dissatisfaction defendant might have with his appointed counsel so as to necessitate substitution of counsel."

(*Valdez, supra*, at p. 97, quoting *Mendoza, supra*, at p. 157.)

This Court reached the same result in *Crandell*, despite the fact that the defendant did significantly more than appellant. Not only did the defendant in *Crandell* assert that appointed counsel had "put up no defense at all for me," the defendant even made a written request for the appointment of "co-counsel." (*People v. Crandell, supra*, 46 Cal.3d at p. 854.) But consistent with *Mendoza* and *Valdez*, this Court still found no *Marsden* duty was triggered because despite the complaints and requests, "defendant did not at any time during the municipal court proceedings seek the appointment of substitute counsel to assume control of his defense." (*Ibid.*) This Court also reiterated that a request for self-representation does not trigger a duty to conduct a *Marsden* inquiry or to suggest substitution of counsel as an alternative. (*Crandell, supra*, at p. 854, citing *People v. Wright* (1977) 72 Cal.App.3d 328, 338-341.)

Following *Crandell*, *Valdez*, and *Mendoza*, no *Marsden* hearings were required in the instant case because appellant never asked for substitute counsel, and instead expressed his clear desire to act as his own attorney. The fact that the trial court granted appellant a confidential hearing anyway shows the court took great care to explore the matter fully, but the court cannot be faulted for ultimately proceeding only on the request that was actually made: to choose self-representation instead of representation by counsel. (See *People v. Crandell, supra*, 46 Cal.3d at p. 855, citing *Faretta, supra*, 422 U.S. at pp. 807, 819-821.)

Accordingly, this Court should conclude, as it has in numerous similar cases, that the trial court did not err in failing to treat appellant's request to

act as his own attorney as a *Marsden* motion for substitution of counsel. (*People v. Clark*, *supra*, 3 Cal.4th at p. 105 [no error in failing to conduct *Marsden* hearing because “[t]he gist of defendant’s motions . . . was that he wished to represent himself, not to substitute counsel”]; see *People v. Gallego* (1990) 52 Cal.3d 115, 162, citing *People v. Crandell*, *supra*, 46 Cal.3d at pp. 854-855 [“A request for self-representation does not trigger a duty to conduct a *Marsden* inquiry . . . or to suggest substitution of counsel as an alternative”]; *People v. Burton*, *supra*, 48 Cal.3d at p. 855.)

C. Assuming Arguendo That Appellant Requested Appointment Of Substitute Counsel Pursuant To *Marsden*, The Trial Court’s Inquiry Was Adequate

Even if this Court were to find that appellant made a clear request for substitute counsel, the trial court conducted a sufficient inquiry and acted within its discretion in declining to replace appointed counsel. (See *People v. Valdez*, 32 Cal.4th at p. 97.)

The rules governing this Court’s inquiry into alleged *Marsden* error are well settled. A criminal defendant lacking the means to employ private counsel has a constitutional right to the assistance of court-appointed counsel (*Gideon v. Wainwright* (1963) 372 U.S. 335, 342-345 [83 S.Ct. 792, 9 L.Ed.2d 799]) and this assistance must satisfy certain minimum standards of competence (*United States v. Cronin* (1984) 466 U.S. 648, 654-655 [104 S.Ct. 2039, 80 L.Ed.2d 657]; *People v. Ledesma* (1987) 43 Cal.3d 171, 215).

When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney’s inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have

become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. [Citation.]

(*People v. Abilez*, *supra*, 41 Cal.4th at pp. 487-488, internal quotation marks omitted.) “A trial court should grant a defendant’s *Marsden* motion only when the defendant has made ‘a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation.’” (*People v. Streeter* (2012) 54 Cal.4th 205, 230, quoting *People v. Hines* (1997) 15 Cal.4th 997, 1025.)

The decision to deny a motion seeking substitution of appointed counsel is reviewed for abuse of discretion. (*People v. Streeter*, *supra*, 54 Cal.4th at p. 231.) “Denial is not an abuse of discretion ‘unless the defendant has shown that a failure to replace counsel would substantially impair the defendant’s right to assistance of counsel.’” (*Ibid.*, quoting *People v. Taylor* (2010) 48 Cal.4th 574, 599.)

In the present case, the trial court conducted a sufficient inquiry into appellant’s concerns about Mr. Seiberling. Even though appellant’s only request was to represent himself—as articulated by counsel and then repeatedly confirmed by appellant—the court nonetheless took great care to explore why appellant wanted to take such a drastic step. When Mr. Seiberling suggested that appellant might have specific complaints about counsel, the court excluded the prosecutor and held a confidential “modified *Marsden*” hearing. At the hearing, the court asked appellant, “What’s your problem?” and allowed him to state his complaints. (2RT 232-233.) Because it was soon apparent that appellant wanted to act as his own attorney rather than have new counsel appointed to take over the defense—and because appellant never alleged ineffective assistance or any irreconcilable conflict in any event—there was nothing to which defense counsel needed to respond. Rather, after hearing appellant explain what he wanted and why, the court reasonably and appropriately turned to the

Faretta request. Nothing in the record suggests the court deprived appellant of the opportunity to speak out regarding any dissatisfaction or prevented counsel from responding to any such allegation. (2RT 233-234.)

The record also does not support appellant's allegation that the court prejudicially misadvised appellant about the nature of a *Marsden* inquiry. (AOB 69-72.) Appellant's complaints are built on the following false premise: that the court "made no effort to ascertain the reasons underlying appellant's request for new counsel and claim of dissatisfaction." (AOB 72.) But as discussed above, no "request for new counsel" appears in the record. Appellant only asked to represent himself, and the court responded and proceeded accordingly. As noted, a request for self-representation does not trigger a duty to conduct a *Marsden* inquiry or a duty to suggest substitution of counsel as an alternative. (*People v. Crandell*, *supra*, 46 Cal.3d at p. 854.)

Appellant, however, complains that during the confidential hearing, he was "instructed [] that a *Marsden* inquiry was limited to whether appellant and appointed counsel had an actual conflict of interest." (AOB 69-70.) Appellant makes too much of the court's comments. First, the court never mentioned or defined the scope of a "*Marsden* inquiry" at all, which is not surprising given that appellant never asked that a new attorney be appointed. Second, the trial court's inquiry into a potential conflict was in response to appellant's assertion that he "would like to go pro per." (2RT 227-228.) Upon hearing that request, the court went to great lengths to dissuade appellant from making such an unwise move. (2RT 228-231.) If anything, Judge Armstrong—who described himself to appellant as a former "defense attorney of 34 years"—appeared to be suggesting that a "conflict" with counsel might give appellant an alternative to the "foolish" choice of self-representation. To that end, the court asked about "conflicts of interest" as a matter of law, as well as a generic "conflicts" between

appellant and Mr. Seiberling. After discussing a legal “conflict of interest”—which clearly did not exist—the court seemed to invite appellant to speak about any broader conflict he might have with counsel. “Now, a separate question is, first you don’t have to accept what he is saying or what I am saying. If you feel there is a conflict that you want to present, your just want to let me know the nature of [what] it is, I would ask the district attorney to leave the courtroom so you could tell me privately what you felt the conflict was without disclosing anything to the prosecutor.” (2RT 228-229.)

However, after allowing appellant to speak confidentially about any concerns he had, it was readily apparent that appellant and Mr. Seiberling had no major “conflict” or “problem” that appellant wished to report. At the hearing, appellant did not relay any offensive question that Mr. Seiberling allegedly had asked. Appellant did not indicate that he and Mr. Seiberling were embroiled in some irreconcilable conflict. Appellant did not allege that he and Mr. Seiberling had a fundamental breakdown in the attorney-client relationship. Rather, appellant simply expressed a disagreement with counsel’s tactics, and insisted on self-representation because “nobody” would fight harder for an acquittal than appellant. (2RT 223; see, e.g., *People v. Earp* (1999) 20 Cal.4th 826, 876-877 [record shows only tactical disagreements].)

Appellant’s reliance on *People v. Munoz* (1974) 41 Cal.App.3d 62, at pages 64-65, is misplaced. (AOB 71.) Unlike the instant case, the defendant in *Munoz* made a clear request for substitute counsel pursuant to *Marsden*. (See *Munoz*, *supra*, 41 Cal.App.3d at p. 65.) Despite that clear request, the trial court in *Munoz* failed to inquire at all into why defendant was dissatisfied with his attorney. (*Ibid.*) In the present case, however, the trial court allowed appellant to voice his concerns and carefully considered them.

Furthermore, the trial court did not err by inquiring about a potential “conflict” or “problem” with counsel. Such concerns are relevant to whether a request for substitute counsel should be granted. A defendant is entitled to substitute counsel if the record clearly shows that the first appointed attorney is not providing adequate representation (*In re Banks* (1971) 4 Cal.3d 337, 342) or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result (*People v. Stankewitz* (1982) 32 Cal.3d 80, 93-94).

Regardless, appellant does not contend that the outcome of any *Marsden* proceeding was wrong. That is, appellant does not allege that he was entitled to substitution of counsel, or that the trial court should have granted such a request. Appellant, in fact, does not allege there were any grounds to have new counsel appointed. He does not contend that Mr. Seiberling rendered ineffective assistance. Nor does he contend that he and Mr. Seiberling were embroiled in an irreconcilable conflict that represented a fundamental breakdown in the attorney-client relationship. (See e.g., *People v. Earp*, *supra*, 20 Cal.4th at pp. 876-877 [record shows only tactical disagreements].) Appellant does not even repeat the tactical disputes that he brought to the trial court’s attention in the context of his *Faretta* motion. In any event, tactical disagreements are not equivalent to an irreconcilable conflict:

A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an “irreconcilable conflict.” “. . . [C]ounsel is ‘captain of the ship’ and can make all but a few fundamental decisions for the defendant.” [Citations.]

(*People v. Jackson* (2009) 45 Cal.4th 662, 688.)

At worst, appellant was dissatisfied with Mr. Seiberling’s tactics. His complaints at the in camera hearing merely reflect a difference of opinion

about what the best defense strategy would be, and whether counsel should have questioned appellant's family members.

Accordingly, even assuming appellant made a clear request for substitute counsel, the trial court conducted an adequate inquiry into whether an irreconcilable conflict existed between appellant and Mr. Seiberling. The trial court provided appellant with sufficient opportunity to voice any concerns and for Mr. Seiberling to respond if necessary. Appellant did not meet his burden of showing an irreconcilable conflict or a breakdown in the relationship likely to result in ineffective representation. Thus, no request for new counsel was ever made, and assuming it was, the trial court properly investigated appellant's potential concerns under the circumstances.

D. Any Error Was Harmless

Finally, any error under *Marsden* was harmless beyond a reasonable doubt. (*Marsden*, *supra*, 2 Cal.3d at p. 126; *People v. Eastman* (2007) 146 Cal.App.4th 688, 697.) Appellant does not identify any grounds upon which a *Marsden* motion could have been granted. He does not contend there was any fundamental breakdown in the attorney-client relationship, and does not suggest that Mr. Seiberling rendered ineffective assistance. Appellant's opening brief does not suggest, let alone demonstrate, that the trial court should have appointed a new attorney to represent him at trial.

Thus, even assuming *arguendo* the trial court should have inquired further, it is very unlikely that such an inquiry would produce any additional complaints of any significance. Indeed, appellant makes no complaints at all about Mr. Seiberling in his brief. And each time appellant was asked to explain what he wanted and why, he expressed in no uncertain terms his desire to act as his own attorney. No further *Marsden* inquiry would have disabused appellant of his adamant belief that "nobody" could

handle his defense case better than he could. (2RT 233.) Appellant is not entitled to reversal of either trial phase or to a remand for a *Marsden* hearing.

II. APPELLANT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL

Appellant contends the trial court committed reversible error when it granted his *Faretta* motion to represent himself. He contends his waiver of his right to counsel was “coerced” and therefore not voluntarily made. (AOB 84-90.) He further contends that his waiver was not knowing and intelligent. (AOB 90-106.) Appellant misconstrues the record and virtually ignores the numerous, extensive admonitions and warnings that he received. Appellant firmly and repeatedly requested to act as his own attorney at trial, and nothing in the record shows he lacked the capacity to waive his right to counsel, or that his repeated oral and written waivers were “coerced” or otherwise “involuntarily made.” Three different superior court judges went to great lengths to warn appellant—both orally and in writing—about the pitfalls of self-representation and the rights he was giving up. And although such waivers need not be in writing, appellant completed two separate Petitions to Proceed In Propria Persona, in which he once again expressly waived his right to counsel. He then orally confirmed that his decision was made “voluntarily,” “knowingly,” “intelligently” and “understandingly.” (3RT 480.) The judges’ factual findings to that effect were therefore justified, and appellant should not now be heard to complain that the trial court honored his adamant and informed request to act as his own counsel.

A. Relevant Proceedings

1. Facts Pertaining To Appellant's Motion To Represent Himself Pursuant To *Faretta*

As discussed in the preceding section, appellant was represented for nearly two years of pretrial proceedings by Jerry Seiberling of the Los Angeles County Public Defender's Office. In March 1993, appellant made a motion to "go pro per." (2RT 227-228.) At a hearing on the matter in open court, Judge Armstrong warned appellant against representing himself, stating:

[Y]ou have a constitutional right to represent yourself. But it's been presented that this is a possible capital case. Apparently, the decision has not been made yet whether or not the People are going to seek the death penalty, but it's one of the options.

Even if they chose not to seek the death penalty, it would still be a matter where if there are special circumstances proved, you would be subject to the possible penalty of life without the possibility of parole. So, therefore, in either case, naturally, if you were found guilty -- in other words, I don't have to tell you the case is about as serious as it can get.

While you have a right to represent yourself, I don't want you to make a foolish choice. Because unless you have some experience in this field, unless you know the law and are able to properly prepare such a serious case, you would be at a tremendous disadvantage. Because whether the case is tried before me or some other judge, I or no one else sitting on the bench can be your attorney.

All we can do is try to see that you get a fair trial, but we can't be in an adversarial position with the district attorney just to help you. That's why you need an attorney at your side who is able to look out for your rights and protect you at all stages of the proceedings.

(2RT 228-230.) The court then confirmed that appellant had never represented himself before, had no education beyond high school, and aside

from “dabbling” in the state prison law library, was untrained and uneducated in the practice of law. (2RT 230.)

Appellant stated, “If I could ask the D.A. to be removed, I could express myself why I would choose to represent myself.” (2RT 231, emphasis added.) He further stated in open court, “I am opting to represent myself because there is a lot of things that’s irrelevant to my case that been asked that I feel have no basis [for] me being found not guilty, or whatever. I have to choose to represent myself. That’s what I’m saying.” (2RT 231.) During the confidential hearing that ensued, appellant stressed, “I feel nobody is going to fight more for my freedom than me.” (2RT 233.)

Judge Armstrong again tried to convince appellant to change his mind. Building on its earlier admonishments against making such a “foolish choice,” the court explained that appellant would be grossly outmatched and fare very poorly at trial, warning appellant as follows:

The problem is that if you put a guy like you into a law library and say, okay, we are going to try this case in a couple months, why, you would have about as much chance of successfully preparing yourself as I could prepare myself to do brain surgery if somebody turned me loose in a medical library. I wouldn’t know where to start. You can’t become a lawyer in a couple months.

That’s why I am - - I tell you up front, you got a constitutional right to represent yourself. If that’s what you want to do, you got it; but I tell you, I wouldn’t give you better advice or more friendly advice than to say don’t do it. Because people who represent themselves - - there is an old saying, you got a fool for a lawyer, and you don’t have any objectivity and you don’t have any experience.

And in this particular case, you have a trained prosecutor who himself has prosecuted an awful lot of cases; and it would be an unfair match for you, without any legal training, to go against somebody who is an experienced attorney. So I can’t deny you your right to go pro per, but I can counsel you against it.

(2RT 235.) But appellant was undeterred, and flatly disagreed with the court's assessment of his capabilities and his prospects at trial. Appellant reiterated to the court, "I feel that I have a better chance of fighting this myself. Even if I do get the death penalty or life without parole, I be more comfortable sitting here every night wondering why did I let him defend me." (2RT 236.) After clarifying that appellant knew what charges he faced (2RT 236), Judge Armstrong indicated the two-year-old case was one of the oldest cases—"if not the oldest"—pending in the courthouse, and that it "has to go to trial sometime." (2RT 236-237.) The court then challenged appellant on whether even with reasonable time to prepare, he could get ready to "try such a serious case" within two or three months. (2RT 237.)

Appellant responded, "[I]f I am adequately preparing myself, if I ask for an extension, hopefully it will be granted." (2RT 237.) When the court asked how much time appellant would need, he answered, "I have no idea — ideas in my head until I am able to sit down in the law library and research them. My next court date, whatever it is, hopefully, whoever is gonna be presiding over my case can see that I am into it wholeheartedly enough if I ask for [an] extension, it will be granted." (2RT 237.)

Judge Armstrong again stressed that it would give appellant reasonable time, up to 100 days, but that the case would have to be tried at some point. The court indicated, "we are going to pick a day in July [1993] and say this is, by God, the trial day. . . . Now, you got that framework to get ready. You think you can get ready in that time, don't kid yourself." When appellant answered, "Yeah," the court warned, "You got to get a legal education first. It takes three years to get a law school. ¶ Would you like to have some kid who just graduated from law school trying your case?" (2RT 238.) Appellant replied, "But this is not a kid. This is me fighting for my life." (2RT 238.)

Once again, Judge Armstrong tried without success to dissuade appellant. "What I am saying," the court explained, "a young man [who] just graduated from law school would at least be trained. You can't get a legal education in two or three months." (2RT 238-239.) Appellant remained unconvinced. He responded, "I [am] just hoping with my strong desire to prevail in this case, I can research adequately to present some kind of defense that's going to be favorable to me - - more favorable than what I been getting with Mr. Seiberling." (2RT 239.) Appellant continued, "Even though this case been in this court for so long, it haven't been courtroom hours. I think I been rolling - - rolling with the current and postponement every time I come here. Whatever prepared [*sic*] between then and now, I have no idea." (2RT 239.)

The trial court then ruled, "The motion to represent yourself is granted. You are given pro per status. Mr. Seiberling is relieved." (2RT 239.) When the district attorney returned to the courtroom, the court explained:

Mr. Wong, in your absence, we discussed the defendant's desires; and he has expressed his desire to represent himself. And the court has cautioned him against that course of action and had tried to talk him out of it and advised him, but he is adamant that's what he wants to do.

Under the law, I think that's his right. Therefore I have granted him pro per privileges. Mr. Seiberling is relieved. Mr. Seiberling will be directed to turn over all discovery that is in his possession.

(2RT 240.) The court then discussed the nature of appellant's pro per privileges while in custody, confirmed with the prosecutor that the case would be tried as a capital case, and indicated the target date for trial would

be in about four months, on August 2, 1993.¹⁹ (2RT 240-243.) After discussing additional administrative matters pertaining to discovery, the court again reminded appellant of the challenges that lay ahead, and that he could change his mind about self-representation:

As you get this [discovery] material, if you decide there are things too complex for you to handle and that you are not able to do this yourself, and you change your mind and decide that you don't want to represent yourself after all, you let me know immediately and we can reverse this and restore your attorney.

And I really think that's what you should do. I would urge you even this afternoon to have some more conversations with Mr. Seiberling, because he is going to have to spend some time with you going over all the matters. I would urge you to reconsider your decision, but I am not going to make you. It's your choice.

(2RT 246.) Appellant, however, did not reconsider his decision. Although months later he requested and received advisory counsel, appellant never sought to rescind his pro per status, and he represented himself for the remainder of the proceedings.

2. Counsel-Related Proceedings That Occurred After Appellant First Waived His Right To Counsel

After five months of pro per status and numerous pretrial appearances, the case was transferred to Judge James A. Bascue, who first presided over the case at a hearing on August 24, 1993. (2RT 317-1.) When the parties stated their appearances, Judge Bascue confirmed that appellant was representing himself, but noted that appellant had made only oral waivers of his right to counsel. Wanting to make a fuller record, Judge Bascue provided appellant with a "Petition To Proceed In Propria Persona (To Act

¹⁹ In fact, it would be more than a year before jury selection began, on May 9, 1994. (2CT 492.)

As My Own Lawyer)” (2CT 305-310), and a copy of the rules governing pro per litigants. Judge Bascue observed this was a “very serious case” and that the court was “very very protective of your constitutional rights and your right to have counsel.” (2RT 317-2.) Judge Bascue indicated that he would bring appellant back after he completed the forms. As Judge Bascue explained, “I want them in the file. I don’t see a written waiver here. I want to make sure we’re protecting the record.” (2RT 317-2.) The court explained it was acting out of an “abundance of caution,” and instructed appellant to review and complete the waivers and forms. (2RT 317-3.) Before adjourning, appellant indicated that he was making a motion “to have standby counsel/advisory counsel,” and Judge Bascue indicated the motion would be heard the following day. (2RT 317-4.)

When the matter was called the next day, appellant appeared with attorney Jackson Chandler, who had discussed the case with appellant’s family members while at the Norwalk courthouse. Mr. Chandler had then contacted appellant in jail about becoming involved in the case. (2RT 318-320.) After confirming that appellant did not have sufficient funds to retain Mr. Chandler, Judge Bascue asked appellant whether he was asking the court to appoint Mr. Chandler to represent him. (2RT 320.) Appellant answered, “To advise me. Have it counsel, standby because if you appoint me standby, that would be from the case law that I read, like read it.” (2RT 320-321.) Appellant clarified that if his pro per status was revoked, “Standby [counsel] automatically comes in and represents the case.” (2RT 321.)

When asked, Mr. Chandler indicated that he had strongly advised appellant against continuing to represent himself. Mr. Chandler had explained to appellant that “it was very difficult for someone to defend themselves in a death penalty case . . . and very, very difficult particularly from an evidentiary point of view in a case like this” Thus, according

to Mr. Chandler, “I advised him that he should ask the court for a lawyer, and he asked me if I would come down here today because he was going to ask some advise [*sic*] of counsel.” (2RT 321.) Judge Bascue was “extremely concerned” that Mr. Chandler had inappropriately solicited business from appellant’s family, and discussed that concern at length. (2RT 322-323.)

Judge Bascue then explained the differences between standby counsel and advisory counsel, and noted that appellant seemed “very well versed” in the matter. (2RT 323.) Judge Bascue, however, wanted to address the self-representation issue first, and, when reviewing appellant written forms, saw that appellant had not initialed several items and had crossed out references to proceeding “WITHOUT THE ASSISTANCE OF A LAWYER.” (2RT 323-234; see 2CT 305-310 [“Petition To Proceed In Propria Persona” dated Aug. 25, 1993].)

Judge Bascue then confirmed that appellant’s alterations to the forms had been made in light of his pending request for advisory counsel. (2RT 323-324.) The court then orally covered each item on the written petition that appellant had either altered or failed to initial. Appellant twice confirmed his understanding that unless advisory counsel were appointed, appellant, while proceeding in pro per, would “conduct your defense by yourself without the aid of a lawyer.” (2RT 324; see also 2RT 325-326.) Appellant also confirmed his understanding that if he gave up his right to represent himself, the court would “appoint an experienced trial lawyer as an attorney for you to try your case for you.” (2RT 325.) The court then addressed the other waivers on the written form, and appellant indicated that he understood them all. (2RT 325-328.)

When appellant began to talk about the subject of his pending motion—his request for the appointment of standby and/or advisory counsel—Judge Bascue stated, “I want us to focus on the pro per issues

first. We're dealing with a standby or advisory [counsel] in a moment."

He then reiterated the stern warnings against self-representation that Judge Armstrong had given five months earlier:

So what I'm really focusing on is to make sure, because you know most people feel that it is a serious disadvantage to try and represent yourself in a case; that the best advice one can have is to get a competent lawyer to represent them; that is the general feeling and consensus, and it's for that reason I'm very cautious you can see to go through to make sure that you're making a knowing, intelligent, and voluntary waiver of your right to counsel in this case. I want to deal with this - - that waiver first, and then we're going to deal with that quote peripheral counsel issue.

(2RT 328.) After confirming that appellant understood and knew the maximum sentence was death, Judge Bascue upheld appellant's pro per status, finding, "I certainly believe after looking at the six-page document, Mr. Bankston, one, you're making a knowing, intelligent, and voluntary waiver of your right to counsel in that case. You clearly thought this through, made some very - - I think some interesting observations in this."

(2RT 328-329.) Appellant then confirmed that he had read the pro per rules that had been provided, understood his obligation to follow those rules, and indicated he was willing to do so. (2RT 329.)

Judge Bascue also warned appellant that by representing himself: (1) he would be unable to raise ineffective-counsel claims on appeal; (2) he would be treated as any other lawyer and receive no special treatment; (3) he would be at a disadvantage; and (4) he would be prosecuted by a trained and experienced lawyer. Appellant said that he understood each point. (2RT 319-320.) Judge Bascue then repeated his ruling, stating, "I'm making a finding that you freely, voluntarily are knowingly waiving your right to counsel." (2RT 330.)

Judge Bascue then denied appellant's motion for advisory counsel, and granted appellant's motion for standby counsel. The court, however,

declined to appoint Mr. Chandler as standby counsel, citing, inter alia, concerns with Mr. Chandler's level of expertise and how he had approached appellant's family. (2RT 331-332.) Instead, the court appointed as standby counsel Mr. Al De Blanc, who was the next qualified death penalty attorney in rotation for appointment. (2RT 332-334.)

The case was then transferred for trial to Judge Nancy Brown, who presided over all further proceedings. (2RT 336.) When Judge Brown called the case for the first time later that same day, she too questioned why appellant had chosen to represent himself. (3RT 418-419.) Appellant once again confirmed that he had elected to go pro per as of March 31, 1993, and then renewed his request for appointment of advisory counsel. (3RT 419-420.) Judge Brown reiterated the warnings given by Judges Armstrong and Bascue, stressing to appellant that his continued insistence on representing himself was a patently unwise choice, especially when facing the death penalty:

As you know, the worst thing that could happen would be that you got convicted, that the jury found the special circumstances, whatever they are, true and then the jury went back in the jury room after the penalty phase and decided that death was the appropriate penalty. That's the worst that could happen. Then there are things that can happen anywhere from not guilty to guilty or some lesser offense of guilty of the charges with the jury deciding on what we call L.W.O.P., life without the possibility of parole.

I would think twice, Mr. Bankston, before I - - even in my position, having gone to law school, graduated, and been on the bench for 22 years, representing myself in any criminal matter. [¶] You see that Judge Bascue selected one of the ablest attorneys in the state of California to assist you if you want him appointed. You don't get advisory counsel because the law doesn't provide for one.

(3RT 421.) In response, appellant indicated that he knew it was not "mandatory" to appoint him advisory counsel. "But," appellant explained,

“I’m not the first to elect to go pro per in capital offenses like *People v. Big[e]low*,^[20] *People v. [C]rand[e]ll*,^[21] things like that were granted.” (3RT 421.) The court initially denied appellant’s request for advisory counsel on the ground that appellant had no legal right to advisory counsel. (3RT 422-423.) After addressing other matters, the court stated near the conclusion of the hearing that Mr. De Blanc would remain as standby counsel only. The court stated, “We don’t do advisory counsel in California anymore, but standby only. . . . The cases say no more advisory counsel. Either you’re pro per or you’re not.” (3RT 427.)

On August 30, 1993, bar panel attorney Mark Borden appeared in chambers and informed the court that Mr. De Blanc already had two other standby counsel assignments, and that Mr. Borden was next in rotation. (3RT 428-429.) The court then apprized Mr. Borden on the status of the case. (3RT 429-433.) The court indicated that as standby counsel, Mr. Borden was not to advise appellant, but was to remain ready to step in should appellant choose to no longer represent himself. (3RT 433-434.)

After appellant arrived at court and conferred with Mr. Borden, a hearing was held in open court. (3RT 435-436.) Appellant renewed his request to have Mr. Chandler appointed as advisory counsel, which the court denied. (3RT 436-438.) The court again indicated that as a pro per defendant, appellant could have standby counsel, and that the only question

²⁰ *People v. Bigelow* (1984) 37 Cal.3d 731, 744 [court’s failure of to exercise its discretion on defendant’s request for appointment of advisory counsel—because it mistakenly believed it had no authority to do so—is reversible error].

²¹ *People v. Crandell*, *supra*, 46 Cal.3d at pp. 864-865 [court’s failure to exercise discretion on defendant’s request for appointment of advisory counsel was harmless error].

was whether that position would be filled by Mr. Borden or someone else. (3RT 438.)

Appellant, however, said that standby counsel would be of “no benefit,” because “I don’t have any intention of relinquishing my pro per status.” (3RT 438.) Appellant further contended that the “monies that would be appropriated for him to standby could be better used to aid me in an advisory counsel capacity” (3RT 438.) At this hearing, however, the court ruled that Mr. Borden would serve only as standby counsel. (3RT 439.)

When Mr. Borden appeared the following week with an order to appoint him as standby counsel, the court noted that it had researched the issue of advisory counsel and intended to revisit appellant’s request when he was scheduled to be in court the following week. (3RT 446.) At appellant’s next appearance on September 13, 1993, the court explained that she had been wrong about the law concerning “advisory counsel,” and had been incorrectly considering appellant’s request under the law pertaining to the appointment of “co-counsel.” (3RT 451.) The court then appointed Mr. Borden as advisory counsel and explained the scope of the role. (3RT 451-455.) The court noted that Mr. Borden would be at appellant’s side and:

[R]eady, willing and able to advise you when you seek such advice. He will assist you in any way he can regarding the defense of your case, but he is advisory counsel only. And he cannot take away from you your right to serve as your own attorney in pro per. So he will be seated at counsel table with you, but he can be seen but not heard.

(3RT 455.) Mr. Borden remained appellant’s advisory counsel for all further proceedings.

The court also revisited the written Petition To Proceed In Propria Persona that appellant had prepared for Judge Bascue. (See 2CT 305-310.)

Because appellant now had advisory counsel to advise and assist him, the court modified the forms to delete references to proceeding entirely “without the aid of a lawyer.” (3RT 458-460; see 2CT 306-307.) Like Judge Bascue had done, the court also orally reviewed with appellant the items that he had not initialed, and confirmed that he understood the rights he had waived by choosing to act as his own attorney. (3RT 460-462.) The court also instructed appellant to complete “my form on petition for pro per”—which was essentially duplicative of the first set of form waivers—so that the court could make its own finding that appellant’s waiver of his right to counsel was valid. (3RT 462, 477-478; see 2CT 301-304 [Petition To Proceed In Propria Persona, dated Sept. 13, 1993].)

After appellant completed the second set of waiver forms, the trial court again cautioned him that he would be precluded from raising ineffective-counsel claims on appeal. (3RT 478-479.) The court then addressed appellant as follows:

The Court: So now do you understand, sir, because you were represented by the public defender before, you do understand that you have a constitutional right to be represented by counsel at all stages of these proceedings?

[Appellant]: Yes.

The Court: You also have a constitutional right to represent yourself if you decide you want to give up your right to counsel.

[¶] You understand that?

[Appellant]: Yes.

The Court: And is it your desire to represent yourself in this trial, which is a very serious case, with the understanding that I have appointed Mr. Borden to assist you as advisory counsel?

[Appellant]: Yes.

The Court: And are you doing that knowingly?

[Appellant]: Yes.

The Court: Intelligently?

[Appellant]: Yes.

The Court: Understandingly?

[Appellant]: Yes.

The Court: And voluntarily?

[Appellant]: Yes.

The Court: And you do understand that he will be seated there at counsel table with you. He can be seen, but not heard. You have to do all the talking.

[Appellant]: Yes.

The Court: Still want to serve as your own attorney?

[Appellant]: Yes.

The Court: All right. [¶] Court finds that the defendant understands his right to be represented by counsel and he does knowingly, intelligently and understandingly and voluntarily give up his constitutional right to be represented by counsel.

(3RT 480-481.)

B. Legal Principles And Standard Of Review For *Farretta* Waivers

A criminal defendant has the absolute right under the Sixth Amendment of the United States Constitution to conduct his or her own defense if the defendant first knowingly and intelligently waives his or her Sixth Amendment right to the assistance of counsel. (*Faretta, supra*, 422 U.S. at pp. 835-836; *People v. Blair* (2005) 36 Cal.4th 686, 708.) The right to self-representation recognized in *Faretta* is not limited to the guilt phase of a capital trial, but also extends to the penalty phase. (*People v. Clark* (1990) 50 Cal.3d 583, 617.) A defendant seeking to represent himself or herself “should be made aware of the dangers and disadvantages of self-

representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” (*Faretta, supra*, at p. 835.)

No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation. (*People v. Blair, supra*, 36 Cal.4th at p. 708; *People v. Koontz* (2002) 27 Cal.4th 1041, 1070.) The test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case. (*Ibid.*; see also *People v. Lawley* (2002) 27 Cal.4th 102, 140.)

This requirement is met if the record establishes the defendant is literate, understanding, and has voluntarily exercised the choice of representing himself. (*People v. McArthur* (1992) 11 Cal.App.4th 619, 627; *People v. Jackson* (1978) 88 Cal.App.3d 490, 496.) The focus of the inquiry is the defendant’s mental capacity to understand the nature and purpose of the proceedings against him or her. (*Godinez v. Moran* (1993) 509 U.S. 389, 399-400 [113 S.Ct. 2680, 125 L.Ed.2d 321].) The defendant’s “technical legal knowledge” is irrelevant to this inquiry. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1364, quoting *Faretta, supra*, 422 U.S. at p. 834.) The burden is on the defendant to demonstrate he did not knowingly and intelligently waive his right to counsel. (*McArthur, supra*, at p. 627; *People v. Harbolt* (1988) 206 Cal.App.3d 140, 149; *People v. Barlow* (1980) 103 Cal.App.3d 351, 370-371.)

This Court reviews whether the waiver was voluntary, knowing, and intelligent de novo. (*People v. Marshall* (1997) 15 Cal.4th 1, 24.) In doing so, the Court reviews the entire record, including the proceedings after proper status is granted, to determine whether the waiver was voluntary and intelligent. (*Ibid.*; see also *People v. Stanley* (2006) 39 Cal.4th 913, 932.) A review of the record in this case reveals that appellant’s waiver was valid.

C. Appellant's Waiver Of His Right To Counsel Was Voluntary

Appellant claims his waiver of counsel was “involuntary and coerced” because Judge Armstrong “mishandl[ed] his initial request for substitution of counsel and his complaints about appointed counsel’s representation.” (AOB 84-90.) But as discussed at length above, appellant never made a clear request to discharge his appointed counsel and substitute another attorney. (See *People v. Abilez*, *supra*, 41 Cal.4th at pp. 487-488.) Appellant’s mild tactical disagreements about defense strategy were offered only to explain appellant’s decision to act as his own attorney. Thus, the trial court did not err in failing to treat appellant’s *Faretta* request as a *Marsden* motion for substitution of counsel. (See *People v. Gallego*, *supra*, 52 Cal.3d at p. 162, citing *People v. Crandell*, *supra*, 46 Cal.3d at pp. 854-855 [“A request for self-representation does not trigger a duty to conduct a *Marsden* inquiry . . . or to suggest substitution of counsel as an alternative”]; *People v. Burton*, *supra*, 48 Cal.3d at p. 855.) As also discussed above, to the extent the trial court was required to inquire about appellant’s dissatisfaction with appointed counsel, the inquiry was adequate under the circumstances.

In any event, the record does not substantiate appellant’s contention that he was “coerced” into self-representation. (See AOB 84.) Despite Mr. Seiberling’s indication that there had been “talk” of a possible *Marsden* motion, appellant unequivocally clarified to both Mr. Seiberling and to the court that he in fact “wanted to go pro per.” (2RT 222-223.) Appellant then emphatically and repeatedly sought to dismiss his retained counsel and to represent himself. (2RT 222-223, 231, 233; see also 2RT 240 [court characterizing appellant as being “adamant” in his *Faretta* request].)

Moreover, appellant was clear and articulate in describing why he wanted to represent himself at trial, and his remarks—which he fails to

confront in his brief—clearly show that his choice to give up his right to counsel was “voluntary.” (See, e.g., 2RT 227 [appellant confirming his motion was to “go pro per”]; 233 [appellant explaining, “I feel nobody is going to fight more for my freedom than me”].) Nor did Judge Armstrong “mishandle” that motion. The court had no discretion to deny the timely *Faretta* request under the circumstances, and nothing the court did or said “coerced” appellant into waiving his right to counsel. To the contrary, Judge Armstrong went to great lengths to try to convince appellant *not* to waive his right to counsel. (See, e.g., 2RT 230 [telling appellant, while still represented by counsel, that it would be a “foolish choice” to proceed without an attorney, among other warnings], 230 [advising appellant, “[Y]ou need an attorney at your side who is able to look out for your rights and protect you at all stages of the proceedings”], 235 [telling appellant in no uncertain terms that he would be a “fool” to go pro per, among other warnings]; *ibid.* [telling appellant, “I can’t deny you your right to go pro per, but I can counsel you against it”].)

Despite these advisements, appellant still chose to exercise his right to relieve appointed counsel and act as his own attorney. He explained, “I feel *nobody* is going to fight more for my freedom than me.” (2RT 233, italics added.) He disagreed with the court’s assessment of his capabilities and his poor prospects at trial. (2RT 236.) He asserted, “I feel that I have a better chance of fighting this myself.” (2RT 236.) He asserted that he could adequately prepare for trial within several months. (2RT 237.) He further explained that he would do better than “some kid” fresh out of law school, arguing, “But this is not a kid. This is me fighting for my life.” (2RT 238.) Appellant—not Judge Armstrong—was the driving force behind his waiver of his right to counsel, and that waiver was clearly “voluntary.”

Appellant’s reliance on *People v. Cruz* (1978) 83 Cal.App.3d 308, and *People v. Hill* (1983) 148 Cal.App.3d 744, does not require a different

result. (See AOB 58-86.) In *Cruz*, the defendant not only complained about his counsel's performance, but asserted that he had a conflict of interest with the entire public defender's office. After hearing the defendant's explanation, the court, without further inquiry, permitted the defendant to represent himself. (*Cruz, supra*, at p. 317.) In *Hill*, the defendant repeatedly stated he was only waiving counsel because the trial court had *refused* to appoint substitute counsel. (*Hill, supra*, at pp. 750-751.) The defendant in *Hill* repeatedly stated that he did *not* actually wish to represent himself, but he did not have confidence in his current attorney, and would only represent himself if the court did not appoint different counsel. (*Id.* at pp. 750-751.) But in this case, appellant never asserted he had a conflict of interest with his current counsel, let alone the entire public defender's office, and never asked for substitute counsel. By contrast, appellant clearly expressed his preference for self-representation over the appointment of substitute counsel. Under these circumstances, the trial court did not err in failing to advise appellant to seek substitute counsel, and therefore nothing the court did made the *Faretta* waiver ineffective. (See *People v. Gonzalez, supra*, 210 Cal.App.4th at p. 739.)

Even assuming arguendo that Judge Armstrong's advisements were inadequate, any potential confusion was removed in the subsequent proceedings before Judges Bascue and Brown. Judges Bascue and Brown subsequently sought and obtained their own oral and written *Faretta* waivers from appellant, because each judge wanted to make their own record and to make their own findings that appellant's patently unwise decision to waive his right to counsel was made voluntarily, knowingly, and intelligently. To that end, on two different dates before two different judges, appellant completed two Petitions to Proceed In Propria Persona. (2CT 301-310.) On each form, appellant acknowledged and expressly "gave up" the following right, among others: "I UNDERSTAND THAT I

HAVE THE RIGHT TO BE REPRESENTED BY A LAWYER AT ALL STAGES OF THE PROCEEDINGS AND, IF I DO NOT HAVE FUNDS TO EMPLOY COUNSEL, ONE WILL BE APPOINTED FOR ME BY THE COURT.” (2CT 301, 305.)

When Judge Brown asked appellant—after additional warnings against self-representation—whether he “want[ed] to give your right to counsel,” appellant confirmed that he did, and stated that his decision was made “voluntarily.” (3RT 408.) These repeated, explicit advisements about his right to counsel—and appellant’s express written and oral assertions that he was “voluntarily” waiving his right to counsel—are fatal to his claim that his waivers were the result of coercion.

D. Appellant’s Waiver Of His Right To Counsel Was Knowing And Intelligent

As noted above, “If a request for self-representation is unequivocally asserted within a reasonable time before the commencement of the trial, and if the assertion is voluntarily made with an appreciation of the risks involved, the trial court has no discretion to deny it.” (*People v. Bloom* (1989) 48 Cal.3d 1194, 1219, citing *Faretta, supra*, 422 U.S. 806.) “A defendant may challenge the grant of a motion for self-representation on the basis that the record fails to show that the defendant was made aware of the risks of self-representation.” (*Id.* at p. 1224.) However, “[t]he test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case.” (*Id.* at p. 1225.)

Here, the record is replete with oral and written warnings—on three separate occasions and by three separate judges—about the dangers and disadvantages of self-representation. For example, Judge Armstrong told

appellant he could face the death penalty or life without the possibility of parole and that the case “is about as serious as it can get.” (2RT 230.) Judge Armstrong orally warned that self-representation in such a case was a “foolish choice,” that appellant would be at a “tremendous disadvantage,” and that he “need[ed] an attorney at your side who is able to look out for your rights and protect you at all stages of the proceedings.” (2RT 230.) Judge Armstrong further cautioned that appellant had no legal experience and that the prosecutor was a trained, experienced lawyer who would have an advantage over him. Judge Armstrong also cautioned that appellant could not be objective, that it would be an “unfair match,” and that if appellant represented himself he would have a “fool for a client,” and that he “can’t become a lawyer in a couple months.” (2RT 235.) Judge Armstrong warned that even if the case were continued for another 100 days, appellant should not “kid yourself” that he could be prepared, and likened appellant’s situation to being represented by “some kid who just graduated from law school.” (2RT 238.) Judge Armstrong further alerted appellant that, as a pro per defendant, he would receive no special consideration from the court, and that being in custody would limit his ability to prepare. (2RT 240-243.) Appellant, however, repeatedly insisted on acting as his own attorney because he believed no one else could do a better job. (See 2RT 233 [“I feel nobody is going to fight more for my freedom than me”], 236 [“I feel that I have a better chance of fighting this myself”], 238 [“This is me fighting for my life”].) Judge Armstrong implored appellant to change his mind and have counsel appointed, but appellant refused. (2RT 246.)

Additionally, when appellant first appeared before Judge Bascue, the judge, “out of an abundance of caution” (2RT 317-2), had him complete a six-page Los Angeles County Superior Court “Petition to Proceed in Propria Persona,” which detailed his rights and the risks of self-

representation. Therein, appellant in writing expressed his understanding of the charges against him and the possible penalties, including death. (2CT 305-310.) Appellant also initialed the following warning:

I FURTHER UNDERSTAND THAT IT IS THE ADVICE AND
RECOMMENDATION OF THIS COURT THAT I DO NOT
REPRESENT MYSELF, AND ACCEPT COUNSEL
APPOINTED BY THE COURT.

(2CT 307.)

In completing the petition, appellant filled out all applicable portions that asked for a written response. (2CT 305-310.) He provided biographical data, including information about his education. He wrote that he had graduated from high school and had attended community college. (2CT 306.) He acknowledged that he had no legal education, and would face a trained and experienced prosecutor, and would receive no special consideration or assistance by the court. (2CT 307.) Among his other written responses, appellant acknowledged he was being charged, inter alia, with multiple counts of "187(a)" and "664/187(a)," and that if found guilty his minimum sentence would be "LWOP" and his maximum sentence would be "Death." (2CT 308.) Appellant acknowledged that he would be unable to claim ineffective assistance of counsel on appeal. (2CT 310.) Finally, appellant signed and dated the forms, certifying that he "read, understood and considered all of the printed matter on this petition," and that it was completed in his own handwriting. Appellant signed his name directly beneath the following sentence: "I understand that by making this request I am giving up the right to be represented by a lawyer appointed by the court." (2CT 310.)

Even more oral and written advisements followed. After discussing the written forms at length with appellant, Judge Bascue orally repeated many of the warnings that appellant had acknowledged in writing, including warnings that by representing himself: (1) he would be unable to

raise ineffective-counsel claims on appeal; (2) he would be treated as any other lawyer and receive no special treatment; (3) he would be at a disadvantage; and (4) he would be prosecuted by a trained and experienced lawyer. Appellant stated that he understood each point. (2RT 319-320.) Judge Bascue found, "I'm making a finding that you freely, voluntarily are knowingly waiving your right to counsel." (2RT 330.)

Still more advisements followed. When appellant later appeared before Judge Brown, she reiterated the prior warnings given by the other two judges and stressed that appellant's continued insistence on representing himself was a patently unwise choice, especially when facing the death penalty. (3RT 421.) Appellant also executed a second written "Petition to Proceed in Propria Persona," in which he once again expressed in writing his understanding of the charges against him and the possible penalties, including death. (2CT 301-304) He further acknowledged in writing that he would have to handle pretrial, trial, any penalty phase of trial, and many posttrial matters himself without the assistance of an attorney, and that he would have to comply with all substantive and procedural rules, which could be quite technical. (2CT 302-303.) He thus demonstrated an understanding of the risks and complexities of his case.

Judge Brown also orally warned appellant that he would be unable to claim ineffective assistance of counsel on appeal, that it would be difficult to be objective about his own case, and that a death penalty case involved special risks including a penalty phase of trial. (3RT 421.) This round of advisements also sufficed to apprise defendant of the dangers and disadvantages of self-representation.

That certain warnings and understanding were expressed only in writing makes no difference in assessing whether appellant's waiver was knowing and intelligent. (Cf. *People v. Marshall*, *supra*, 15 Cal.4th at p. 24.) The Los Angeles County Superior Court's in propria persona

advisement form (sometimes referred to as a *Faretta* form) serves as “a means by which the judge and the defendant seeking self-representation may have a meaningful dialogue concerning the dangers and responsibilities of self-representation.” (*People v. Silfa* (2001) 88 Cal.App.4th 1311, 1322.) The court might query the defendant orally about his responses on the form, to create a clear record of the defendant’s knowing and voluntary waiver of counsel. (Cf. *People v. Koontz*, *supra*, 27 Cal.4th at p. 1071.) The failure to conduct an oral inquiry, however, does not necessarily invalidate a defendant’s waiver, particularly when, as here, there is no indication that appellant did not understand what he was reading and signing. To the contrary, appellant demonstrated his ability to read and write in numerous pro se filings in the superior court. He also appeared to be of at least normal intelligence and spoke articulately in court.

As Judge Bascue observed, “I certainly believe after looking at the six-page document, Mr. Bankston, one, you’re making a knowing, intelligent, and voluntary waiver of your right to counsel in that case. You clearly thought this through, made some very - - I think some interesting observations in this.” (2RT 328-330.) Judge Brown reached the same conclusion, finding, “that the defendant understands his right to be represented by counsel and he does knowingly, intelligently and understandingly and voluntarily give up his constitutional right to be represented by counsel.” (2RT 480-481.) Appellant himself personally announced that his waiver was made “knowingly,” “intelligently,” “understandingly,” and “voluntarily.” (3RT 480-481.)

There is no reason for this Court to question the validity of appellant’s waivers. Three superior court judges personally warned him of the dangers of self-representation and advised him against it. The oral admonishments, combined with two detailed petitions to proceed in pro per, were clearly adequate to inform appellant about the disadvantages and risks of self-

representation. The record as a whole reflects that appellant was familiar both with the facts and the difficulties of his particular case and with the risks he faced in representing himself against an experienced prosecutor in a capital case. He demonstrated considerable legal knowledge, had been a criminal defendant many times before, and made numerous oral and written motions throughout the proceedings. These facts support the court's findings that appellant understood the *Faretta* warnings. (See *People v. Lawley, supra*, 27 Cal.4th at p. 142 [relying in part on the defendant's experience in prior trials to find his waiver knowing and intelligent].)

Appellant contends nonetheless that he was misadvised about his right to effective assistance of counsel, again referring back to the allegedly inadequate "*Marsden* inquiry" conducted by Judge Armstrong. (AOB 92-95.) He also argues that he was "confused" about the difference between a right to self-representation, and a right to self-representation with the assistance of advisory counsel, and that his waiver of his right to counsel was therefore not "knowing and intelligent." (AOB 95-102.) Appellant's argument misses the mark. As argued above, Judge Armstrong had no duty to conduct a *Marsden* hearing, and to the extent there was such a duty, the court's inquiry was adequate under the circumstances. (See *People v. Clark, supra*, 3 Cal.4th at p. 105 [no error in failing to conduct *Marsden* hearing because "[t]he gist of defendant's motions . . . was that he wished to represent himself, not to substitute counsel"].) Regardless, any resulting confusion that appellant had about the interplay between his *Marsden* and *Faretta* rights was removed in the subsequent proceedings before Judges Bascue and Brown. In his written petitions submitted to those judges, appellant acknowledged and expressly "gave up" the following right, among others: "I UNDERSTAND THAT I HAVE THE RIGHT TO BE REPRESENTED BY A LAWYER AT ALL STAGES OF THE PROCEEDINGS AND, IF I DO NOT HAVE FUNDS TO EMPLOY

COUNSEL, ONE WILL BE APPOINTED FOR ME BY THE COURT.”
(2CT 301, 305.)

Even assuming appellant was confused at one point about the role of advisory or standby counsel—or confused about any of the other numerous legal issues that he faced while acting as his own attorney—this does not mean that appellant did not “understood the disadvantages of self-representation, including the risks and complexities of the particular case.” (*People v. Bloom, supra*, 48 Cal.3d at p. 1225, citing *Faretta, supra*, 422 U.S. 806.)

Appellant also contends that his waiver was not knowing and intelligent because he was not adequately advised about the “nature” of capital proceedings and the “meaning” of the charges against him. (AOB 102-106.) He complains that no court made any “specific reference to the heightened risks and specific complexities of capital litigation.” (AOB 103-104.) Appellant, however, cites no authority in support of his contention that any additional admonishments are necessary in a capital case, because apparently no such authority exists. In fact, this Court has recently rejected similar claims. (See *People v. Blair, supra*, 36 Cal.4th at pp. 708-710; *People v. Lawley, supra*, 27 Cal.4th at p. 142 [defendant’s waiver of counsel found to be knowing and intelligent although court did not advise him concerning the possibility of a second phase of the trial to determine penalty].)

Appellant further claims that none of the three judges asked whether he understood the nature of the charged offenses, including the grave risk arising from the special circumstance allegation, or the nature of a capital proceeding, including the possibility of a separate penalty phase. (AOB 102-104.) Appellant is wrong. Judge Brown expressly told appellant that if he were convicted, there would be a “penalty phase,” in which the jury, if they “found the special circumstances” true, would then determine whether

death or life without the possibility of parole was the appropriate penalty. (3RT 421.) Moreover, as appellant stated on both of his "Petition[s] to Proceed in Propria Persona," he understood that he was being charged with multiple murder charges, and that death was a possible penalty. (2CT 302-302, 307-308.) In the second, more recent version of the petition, which appellant submitted to Judge Brown, he expressly acknowledged that if he continued to represent himself he would be required to handle any separate "penalty phase." (2CT 303.)

Further, all three judges consistently and repeatedly warned that a death penalty case required the expertise of a lawyer. In explaining "why you need an attorney," Judge Armstrong told appellant,

[Y]ou have a constitutional right to represent yourself. But it's been presented that this is a possible capital case. Apparently, the decision has not been made yet whether or not the People are going to seek the death penalty, but it's one of the options. [¶] Even if they chose not to seek the death penalty, it would still be a matter where if there are special circumstances proved, you would be subject to the possible penalty of life without the possibility of parole. So, therefore, in either case, naturally, if you were found guilty -- in other words, I don't have to tell you the case is about as serious as it can get.

(2RT 229-230.)

Later, before Judge Bascue, Mr. Chandler related his own warnings to appellant. As Mr. Chandler stated, he had explained to appellant that "it was very difficult for someone to defend themselves in a death penalty case . . . and very, very difficult particularly from an evidentiary point of view in a case like this" Thus, according to Mr. Chandler, "I advised him that he should ask the court for a lawyer, and he asked me if I would come down here today because he was going to ask some advise [sic] of counsel." (2RT 321.) Judge Bascue also observed this was a "very serious case" and that the court intended to be "very very protective of your constitutional rights and your right to have counsel." (2RT 317-2.) Finally,

Judge Brown reiterated the warnings given by her colleagues, stressing to appellant that representing himself was unwise, especially when facing the death penalty. (3RT 421.) No more was required. (Cf. *People v. Lawley*, *supra*, 27 Cal.4th at p. 142 [defendant's waiver knowing and intelligent even though court did not advise him regarding the possibility of a second phase of the trial to determine penalty].)

Appellant further argues that none of the three judges said he would be responsible for “the complexities of investigating, developing and presenting mitigating evidence,” which, according to appellant, typically requires the dedicated, in-depth work by “specially-trained counsel.” (AOB 104-105.) But again, this Court has rejected contentions that such detailed advisements are necessary. (See *People v. Riggs* (2008) 44 Cal.4th 248, 276-278.) Those concerns, and many other legal aspects of trying a capital case, are at issue regardless of whether a defendant opts for self-representation or is represented by counsel. (*Ibid.*) Thus, as this Court noted, a trial court

is not required to ensure that the defendant is aware of legal concepts such as the various burdens of proof, the rules of evidence, or the fact that the pursuit of one avenue of defense might foreclose another before the trial court can determine that a defendant has been made aware of the pitfalls of self-representation, such that he or she can make a knowing and intelligent decision whether to waive the right to counsel.

(*Ibid.*; see also, e.g., *People v. Koontz*, *supra*, 27 Cal.4th at pp. 1072-1073 [failure to advise defendant regarding restrictions on library privileges and investigations did not vitiate waiver]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1042 [noting lack of authority for defendant's claim that trial court must advise a defendant seeking in propria persona status “of each limitation upon his ability to act effectively as counsel that will flow from security concerns and facility limitations”].)

In short, appellant was thoroughly admonished by three judges on several occasions. None of these three judges, nor counsel, nor the prosecutor raised any concern during any *Faretta* proceeding that appellant did not understand what he sought to undertake. To the contrary, all those involved conveyed to appellant the dangers and disadvantages of self-representation and all the potentially negative consequences that might follow. In spite of their efforts to convince appellant otherwise, his request was unequivocal, his waiver was voluntary, knowing, and intelligent, and the court had no choice but to grant the motion. Accordingly, appellant's claim should be rejected.

III. APPELLANT'S ABSENCE FROM TWO PRETRIAL DISCUSSIONS WITH BAR PANEL ATTORNEY BORDEN, IF ERROR, WAS HARMLESS

Citing two pretrial discussions held in chambers with bar panel attorney Mark Borden, appellant contends that his federal and state constitutional and state statutory rights to be present at trial were violated. (AOB 108-121.) Appellant demonstrates neither error nor prejudice.

A. Relevant Proceedings

1. First In-Chambers Discussion With Bar Panel Attorney Borden (August 30, 1993)

After Mr. De Blanc was appointed as standby counsel, the case was transferred to Judge Nancy Brown for all further proceedings. (2RT 333-335; 3RT 418.) As noted in detail in the preceding section, when Judge Brown first called the case on August 25, 1993, she questioned why appellant had chosen to represent himself. (3RT 418-419.) Appellant confirmed that he had elected to go pro per as of March 31, 1993, and requested the appointment of advisory counsel. (3RT 419-420.) Although the court ultimately granted appellant's request, she stated at this hearing,

“You don’t get advisory counsel because the law doesn’t provide for one.” (3RT 421.) After addressing other matters, the court repeated its ruling, stating, “The cases say no more advisory counsel. Either you’re pro per or you’re not.” (3RT 427.) The matter was adjourned until August 30, 1993. (3RT 427.)

On August 30, 1993, bar panel attorney Mark Borden appeared in chambers. (3RT 428-429.) Appellant was not present. The court noted, “This is an in chambers conference on the record. Mr. Bankston is in custody and I was advised by my bailiff there was something happening down at the county jail. However, Mr. Bankston may have reached the criminal courts building. The bailiff is checking right now.” The court continued:

In the meantime, the prosecution is represented by Mr. Lance Wong. Last week, I believe it was on a Thursday, Mr. Bankston was present in court in pro per and the case had come from Department 100 and Judge Bascue had nominated Mr. De Blanc as standby counsel. I was then advised by my clerk that Mr. De Blanc has two other standby counsel assignments. Therefore, under the rules . . . is it alternate defense counsel or bar panel that De Blanc was a part of?

(3RT 428.) Mr. Borden answered, “Bar panel.” (3RT 428.) Mr. Borden confirmed that Mr. De Blanc indeed had two other assignments, and that Mr. Borden was next in rotation. (3RT 428-430.) The court then observed that Mr. Borden “has absolutely no knowledge of this case, and I want to tell you what happened Thursday [August 25, 1993].” (3RT 430.) The court discussed the status of the case, and relayed its initial ruling that appellant was not entitled to advisory counsel. (3RT 429-434.) Mr. Borden indicated he would be willing to take the case if appellant—whom he had not yet met—agreed to waive time. (3RT 431.) Mr. Borden said he could be prepared in 90 days. (3RT 432.) The court indicated that if Mr. Borden were to become standby counsel, he was not to advise appellant,

but was to remain ready to step in should appellant choose to no longer represent himself. (3RT 431-434.) The court explained, "I have already been through this advisory counsel bit with him and he knows that I am not going to appoint advisory counsel. I don't know of any one who would be willing to undertake that type of situation." Mr. Borden stated, "Worst of all possible worlds," and the court concurred. (3RT 434-435.)

After appellant arrived at court and conferred with Mr. Borden, a hearing was held in open court. (3RT 435-436.) Appellant renewed his request to have Mr. Jackson Chandler appointed as advisory counsel, which the court again denied. (3RT 436-438.) The court stated that as a pro per defendant, appellant could have standby counsel, and that the only question was whether that position would be filled by Mr. Borden or someone else. (3RT 438.) Appellant replied that standby counsel would be of "no benefit," because "I don't have any intention of relinquishing my pro per status." (3RT 438.) Appellant further contended that the "monies that would be appropriated for him to standby could be better used to aid me in an advisory counsel capacity" (3RT 438.) At this hearing, however, the court ruled that Mr. Borden would serve only as standby counsel. (3RT 439.) The matter was adjourned, and the next hearing was scheduled for September 13, 1993. (3RT 442.)

2. Second In-Chambers Discussion With Bar Panel Attorney Borden (September 7, 1993)

On September 7, 1993, Mr. Borden appeared in court to submit an order to appoint him as standby counsel. The matter was not scheduled for a hearing until September 13, 1993, and the court noted that appellant was not present. (3RT 446.) The court told Mr. Borden it had researched the issue of advisory counsel and that "we're going to revisit the advisory counsel issue ab initio when Mr. Bankston is present." (3RT 446.) Mr.

Borden stated, "Fine, Judge. I know we have an appearance in here on next Monday on the 13th." (3RT 446.) When asked by Mr. Borden, the court said it had no intention of "unappointing" him as standby counsel, and indicated, "If anything happens, it's going to be an increase as opposed to a decrease in services." (3RT 447-448.) The court reiterated, "Right, next Monday when Mr. Bankston is present, and by that time I will have had an opportunity to read this order that you've prepared, looks like a three-page order. And with Mr. Bankston present, which he has an absolute right to be, we will go through the entire colloquy of whether or not he should have advisory counsel." (3RT 448.)

At appellant's next appearance on September 13, 1993, the court explained that Mr. Borden had "dropped by an order for the court to sign last week, but you weren't here and the matter wasn't on calendar so we didn't have any proceedings outside of your presence." (3RT 452.) "In a death penalty case," the court explained, "there cannot be proceedings outside the presence of the defendant. So I just read the order and I would review it over the weekend and be prepared to advise you and him regarding his status in this case." (3RT 452.)

The court then reversed its initial ruling and granted appellant's request for advisory counsel. The court explained that it had incorrectly considered appellant's request under the law pertaining to the appointment of "co-counsel," and that appellant's argument had persuaded the court to research the matter. (3RT 451-452.) The court then appointed Mr. Borden as appellant's advisory counsel, and explained the scope of his role. (3RT 451-455.) Appellant did not request appointment of a different attorney or suggest any grounds for doing so, and Mr. Borden remained appellant's advisory counsel for all further proceedings.

B. Appellant Is Not Entitled To Reversal Due To His Absence From The Pretrial Discussions With Mr. Borden

The Court has summarized the applicable principles to a claim of “presence error” as follows:

A criminal defendant’s right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution. . . . A defendant, however, does not have a right to be present at every hearing held in the course of a trial. A defendant’s presence is required if it bears a reasonable and substantial relation to his full opportunity to defend against the charges. The standard under sections 997 and 1043 [concerning a defendant’s right to presence] is similar. [T]he accused is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him

(*People v. Davis* (2005) 36 Cal.4th 510, 530, internal citations and quotation marks omitted; see also *People v. Lucero* (2000) 23 Cal.4th 692, 716-717; *People v. Waidla* (2000) 22 Cal.4th 690, 742; *People v. Ervin* (2000) 22 Cal.4th 48, 74.) A defendant “has the burden of demonstrating that his absence prejudiced his case or denied him a fair trial.” (*Ervin, supra*, at p. 78; *People v. Bradford, supra*, 15 Cal.4th at p. 1357.) Federal constitutional presence error is evaluated under the harmless-beyond-a-reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*). (*People v. Davis, supra*, 36 Cal.4th at p. 532; see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 307 [111 S.Ct. 1246, 113 L.Ed.2d 302] [listing “denial of a defendant’s right to be present at trial” among types of error which may be assessed for harmlessness]; *Campbell v. Rice* (9th Cir. 2005) 408 F.3d 1166, 1172 (en banc) [“any error resulting from [defendant’s] exclusion from the in-chambers meeting was not a structural error, but was, instead, trial error subject to harmless error review”].)

State statutory error under sections 977 and 1043 that does not rise to a federal constitutional violation is evaluated under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, requiring the defendant to show a reasonable probability he would have received a more favorable trial outcome had he been present at the proceedings in question. (*People v. Davis, supra*, 36 Cal.4th at pp. 532-533.) Speculation is inadequate to show prejudice under either standard. (*People v. Waidla, supra*, 22 Cal.4th at p. 742; see also *Campbell v. Rice, supra*, 408 F.3d at p. 1169, fn.1.)

In this case, appellant was also acting as his own attorney when the in-chambers discussions took place. (AOB 116.) The federal constitutional right to counsel also arises at critical stages of the prosecution or when necessary to assure a meaningful defense. (*United States v. Wade* (1967) 388 U.S. 218, 225 [87 S.Ct. 1926, 18 L.Ed.2d 1149]; *People v. Koontz, supra*, 27 Cal.4th at p. 1069.) As this Court has also noted, “Proceedings held in chambers and outside the presence of a party are generally disfavored.” (*People v. Carasi* (2008) 44 Cal.4th 1263, 1299, citing *People v. Ayala* (2000) 24 Cal.4th 243, 262, 293-294; see generally *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 [excluding public from proceedings]; *People v. Wright* (1990) 52 Cal.3d 367, 402 [ex parte communications with jurors]; *People v. Beeler* (1995) 9 Cal.4th 953, 1014 (conc. and dis. opn. of Kennard, J.).) However, the federal constitutional protections usually do not cover in camera discussions on matters bearing no reasonable, substantial relation to the defense of the charge. (*People v. Rogers* (2006) 39 Cal.4th 826, 855; *People v. Waidla, supra*, 22 Cal.4th at p. 742.) Moreover, a trial court retains discretion to conduct in camera ex parte proceedings if compelling reasons justify them. (*People v. Valdez* (2012) 55 Cal.4th 82, 125; see also, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 593-594 [privileged attorney-

client information]; *People v. Lawley*, *supra*, 27 Cal.4th at p. 159 [identity of confidential informant].)

Turning to the two proceedings identified by appellant, neither bore any substantial relation to his opportunity to defend, or resulted in a prejudicial violation of his right to counsel. Each proceeding was simply a brief discussion with bar panel attorney Mark Borden about the procedural posture of the case and Mr. Borden's possible appointment as either standby or advisory counsel. The August 30, 1993 discussion took place while waiting for appellant to arrive in court. Mr. Borden introduced himself to the court, and confirmed what the court had heard from her clerk—that bar panel attorney De Blanc could not serve as standby counsel after all. Mr. Borden explained that he was next in the rotation of qualified bar panel attorneys. (3RT 428-430.) Because Mr. Borden had not even met appellant yet, the court briefly summarized the procedural circumstances of the case, and relayed its initial ruling that it would only appoint standby counsel for appellant. (3RT 429-431.) Nothing was argued, and the court made no rulings. (3RT 428-435.) Appellant soon arrived and conferred with Mr. Borden. (3RT 435.)

The second in-chambers discussion occurred on September 7, 1993, when Mr. Borden appeared in court—after conferring with appellant—with a proposed order to appoint him as standby counsel. (3RT 446.) Although no hearing was scheduled for that day, the trial court took the opportunity to alert Mr. Borden that it intended to “revisit the advisory counsel issue ab initio when Mr. Bankston is present.” (3RT 446.) Mr. Borden stated, “Fine, Judge. I know we have an appearance in here on next Monday on the 13th.” (3RT 446.) Once again, no argument was made, and the court made no rulings. (3RT 428-435.)

Appellant is not entitled to reversal. His absence from these two, brief in-chambers discussions bore no reasonable, substantial relation to his

opportunity to defend the charges against him, and, therefore, did not constitute error under either state or federal law. (See, e.g., *People v. Ervin*, *supra*, 22 Cal.4th at pp. 72, 74 [absent from discussion of jury instructions]; *People v. Waidla*, *supra*, 22 Cal.4th at p. 742; *People v. Hardy* (1992) 2 Cal.4th 86, 177-178 [absent from discussions about media, instructions, and the admission of exhibits]; *People v. Wharton* (1991) 53 Cal.3d 522, 602-603 [absent from discussion regarding the jury note].) Even assuming appellant's state or federal right to be present were implicated at either proceeding, his absence could not possibly have been prejudicial. These two in-chambers discussions with Mr. Borden were very short, and the second was almost perfunctory. In each case, the court merely took the opportunity of Mr. Borden's presence to tell Mr. Borden the status of the case, and to relay the court's intention to revisit appellant's motion for advisory counsel. That is to say, the proceedings were not so significant that appellant's presence was "required to ensure fundamental fairness or a 'reasonably substantial . . . opportunity to defend against the charge.'" (*United States v. Gagnon* (1985) 470 U.S. 522, 527 [105 S.Ct. 1482, 84 L.Ed.2d 486], quoting *Snyder v. Massachusetts* (1933) 291 U.S. 97, 105-106 [54 S.Ct. 330, 78 L.Ed. 674].)

Even if the court erred in having two brief conversations with Mr. Borden without appellant present, it was plainly harmless in this case. Any assumed error is not structural. "[A]t the preliminary examination . . . even in a situation as extreme as the denial of counsel, the U.S. Supreme Court has held that the harmless error rule is applicable." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 530, citing *Coleman v. Alabama* (1970) 399 U.S. 1, 11 [90 S.Ct. 1999, 26 L.Ed.2d 387].) Because the in-chambers discussions with Mr. Borden occurred pretrial, like a preliminary examination, the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California*, *supra*, 386 U.S. at page 24 applies. (*Coleman*, *supra*, 399 U.S. at p. 11.)

And, again, any statutory violation is assessed under the reasonable-probability standard of *People v. Watson*, *supra*, 46 Cal.2d at page 836. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13.) Under either standard, there was no prejudice.

Appellant's arguments for prejudice are not persuasive. (See AOB 120-121.) He incorrectly contends that the trial court "decided" to appoint Mr. Borden as advisory counsel "in appellant's absence, and without appellant having an opportunity to object to Borden's appointment" (AOB 120.) Not so. The court merely informed Mr. Borden that it had researched the issue of advisory counsel and would revisit appellant's request "ab initio" when appellant was present. (3RT 446.) And when the court did address the matter with appellant at the next hearing, the issue was discussed at length, and appellant had ample "opportunity to object." Appellant had already made clear that he objected to the appointment of any attorney other than the one he had proposed—Mr. Jackson—and never suggested there were grounds that would disqualify Mr. Borden or any other a bar panel attorney. Appellant did express fear that the appointment of Mr. Borden as advisory counsel would consume funds that appellant could spend on expert witnesses. (2RT 454-455.) The court, however, assured appellant that it was "not taking anything," and appellant did not voice any other concerns about Mr. Borden. And, as explained above, appellant had several opportunities to argue about the appointment of advisory counsel, and did so at length. Appellant ultimately prevailed in his request, and he kept Mr. Borden as his advisory counsel—without complaint or a motion for substitution—for the duration of the trials.

Appellant claims he would have objected to the appointment of Mr. Borden if he had heard Mr. Borden agree with the court that the role of advisory counsel would be the "worst of all worlds." (AOB 119-120.) Appellant makes too much of this mild quip, which hardly warrants reversal.

First, as the court later explained, when it spoke to Mr. Borden it had been operating under the misguided belief that appellant was actually seeking something akin to “co-counsel.” (See 3RT 451 [trial court explaining to appellant that its first ruling was wrong because, “What I was making reference to [at the previous hearing] was the status of co-counsel”].) The court’s comment that no counsel would be willing to undertake such a role was therefore not directed to the role of an advisory attorney, and the characterization became moot in any event once the court researched the matter and granted appellant’s motion. Second, even if appellant had been present and had objected, there is no indication the trial court would have disqualified Mr. Borden based on Borden’s parroting of the court’s “worst-of-all-worlds” comment. In short, the trial court did not make any substantive legal error at either in-chambers discussion that appellant’s presence might have helped to prevent. Under any standard, appellant’s absence from these brief discussions was not prejudicial. There is no doubt on this record that his presence at the in chambers discussions would not have altered the outcome of Mr. Borden’s appointment as advisory counsel. If there was any error, it was therefore harmless.

IV. THE TRIAL COURT CONDUCTED ADEQUATE JURY VOIR DIRE

Appellant contends he was denied his constitutional rights to due process and a fair, impartial, and unbiased jury because the trial court did not conduct an adequate voir dire of the prospective jurors at either of his trials. (AOB 123-149.) Specifically, appellant claims that by rephrasing many of his proposed open-ended questions to “yes or no” questions, the trial court unreasonably deprived him of adequate voir dire. (AOB 126-137.) Appellant also complains that it was error for the court to ask newly-seated prospective jurors who filled vacant seats on the panel whether their answers would “differ in any way” from the answers of other panelists who

had just been questioned. Appellant contends this amounted to a “short cut” procedure that was constitutionally inadequate. (AOB 137-149.) Accordingly, appellant alleges reversal of his guilty verdicts and penalty judgment is required. (AOB 125-126.)

Appellant forfeited his claim by failing to object to the trial court’s procedures and by failing to exercise all of his peremptory challenges at trial. In any event, the trial court conducted a sufficient inquiry to ascertain whether each prospective juror had any bias or prejudice that would affect his or her ability of making a fair determination of the issues. In fact, voir dire was extensive and exhaustive: the court—over days of voir dire spanning hundreds of pages of transcripts—orally asked scores of questions to prospective jurors, both individually and collectively, on a wide range of topics and pertinent legal principles. Therefore, appellant’s contention is meritless.

A. The Jury Selection Process

1. First Guilt Phase Trial

Respondent summarizes the process used to select the trial juries in this case—context that appellant fails to provide in challenging such procedures on appeal. In January 1994, months before jury selection began, the trial court explained to the parties that it would not use jury questionnaires, and instead would personally ask questions during voir dire in accordance with Proposition 115.²² (5RT 671-672.) The court also

²² Proposition 115, the “Crime Victims Justice Reform Act,” changed voir dire in several respects on June 6, 1990. At the time of appellant’s trials, “The new voir dire statute provided that the court rather than the attorneys ‘shall conduct the examination of prospective jurors’ and that the examination ‘shall be conducted only in aid of the exercise of challenges
(continued...)”

stated it would also ask prospective jurors any questions that either party wanted the court to ask, assuming the questions were relevant and went to “cause,” as was required by Proposition 115. (5RT 671.) The court invited the parties to submit any proposed questions in writing. (2RT 671.)

In March 1994, appellant submitted 50 written questions that he proposed the court ask “to all death-qualified jurors.” (2CT 439-445.)

On April 14, 1994, about a month before jury selection began, the trial court reiterated that it would question the prospective jurors personally and would not use written questionnaires. (8RT 776.) The court explained, “I am going to very carefully voir dire this jury, and I will ask all appropriate and proper questions” that the parties proposed. (8RT 776.) Appellant said, “All right. And I have no problem with that. That’s why I submitted them as you asked.” (8RT 776.)

At a hearing on April 29, 1994, the trial court indicated it had reviewed all of appellant’s proposed questions. (9RT 791.) The court said, “[C]ertain questions I’m going to have to say no to; but as to a number of these questions, I am going to rephrase them so that they are neutral, and then the court will ask them.” (9RT 791.)

The trial court then went through each of appellant’s 50 proposed questions. The court rejected 12 of them as inappropriate or because they were duplicative of the court’s own questions. (See, e.g., 2RT 792 [rejecting #3—“Please explain your general viewpoint on gangs and their members”—because it did not go to cause], 795-797 [rejecting #20—“If you or anyone that you know holds any professional licenses, please list”—as “too general” and duplicative of the standard biographical questions that

(...continued)

for cause.’ (Prop. 115, § 7, codified as Code Civ. Proc., § 223).” (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 286-287.)

would be asked²³], 814-817 [rejecting #24—“Would you describe yourself as a leader or a follower?”—because it did not go to cause], 815 [rejecting #27—“Please describe your reading habits:” and follow up questions—because it did not go to cause], 815-816 [rejecting #28—“Have you or anyone that you know ever written a letter to the editor and/or journalist of any newspaper ?”—because it did not go to cause], 817-818 [rejecting #29 & #30, which asked prospective jurors to list their radio stations and news sources], 819 [rejecting #30 & #24, concerning experiences with attorneys, as duplicative of other questions the court would ask], 819 [rejecting #35—“How do you feel about serving on jury duty at this time?”—because it did not go to cause and was improper in any event], 821 [rejecting #42—“Have you ever belonged to any organization that has promoted any specific law?”—as too general, but inviting appellant to rephrase it with greater specificity], 821 [rejecting follow up questions to #42 because they did not go to cause], 823 [rejecting #47—“Why do you feel you can be impartial?”].)

The court also indicated it would rephrase eight of the other proposed questions to make them more neutral and less open-ended. (See, e.g., 9RT 792-793 [rephrasing #7—“What are your views on active gang members being informants for law enforcement personnel?”—to “Do you have any views on active gang members being witnesses for law enforcement

²³ The trial court took this opportunity to explain to appellant that prospective jurors would be selected from panels of 25, and that each would give a biographic sketch of themselves, including their names, residences, marital status, occupations, occupations of any spouses and adult children, and prior jury experience. (9RT 798; see Cal. Stds. Jud. Admin., § 8.5(b)(20) [recommending trial court’s ask these biographical questions]; *People v. Holt* (1997) 15 Cal.4th 619, 661.) The court also explained to appellant the nature of for-cause and peremptory challenges. (9RT 798-800.)

personnel which would impair your ability to be fair and impartial?"]], 794 [rephrasing #10—"What reasons would you say why a defendant would choose to represent himself?"—to "Would the fact the defendant has chosen to represent himself in this case cause any of you to feel you could not be fair and impartial to him?"]], 811 [rejecting as "forbidden" #21—"Please describe your religious preference and or affiliation"—and indicating it would ask that question in an "amended way to make certain that there isn't anything about a person's religion . . . that would prevent him from serving as a fair and impartial juror in this case"], 812 [rephrasing #22 to replace "prescribe the judgment under color of law" with "follow the law"], 813-814 [specifying #23, concerning membership in any organizations, to cover neighborhood watch, block clubs, and anti-gang associations], 815 [rephrasing #26, concerning "how accurate do you think" gangs are portrayed on TV, to state, "Is there anything that you viewed on television regarding gangs or any other subject that would cause you to favor or disfavor one side or another?"]], 821 [rephrasing #45, concerning whether jurors, if given the choice, would "prefer" not to serve on the jury, as "Are there any of you who would prefer not to serve as a juror on this case for any reason whatsoever?"]], 821-822 [revising #46, with Mr. Borden's input, to ask, "If you have any biases that would affect your ability to be fair and impartial regarding the following subjects: gang allegations, Mexican victims, Black on Black crime, or any other subject which is relevant to this case?"]].)

Jury selection began on May 9, 1994, with 60 prospective jurors in the courtroom. (10RT 859.) A panel of 25 jurors was seated inside the jury box. (10RT 862.) The trial court conducted a preliminary screening that resulted in several excusals on hardship grounds. After each excusal, a new

prospective juror was seated in the 25-person panel. (10RT 862-874.)²⁴ Voir dire began with this first panel of 25 prospective jurors. The court read the charges and special allegations, and indicated that appellant had pleaded not guilty. (10RT 877-881.) The court examined each panelist at length. Except for sensitive personal matters (see, e.g., 10RT 934-937), all voir dire occurred in open court. The first panelists provided biographical information, including their names, residences, marital status, occupations, occupations of any spouses and adult children, and prior jury experience. The court asked numerous follow-up questions to pertinent biographical information. (10RT 875-898, 906-924.)

After the biographical voir dire was complete, the court told the remaining potential jurors—which it called “panel one”—that a second panel would be brought to the courtroom the next day. The court explained, “Then, when we get panel two in here, I will start asking the questions that I talked about. I have my own questions that I ask you regarding your qualifications to serve as fair and impartial jurors in this case.” The court stated:

I have questions which I will ask on behalf of the prosecution, as well as the defendant. It is a long series of questions, and that’s one of the reasons why I’m putting this off until we get another panel in here so I don’t have to do it twice.

After I finish all these questions, and we’ve gotten all of your answers - - and I want everyone to listen very carefully to the questions. And those of you who are not seated up here, I want you to make a written note of any answers that would differ so that when you’re called to be seated up here, I’ll say to you “would your answers differ in any way?” You can look at your written note and say this answer would differ and this answer

²⁴ Similar screenings occurred whenever prospective jurors alerted the court to a potential hardship, indicated that they might know someone involved in the case, or indicated that they could not be fair or impartial. (See, e.g., 10RT 902-905, 924-929, 930-931, 934-936; 11RT 1000-1003.)

would differ, if that is the case. . . . I do need to get this other panel here so we don't have to repeat this long series of questions twice.

(10RT 929-930.) Appellant did not object to the court's procedure.

The following day, before the panels entered the courtroom, the court explained to appellant that it would first go through all of the parties' and the court's questions. When only 11 people remained in panel one, the vacancies would be filled from panel two, at which point, "we begin the biographical information all over again." (11RT 946.)

The combined panels of 80 prospective jurors then entered the courtroom, and the trial court conducted another preliminary screening that resulted in several hardship excusals. (11RT 949-961.) The court then reread the charges and indicated appellant had pleaded not guilty. (11RT 962-966.) The court then explained how questioning would commence:

Now, what I have done with the people who are up here, numbers 1 through 25, we've gone through their biographical information and now I'll be asking a series of questions. I would like you to take out a little piece of paper and make a written note of any answers of yours that would differ from the answers of the people who are up here who have been assigned numbers[,] because some of you will be called upon to be seated up here and I will ask you if your answers to any of the questions would differ in any way. And so I want you to be able to pull out our little piece of paper, just go right down the list as to any answer that would differ.

(11RT 966.) After confirming that none of the prospective jurors knew appellant, the court reiterated that its question would be directed to panel one, and that those in the public section of the courtroom did not need to answer. "But if you're called upon to be seated up here," the court repeated, "I'll ask you if your answers would differ in any way." (11RT 967.) Again, appellant did not object.

The court then collectively or individually asked the prospective jurors numerous non-biographical questions. These were separate from the “death-qualifying” questions that the trial court later posed to individual prospective jurors. These questions included those prepared by the trial court, as well as the bulk of the 50 questions that appellant had proposed.²⁵ The court’s 100-plus questions (by appellant’s tally) spanned a broad scope of topics, including the jurors’ experiences with attorneys, (see, e.g., 11RT 967-970), contacts with judges, prosecutors, prosecutorial agencies, or court personnel (11RT 970-971, 1041-1042; 12RT 1146-1147), whether they knew appellant, any of the witnesses, or court personnel (11RT 967, 974-975; 12RT 1159-1161), relationships with anyone employed by the LASD, LAPD, or the Compton Police Department (11RT 975-983), prior knowledge of the case (11RT 983, 1091), knowledge of the areas where the crimes occurred (11RT 1093-1098), administration of justice experience (11RT 983-1000, 1008-1012), whether they had witnessed or been the victim of a crime (11RT 1012-1041), whether there was any reason they would prefer not to be a juror in the case (11RT 1055-1059), affiliations with organizations opposing the death penalty (11RT 1070), affiliations with organizations related to crime prevention (12RT 1142), affiliations with any victim’s rights organizations (12RT 1142), involvement in the “MAGIC” organization or a neighborhood watch (12RT 1142-1144), affiliations with organizations that promoted a specific law (12RT 1148), any other affiliations that might hinder their ability to be fair and impartial (12RT 1138), gun possession and ownership (12RT 1149-1156), any medical,

²⁵ As noted above, the trial court declined to ask 12 out of the 50 question that appellant had proposed, on the grounds that they were either not relevant or were duplicative of the court’s own questions. The court asked appellant’s remaining proposed questions, eight of which the court rephrased.

legal, law enforcement, psychological, or psychiatric training (11RT 1098-1107), military experience (11RT 1099, 1106), pretrial publicity (11RT 1092), ability to follow the court's admonishments to not discuss the case (11RT 1093), general views on the death penalty (11RT 1070-1072), ability to impose the death penalty or life without the possibility of parole if the law required them to do so (11RT 1063-1067, 1073-1074), impact of any religious or other views on their ability to follow the law or impose the death penalty or life without the possibility of parole (12RT 1136-1138), knowledge, training, or education about street gangs, and any experiences with gangs or gang members (11RT 1075-1088), the ability to speak Spanish or Swahili (11RT 1108; 12RT 1135), potential media influence concerning gangs (12RT 1144-1147), bias for or against law enforcement officers (11RT 1061), bias related to appellant exercising his right to represent himself (11RT 1088-1091), the ability to give both sides a fair and impartial trial (11RT 1062), the ability to base their decision solely on the evidence and the law (11RT 1092), the ability to could follow the law (11RT 1062-1063; 12RT 1157-1158), any physical conditions or other matters that might affect their ability to serve on the jury (12RT 1157, 1159), biases or strong feelings or beliefs about gangs, victims of Mexican or Latin decent, or "Black on Black crime" (12RT 1158). As the above excerpts also show, the trial court made further inquiry on these concepts whenever necessary.

The court also instructed and questioned the prospective jurors on the burden of proof, the presumption of innocence, what constituted evidence, and appellant's right to represent himself and his rights not to testify or to put on a defense. (See, e.g., 11RT 1067-1070, 1089-1091.) Where concerns arose about whether a juror could understand and apply the basic legal concepts, the court explained the concepts in further detail and made sure

each juror would apply these basic legal concepts in appellant's case. (See, e.g., 11RT 1067-1070.)

The trial court then questioned the prospective jurors on matters concerning "death qualification"—i.e., whether any prospective juror had such conscientious or religious scruples about capital punishment that his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*People v. Clark*, *supra*, 50 Cal.3d at p. 596, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.Ct. 2521, 65 L.Ed.2d 581], *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841], and *People v. Coleman* (1988) 46 Cal.3d 749, 765; 12RT 1181-1205; see, e.g., 12RT 1065-1076, 1116-1117, 1165, 1181-1203.)

The "death-qualification" voir dire led to the for-cause excusal of four prospective jurors. (12RT 1209-1210.) The parties then began to exercise their peremptory challenges. (12RT 1223.) Appellant used two of his 20 allotted peremptory challenges. (12RT 1216, 1223-1224.)

When only 11 people were left in the jury box, the court called more names to create a new 25-person panel. (12RT 1212-1279.) After each new panelist provided his or her biographical information, the court asked whether his or her answers to the other questions that the court had asked the first panel would differ in any way. (See, e.g., 12RT 1229 [prospective juror Roxas], 1234 [prospective juror Willoughby], 1235 [prospective juror Roehrs], 1243 [prospective juror Taylor].) The court also individually questioned each new panelist on matters concerning death qualification. (See, e.g., 12RT 1230-1232 [prospective juror Roxas], 1234 [prospective juror Willoughby], 1239-1240 [prospective juror Roehrs], 1243-1245 [prospective juror Taylor].) For each replacement panelist that had different answers or other information to share, the trial court made further inquiry whenever necessary. (See, e.g., 12RT 1235-1238 [trial court asking follow

up questions when prospective juror Roehrs indicated he had answers to discuss regarding gangs and being a crime victim], 1249-1250 [trial court asking follow up questions when prospective juror Kane indicated he knew a Los Angeles County district attorney and a public defender]; 1274-1275 [trial court asking follow up questions when prospective juror Goernt indicated his answers would differ about contact with law enforcement personnel and views on the death penalty].)

The parties exercised additional peremptory challenges, and then accepted the 12-person jury. (12RT 1282-1283.) Appellant used a total of six peremptory challenge out of 20. (12RT 1282-1283.)

A similar process was used to choose the seven alternates, and each side was allotted 12 peremptory challenges. (See 12RT 1283-1298, 1301-1302 [allotting 12 peremptory challenge for alternates]; 13RT 1320-1328 [voir dire], 1329-1335 [peremptory challenges], 1335-1342 [rereading charges to third panel], 1342-1357, 1373-1378, [biographical voir dire of new prospective alternates], 1378-1379 [instructing the prospective alternates in the public section of the courtroom to listen carefully to the questions asked, and to write down any answer “that differs from those up here”], 13RT 1380-1453 [trial court asking the 100-plus voir dire questions posed to the previous panels], 1453-1478 [death-qualifying voir dire of individual prospective alternates]; 2CT 511.)

Once again, when a new prospective alternate from the public section of the courtroom was seated and provided biographical information, the court asked whether his or her answers to the other questions that the court had asked the seated panelists would differ in any way. (See e.g., 14RT 1488, 1494, 1498.) Again, the court also questioned each new panelist on matters concerning death qualification. (See, e.g., 14RT 1508-1509, 1525-1526, 1534-1535.) Once again, for each replacement panelist who had different answers or other information to share, the trial court made further

inquiry whenever necessary. (See, e.g., 14RT 1501-1503 [prospective alternate Webster], 1516-1518 [prospective alternate Paparteys], 1520-1525 [prospective alternate Vohs], 1529-1531 [prospective alternate Rodriguez], 1532-1534 [prospective alternate Ranellucci].)

After the court finished questioning the prospective alternates, neither party requested a more specific advisement or any additional voir dire. After the parties exercised additional peremptory challenges and accepted the panel (14RT 1546-1552), seven alternate jurors were sworn, and the guilt phase of the trial commenced (14RT 1553-1556).

2. Second Guilt Phase Trial

A similar process was used to select the jury and alternates for appellant's second guilt phase trial. (See 30RT 3392-3442 [discussing the proposed questions from the jury questionnaires], 3419 [trial court noting that it did not want to use open-ended questions such as "what kind of organizations do you belong to" because "it could take hours to answer to questions like that"], 3419 [trial court explaining, "My questions have to be very carefully phrased and going to cause"]; 31RT 3480-3535, 3573-3595; 32RT 3694-3697 [biographical voir dire of panel one and their replacements]; 31RT 3536-3564, 3596-3681; 32RT 3697-3734, 3806-3809 [trial court's additional voir dire questions for panel one and their replacements]; 32RT 3734-3788, 3796; 33RT 3899-3945 [death-qualifying voir dire of individual prospective jurors].)

Once again, each time a replacement panelist had different answers or other information to share, the trial court made further inquiry. (See, e.g., 32RT 3815-3817 [asking follow up questions when prospective juror Kidd indicated she had different answers to discuss regarding gang experience], 3830-3837 [asking follow up questions when prospective juror Ballard indicated he had different answers to discuss], 3854-3855 [same for

prospective juror Ortega], 3862-3863 [same for prospective juror Vella], 3879-3882 [same for prospective juror Ward]; 33RT 4035-4037 [same for prospective alternate juror Spann]; 34RT 4062-4065 [same for prospective alternate juror Olsen], 4083-4085 [asking follow up questions when prospective alternate juror Pierce indicated he had different answers concerning imposition of the death penalty], 4111-4114 [asking follow up questions when prospective alternate juror Esquivel-Larios indicated he had different answers to discuss], 4120-4122 [same for prospective alternate juror Teng], 4162-4169 [same for prospective alternate juror Oglesby], 4171-4174 [same for prospective alternate juror Chapman], 4184-4186 [holding a bench conference with prospective alternate juror Lesevich when he indicated he had additional comments], 4195-4198 [asking follow up questions when prospective alternate juror Orpilla indicated he had different answers to discuss].)

As with the first guilt phase trial, when the court finished questioning the prospective jurors and alternates, neither party requested additional voir dire. After the parties exercised peremptory challenges and accepted the panel (33RT 3993-3996) and the alternates (34RT 4200-4201), the jurors and eight alternate jurors were sworn, and the second guilt phase trial commenced (35RT 4228).

B. Appellant Forfeited His Challenges To The Adequacy Of Voir Dire

Appellant challenges the trial court's refusal to use open-ended questions (AOB 126-137) and the procedure it used to question prospective jurors who were moved from the public section of the courtroom to the

vacated seats on the jury-box panels (AOB 137-149). The claims are forfeited and meritless.²⁶

Preliminarily, appellant's claim that the trial court inadequately examined prospective jurors is forfeited by his failure to object to the selection process or to challenge the jurors for cause or with a peremptory challenge. (*People v. Hart* (1999) 20 Cal.4th 546, 589.) This Court has repeatedly required that an objection be interposed in the trial court to preserve jury selection issues, including inadequate voir dire. (*People v. McKinnon* (2011) 52 Cal.4th 610, 640-641, citing, e.g., *People v. Foster* (2010) 50 Cal.4th 1301, 1324; *People v. Taylor, supra*, 48 Cal.4th at p. 638; *People v. Rogers* (2009) 46 Cal.4th 1136, 1149; *People v. Cook* (2007) 40 Cal.4th 1334, 1341-1342; see also *People v. Johnson* (1993) 6 Cal.4th 1, 23 ["Objections to the jury selection process must be made when the selection occurs"].)

Additionally, a defendant's failure to challenge jurors for cause or with a peremptory challenge precludes a claim that the trial court inadequately examined prospective jurors for bias and prejudice. It is a "long-held rule that a party objecting to errors in the jury selection process must exhaust all available peremptory challenges in order to preserve the objection for

²⁶ Although not a specific challenge, appellant seems to suggest the trial court was wrong not to utilize written questionnaires, and particularly wrong to "reject" appellant's proposed jury questionnaire. (See AOB 138; see also AOB 148 [noting the jurors "were not asked to complete a jury questionnaire"].) Appellant, however, told the court he had "no problem" with asking the questions orally instead of in writing. (8RT 776.) In any event, whether prospective jurors are required to complete a written questionnaire is a matter within the trial court's discretion. (See *People v. Box* (2000) 23 Cal.4th 1153, 1180 [trial court used a questionnaire proposed by the defense in formulating questions it asked during voir dire and provided the parties an opportunity to supplement questions].) Appellant does not claim—and has failed to show—that the trial court abused its discretion in opting to question the jurors orally.

appeal. [Citations.]” (*People v. Caro* (1988) 46 Cal.3d 1035, 1047, fn. 3; *People v. Hart, supra*, 20 Cal.4th at p. 589.)

Here, although the parties had submitted a proposed jury questionnaire before the case was transferred to Judge Brown for trial, Judge Brown indicated she would not use written questionnaires. Instead, Judge Brown indicated she would ask all questions orally, and would entertain any relevant questions proposed by the parties. (5RT 671; 8RT 776.) Appellant made no objection, and indicated, “I have no problem with that.” (8RT 776.) Appellant submitted 50 written questions, which the court reviewed one-by-one at a pretrial hearing. (9RT 791.) The court explained at the outset, “[C]ertain questions I’m going to have to say no to; but as to a number of these questions, I am going to rephrase them so that they are neutral, and then the court will ask them.” (9RT 791.) The court said it would not ask 12 of appellant’s proposed questions because they were either inappropriate or were duplicative of the court’s own questions. (See, e.g., 2RT 792, 795-797, 814-819, 821, 823.)²⁷ The court also indicated it would rephrase eight of the other proposed questions to make them more neutral and less open-ended. (See, e.g., 9RT 792-794, 811-815, 821-822.) The court further indicated that after the court had posed these questions to the prospective jurors, it would give the parties “the opportunity to phrase any additional questions that you want to ask as follow up based on their answers.” (See, e.g., 11RT 1118.) Appellant did not object to the court only asking questions going to “cause” in compliance with Proposition 115, or to the court’s practice of rephrasing the questions to avoid open-ended questions.

²⁷ The specific questions that appellant proposed and the court’s discussions of each are recounted in detail in the preceding section.

During jury selection, the court explained to the first panel of prospective jurors, “[W]hen we get panel two in here, I will start asking the questions that I talked about. I have my own questions that I ask you regarding your qualifications to serve as fair and impartial jurors in this case.” Concerning the so-called “short cut” procedure to which appellant now objects, the court stated:

I have questions which I will ask on behalf of the prosecution, as well as the defendant. It is a long series of questions, and that’s one of the reasons why I’m putting this off until we get another panel in here so I don’t have to do it twice.

After I finish all these questions, and we’ve gotten all of your answers - - and I want everyone to listen very carefully to the questions. And those of you who are not seated up here, I want you to make a written note of any answers that would differ so that when you’re called to be seated up here, I’ll say to you “would your answers differ in any way?” You can look at your written note and say this answer would differ and this answer would differ, if that is the case. . . . I do need to get this other panel here so we don’t have to repeat this long series of questions twice.

(10RT 929-930.) Appellant did not object to the court’s procedure. Nor did appellant object when the trial court gave similar instructions to subsequent panels, or when the court actually employed the procedure during voir dire. (See 10RT 930, 966; 12RT 1219; 13RT 1378-1379.) At the conclusion of the court’s voir dire, appellant also did not ask the court to make any further inquiries.

When the court used a similar process at appellant’s second guilt phase trial, appellant again made no objection.²⁸ (See 30RT 3392-3442 [discussing the proposed questions from the jury questionnaires], 3419

²⁸ Appellant did object once to a question proposed by the prosecution, but he did not object to the trial court’s voir dire procedures. (See 30RT 3443-3444.)

[trial court noting that it did not want to use open-ended questions such as “what kind of organizations to you belong to” because “it could take hours to answer to questions like that”], 3419 [trial court explaining, “My questions have to be very carefully phrased and going to cause”]; 31RT 3501-3502 [instructing prospective panelists in the public section of the courtroom to listen carefully to the questions and be prepared to state how any of their answers would differ].) Consistent with the first guilt phase trial, appellant did not object to the voir dire procedure or the nature of the questions, and when the court finished questioning the prospective jurors and alternates, appellant did not request additional voir dire. (See, e.g., 32RT 3790, 3795.)

Because appellant did not object to the challenged aspects of the trial court’s voir dire procedure—namely the predominant use of closed-end questions and the “would-your-answers-differ” questioning of replacement panelists—appellant has forfeited his right to raise the claim on appeal. (See *People v. Ramos* (2004) 34 Cal.4th 494, 515.) Moreover, by stipulating to the excusal of several jurors for cause based on their answers to the court’s questions (see, e.g., 10RT 936; 12RT 1210-1213, 1247, 1263-1264; 13RT 1318, 1328-1329, 1399, 1422-1424; 14RT 1512-1513; 31RT 3616-3617), appellant has forfeited his claim that the wording of court’s questions was inherently incapable of revealing that a prospective juror was unqualified. (See *People v. McKinnon*, *supra*, 52 Cal.4th at p. 637 [by failing to object, and by stipulating to excusals for cause based on prospective jurors’ answers to written questions, capital defendant forfeited claim that the wording of the jury questionnaires was incapable of revealing that a prospective juror was unqualified].)

C. The Trial Court Conducted An Adequate Voir Dire

Assuming appellant may raise his complaints about the adequacy of voir dire despite his failure to object, he is not entitled to reversal.

The right to voir dire the jury is not constitutional, but is a means to achieve the end of an impartial jury. (*People v. Chatman* (2006) 38 Cal.4th 344, 536; *People v. Robinson* (2005) 37 Cal.4th 592, 613.) The goal is to find 12 fair-minded jurors who will impartially evaluate the case. (*People v. Hoyos* (2007) 41 Cal.4th 872, 907, fn. 19.) Without an adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. (*People v. Bolden* (2002) 29 Cal.4th 515, 538.) There is no constitutional right to any particular manner of conducting the voir dire and selecting a jury so long as such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries are not transgressed. (*People v. Robinson, supra*, 37 Cal.4th at p. 613.) Accordingly, the trial court has broad discretion in assessing juror qualifications for cause (*Uttecht v. Brown* (2007) 551 U.S. 1, 20 [127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014]; *People v. Roldan* (2005) 35 Cal.4th 646, 696; *People v. Weaver* (2001) 26 Cal.4th 876, 910), and at the time of appellant's trial, "cause" was the court's only concern (*Tapia v. Superior Court, supra*, 53 Cal.3d at pp. 286-287, citing Prop. 115, § 7).

This Court also has recognized that the trial court is in the best position to assess the amount of voir dire required to ferret out latent prejudice and to judge the responses. (*People v. Robinson, supra*, 37 Cal.4th at p. 617.) The trial court is in the unique position to assess demeanor, tone, and credibility firsthand, and there are factors of critical importance in determining the attitude and qualifications of potential jurors. (*Uttecht v. Brown, supra*, 551 U.S. at p. 9; *People v. DePriest* (2007) 42 Cal.4th 1, 21.)

Accordingly, the trial court is given wide latitude to determine how to conduct the voir dire (*Mu'Min v. Virginia* (1991) 500 U.S. 415, 424 [111 S.Ct. 1899, 114 L.Ed.2d 493]; *People v. Tafoya* (2007) 42 Cal.4th 147, 168), and the court's exercise of discretion in conducting voir dire is entitled to "considerable deference" on appeal (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 189 [101 S.Ct. 1629, 68 L.Ed.2d 22]; *People v. DePriest*, *supra*, 42 Cal.4th at pp. 20-21; *People v. Ramos* (1997) 15 Cal.4th 1133, 1157; *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1313). The failure to ask specific questions is reversed only for abuse of discretion, which is found if the questioning as a whole is not reasonably sufficient to test the jury for bias or partiality. (*People v. Cardenas* (1997) 53 Cal.App.4th 240, 247; *People v. Chaney* (1991) 234 Cal.App.3d 853, 861, citing *United States v. Jones* (9th Cir. 1983) 722 F.2d 528, 529; *United States v. Baldwin* (9th Cir. 1979) 607 F.2d 1295, 1297.) Finally, "Unless the voir dire conducted by the 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. [Citation]." (*People v. Holt*, *supra*, 15 Cal.4th at p. 661.)

Appellant has failed to make the requisite showing. Even if his claim is cognizable, appellant stipulated to excusing several jurors for cause based solely on the court's questioning. (See, e.g., 10RT 936; 12RT 1210-1213, 1247, 1263-1264; 13RT 1318, 1328-1329, 1399, 1422-1424; 14RT 1512-1513; 31RT 3616-3617.) Therefore, appellant cannot persuasively claim that the voir dire was inherently incapable of revealing that a prospective juror was unqualified. (See *People v. McKinnon*, *supra*, 52 Cal.4th at p. 637.) Furthermore, appellant did not use all his peremptories against prospective jurors. "The failure to exhaust peremptory challenges is 'a strong indication "that the jurors were fair, and that the defense itself so concluded."'" (*People v. Robinson*, *supra*, 37 Cal.4th at p. 619, citation

omitted.) Here, appellant makes no claim that any of the chosen jurors were actually biased against him. “A party’s failure to exercise available peremptory challenges indicates relative satisfaction with the unchallenged jurors. Having so indicated in this case, defendant cannot reasonably claim error.” (*People v. Hart, supra*, 20 Cal.4th at p. 589, citing *People v. Morris* (1991) 53 Cal.3d 152, 185.)

Regardless, the trial court’s extensive questioning of the prospective jurors, both individually and collectively, far exceeded the legal minima. Trial judges are advised to follow closely the language and formulae for voir dire recommended by the Judicial Council to ensure that all appropriate areas of inquiry are covered in an appropriate manner. (*People v. Bolden, supra*, 29 Cal.4th at p. 538.) Standard 4.30 of the California Standards of Judicial Administration applies in all criminal cases and suggests, “The trial judge’s examination of prospective jurors in criminal cases should include the areas of inquiry listed below and any other matters affecting their qualifications to serve as jurors in the case.” The enumerated topics include the following: physical and time constraints affecting prospective jury service; bias, prejudice, and beliefs affecting jury service; juror acquaintance with the defendant, defense counsel, the prosecutor, and prospective witnesses; prior knowledge of the case; financial or personal interest in the outcome of the case; prior jury service; criminal victimization of a prospective juror or a person in a significant personal relationship with the prospective juror; and criminal investigation of a prospective juror or a person in a significant personal relationship with the prospective juror. (Cal. Stds. Jud. Admin., § 4.30(b).)

Here, the trial court queried the prospective jurors on all these topics and more. The court’s numerous non-biographical, non-death-qualifying questions included questions about the jurors’ experiences with attorneys (11RT 967-970), contacts with judges, prosecutors, prosecutorial agencies,

or court personnel (11RT 970-971, 1041-1042; 12RT 1146-1147), familiarity with appellant, the witnesses, or court personnel (11RT 967, 974-975; 12RT 1159-1161), relationships with anyone employed by the LASD, LAPD, or the Compton Police Department (11RT 975-983), prior knowledge of the case (11RT 983, 1091), knowledge of the areas where the crimes occurred (11RT 1093-1098), administration of justice experience (11RT 983-1000, 1008-1012), whether they had witnessed or been the victim of a crime (11RT 1012-1041), whether there was any reason they would prefer not to be a juror in the case (11RT 1055-1059), affiliations with organizations opposing the death penalty (11RT 1070), affiliations with organizations related to crime prevention (12RT 1142), affiliations with any victim's rights organizations (12RT 1142), involvement in the "MAGIC" organization or a neighborhood watch (12RT 1142-1144), affiliations with organizations that promoted a specific law (12RT 1148), any other affiliations that might hinder their ability to be fair and impartial (12RT 1138), gun possession and ownership (12RT 1149-1156), any medical, legal, law enforcement, psychological, or psychiatric training (11RT 1098-1107), military experience (11RT 1099, 1106), pretrial publicity (11RT 1092), ability to follow the court's admonishments not to discuss the case (11RT 1093), views on the death penalty (11RT 1070-1072), knowledge, training, or education about street gangs, and any experiences with gangs or gang members (11RT 1075-1088), whether they could speak Spanish or Swahili (11RT 1108; 12RT 1135), potential media influence concerning gangs (12RT 1144-1147), bias for or against law enforcement officers (11RT 1061), bias related to appellant exercising his right to represent himself (11RT 1088-1091), whether they could give both sides a fair and impartial trial (11RT 1062), whether they could base their decisions solely on the evidence and the law (11RT 1092), whether they could follow the law (11RT 1062-1063; 12RT 1157-1158), any physical conditions or other

matters that might affect their ability to serve on the jury (12RT 1157, 1159), biases or strong feelings or beliefs about gangs, victims of Mexican or Latin decent, or “Black on Black crime” (12RT 1158). As the hundreds of pages of voir dire transcripts also show, the trial court made numerous further inquiries on these concepts whenever necessary.

The court also repeatedly instructed and questioned the prospective jurors on the burden of proof, the presumption of innocence, what constituted “evidence,” and appellant’s right to represent himself and his rights not to testify or to put on a defense. (See, e.g., 11RT 1067-1070, 1089-1091.) Where concerns arose about whether a juror could understand and apply the basic legal concepts, the court explained the concepts in further detail and made sure each juror would apply these basic legal concepts in appellant’s case. (See, e.g., 11RT 1067-1070.) As noted, numerous prospective jurors and alternates were excused by stipulation at both trials based on their answers to the trial court’s voir dire. (See, e.g., 10RT 936; 12RT 1210-1213, 1247, 1263-1264; 13RT 1318, 1328-1329, 1399, 1422-1424; 14RT 1512-1513; 31RT 3616-3617.)

That many—but not all—of the court’s questions called for a “yes or no” answer, or ended by focusing on the juror’s ability to be fair and impartial, does not render the extensive voir dire “inadequate.” Contrary to appellant’s suggestion, the trial court was under no obligation to pose the numerous questions in an “open-ended” format. (See AOB 126-132.) As appellant acknowledges, there is no prohibition on closed-ended and leading questions on voir dire. (AOB 132.) More to the point, as the high court has made clear, there is no requirement that a trial court ask *any* “content questions” during voir dire. “The Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.” (*Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct. 2222, 119 L.Ed.2d 492], quoted in *People v. Box*, *supra*, 23 Cal.4th at p. 1179.) The

Court has “stressed the wide discretion granted to the trial court in conducting voir dire in . . . areas of inquiry that might tend to show juror bias.” (*Mu’Min v. Virginia*, *supra*, 500 U.S. at p. 427 [trial court is not required to ask content-based questions regarding pretrial publicity]; see also *People v. Taylor*, *supra*, 5 Cal.App.4th at p. 1313.) 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*, *supra*, at pp. 424, 425; see *People v. Cleveland* (2004) 32 Cal.4th 704, 737.)

In this case, numerous “content” issues were, in fact, explored—especially during the frequent follow-up questioning and bench conferences. Nonetheless, the trial court aptly noted before jury selection began that it had a very long list of questions to ask, and that voir dire would take far too long if all the questions were open ended. Moreover, the trial court noted that certain proposed questions, if left open-ended, would not only cause delay, but would be irrelevant to “cause.” (See, e.g., 9RT 817-818 [rejecting #29 & #30, which asked the prospective jurors to describe what radio stations they listened to, and to name the TV channels, radio stations, newspapers, and magazine titles that they relied on for news].)

Nor did the trial court abuse its discretion in posing some questions, including death-qualification questions, individually to some jurors and collectively to others. Individual and sequestered voir dire of prospective jurors in capital cases is not required. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1250; *People v. McKinnon*, *supra*, 52 Cal.4th at pp. 632-633; *People v. Gonzales* (2011) 51 Cal.4th 894, 956.)

Along these same lines, the court acted within its discretion in using what appellant calls a “short cut” procedure—in which the court asked newly-seated panelists who had filled a vacated seat whether their answers would differ in any way from the voir dire they had just heard. Appellant

points out that a new panelist could not have had *identical* answers to *all* answers they had just heard—especially when previous panelists had provided a variety of answers to the same questions. Appellant pounces on this mathematical impossibility to conclude that “as a matter of pure logic” (AOB 142), the new panelists’ answers were “meaningless” (AOB 142-143, 146-148). Appellant’s hypertechnical view of the voir dire process ignores both the context of the trial court’s questions, and the jurors’ commonsense. When properly viewed as part of the ongoing dialogue between the court and the prospective jurors, it was clear that the court was not simply asking the jurors to play a matching game, e.g., whether every one of their answers precisely matched every answer given by every previous panelist. Rather, as the record reflects, the point of the trial court’s inquiry was to discover from the newly-seated panelists if they had relevant information about the topics addressed that would influence their ability to be fair and impartial jurors. This would have become increasingly clear as the court’s questions, instructions, and answers were heard again and again over the course of the court’s extensive dialogue with prospective jurors.

Indeed, the trial court explained the broad purpose of the “would-your-answers-differ” procedure. For example, at one point the trial court explained, “By that, I mean, where somebody [in the jury-box panel] raises their hand and gives an explanation, if there’s something that you need to explain to the court regarding the answer to the specific question, I want you to write it down” (13RT 1379.) Appellant’s narrow view of this “short cut” procedure also ignores the rest of the court’s voir dire instructions. For example, the court stressed the seriousness of the case (e.g., 11RT 1051), the “extremely important” nature of voir dire (e.g., 11RT 1055), the importance for everyone to listen “very carefully” to each and every question (e.g., 10RT 930; 11RT 1052), the need for all jurors to follow the law and be fair and impartial (e.g., 12RT 1163), and the need for jurors to be “as candid as

you possibly can be in answering these questions” (12RT 1137). And, at the end of the questioning, the court essentially posed the most open-ended question possible, by inviting the prospective jurors to come forward with “any questions that have not been asked that you feel should have been asked.” (12RT 1162.)

Moreover, the record shows that the parties and the panelists clearly understood what the court was seeking, and that the court’s procedure was actually quite effective at producing relevant information. Indeed, when the trial court asked whether a new panelist’s answers would “differ in any way” from the voir dire they had heard, the panelists had no difficulty coming forward with relevant information. (See, e.g., 12RT 1235-1238 [trial court asking follow up questions when prospective juror Roehrs indicated he had answers to discuss regarding gangs and being a crime victim], 1249-1250 [trial court asking follow up questions when prospective juror Kane indicated he knew a Los Angeles County district attorney and a public defender], 1274-1275 [trial court asking follow up questions when prospective juror Goermt indicated his answers would differ about contact with law enforcement personnel and views on the death penalty]; 14RT 1501-1503 [trial court asking follow up questions when prospective alternate Webster indicated he had different answers to discuss regarding knowing lawyers and judges, witnessing crimes, being a crime victim, and concerning gun control], 1516-1518 [trial court asking follow up questions when prospective alternate Paparteys indicated he had several different answers to discuss], 1520-1525 [trial court asking follow up questions—and conducting additional voir dire without the rest of the jurors—when prospective alternate Vohs indicated he had different answers to discuss], 1529-1531 [trial court asking follow up questions when prospective alternate Rodriguez indicated he had different answers to discuss], 1532-

1534 [trial court asking follow up questions when prospective alternate Ranellucci indicated he had different answers to discuss].)

The newly-seated panelists at appellant's second guilt phase trial also clearly understood the court's instructions, and they too informed the court when they had relevant information that was "different" from the voir dire they had just heard. (See, e.g., 32RT 3815-3817 [trial court asking follow up questions when prospective juror Kidd indicated she had different answers to discuss regarding gang experience], 3830-3837 [trial court asking follow up questions when prospective juror Ballard indicated he had different answers to discuss], 3854-3855 [same for prospective juror Ortega], 3862-3863 [same prospective juror Vella], 3879-3882 [same for prospective juror Ward]; 33RT 3921 [same for prospective alternate juror Roberts], 3955-3961 [same for prospective alternate juror Cormier], 3966-3970 [same for prospective alternate juror Raygoza], 3984-3986 [same for prospective alternate juror Don], 3990-3991 [same for prospective alternate juror Ham], 4029-4031 [same for prospective alternate juror Allen], 4035-4037 [same for prospective alternate juror Spann]; 34RT 4062-4065 [same for prospective alternate juror Olsen], 4083-4085 [trial court asking follow up questions when prospective alternate juror Pierce indicated he had different answers concerning imposition of the death penalty], 4111-4114 [trial court asking follow up questions when prospective alternate juror Esquivel-Larios indicated he had different answers to discuss], 4120-4122 [same for prospective alternate juror Teng], 4151-4158 [same for prospective alternate juror Lamme], 4162-4169 [same for prospective alternate juror Oglesby], 4171-4174 [same for prospective alternate juror Chapman], 4184-4186 [holding a bench conference with prospective alternate juror Lesevich when he indicated he had additional comments], 4195-4198 [asking follow up questions when prospective alternate juror Orpilla indicated he had different answers to discuss].)

Thus, when viewed as a whole, the voir dire process was far more than a perfunctory “yes or no” affair, as appellant would suggest. The trial court personally engaged in days of intensive, detailed voir dire with the prospective jurors. The court orally posed hundreds of questions to the prospective jurors and alternates—individually, collectively, and in small groups. The trial court asked dozens of follow up questions, asked the jurors to “elaborate” when appropriate (e.g., 34RT 4163-4164), and sought repeated assurances from the prospective jurors that they could be fair and impartial. When potentially sensitive matters called for further inquiry, the court inquired by way of confidential bench conferences. (See, e.g., 10RT 934 [bench conference with prospective juror Estrada].) For all routine voir dire, the court conducted the questioning in open court, in conformity with Proposition 115. The answers to the court’s voir dire questions resulted in several for-cause excusals based on stipulation. Appellant indicated he was “satisfied” with the questions asked. With the exception of proposed follow-up questions concerning “taggers” versus “gang members,” appellant did not feel the need to propose any additional questions, despite being invited to do so. (See, e.g., 11RT 1118; see also, e.g., 32RT 3790 [asking appellant at second guilt phase voir dire, “[A]re there any other questions, Mr. Bankston, that you want the court to ask?”], 3795 [same].)

The extensive, days-long voir dire was adequate, and balanced appellant’s right to an impartial jury against the trial court’s duty to restrict voir dire within reasonable bounds to expedite the trial. (*People v. Avila* (2006) 38 Cal.4th 491, 536.) By limiting the amount of open-ended questioning—and by asking appropriate follow-up questions whenever an answer prompted further inquiry—the trial court placed “reasonable limits” on voir dire questioning, which was within the “judge’s sound discretion.” (Code Civ. Proc., § 222.5; see also § 1044 [trial judge has duty to control all

trial proceedings “with a view to the expeditious and effective ascertainment of the truth regarding the matters involved”].)

Finally, there is no indication or allegation that any prospective juror was unaware of, or unable to apply, the concepts of reasonable doubt, burden of proof, and the presumption of innocence. A court need not question the jury on legal principles unless they are so controversial that they are likely to invoke strong resistance to their application. (See *People v. Johnson* (1989) 47 Cal.3d 1194, 1224-1225.)

Even if the voir dire examination was flawed, appellant has failed to demonstrate any reversible error. As noted, voir dire is not a constitutional right, but a means to achieve the end of an impartial jury. (*People v. Chatman, supra*, 38 Cal.4th at p. 536; *People v. Robinson, supra*, 37 Cal.4th at p. 613.) Reversal of the judgment is required only if the voir dire was “so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair.” (*People v. Holt, supra*, 15 Cal.4th at p. 661; see also *Robinson, supra*, at p. 621; *People v. Bolden, supra*, 29 Cal.4th at p. 538.) In the present case, the court’s voir dire interviews covered by all applicable legal principles. The trial court exercised its discretion in conducting voir dire in a manner that did not cause a miscarriage of justice. Nothing in the record establishes that the impaneled jury was not fair and impartial, or that the jury-selection process prejudiced appellant in any way. Appellant’s claims fail to establish error, let alone reversible error. (See, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 353-354 [any error in restricting voir dire of prospective death penalty jurors was harmless; rulings were minimally restrictive, defense had several peremptory challenges remaining when it accepted jury, defendant did not express dissatisfaction with jury as sworn, and when jury was finally selected, defendant did not claim that any juror was incompetent, or was not impartial].) Accordingly, his contentions should be rejected.

V. APPELLANT FORFEITED HIS CLAIM THAT THE TRIAL COURT RESTRICTED HIS USE OF PEREMPTORY CHALLENGES WHEN, DURING SELECTION OF THE ALTERNATES, A MEMBER OF THE ACCEPTED BUT UNSWORN JURY PANEL NEEDED TO BE REPLACED

Appellant contends, for the first time that the trial court erred by prohibiting him from using his peremptory challenges for the entire panel of 12 prospective jurors when, during selection of the alternates, a member of the accepted but unsworn jury panel needed to be replaced. (AOB 150-156.) He contends that the selection procedure violated his constitutional rights to due process and a fair and impartial jury, and that reversal is required. Under this Court's settled authority, however, appellant forfeited this claim by not objecting to the procedure at trial.

A. Relevant Trial Court Proceedings

The parties accepted a panel of 12 jurors for the first guilt phase trial on the afternoon of May 11, 1994. (12RT 1209, 1283.) The panel was not sworn, and the trial court turned to the selection of alternates. (12RT 1283-1299.) When court reconvened the following morning to continue the selection of alternates, two prospective alternates were excused by stipulation due to hardships. (13RT 1306, 1313-1314.) The court then read a note from one of the regular jurors, Mr. Baldwin, indicating he had prepaid airline tickets for a vacation in July. When asked by the court, appellant said he would stipulate to excuse the juror. (13RT 1313-1314.)

Before the prosecutor joined in the stipulation, he stated at a bench conference:

Your Honor, that's fine with me as long as we get consent of Mr. Bankston because I think, in fact, with the initial panel picked and we're now in the process of alternates, you have a right, of course, to have the initial 12 that we both chose. Because of the situation with Mr. Baldwin, Mr. Bankston, do you agree that he can be excused pursuant to a stipulation and

that we can now substitute and actually we do not have the initial 12 that will hear this case. ¶ Is that acceptable to you, Mr. Bankston?

(13RT 1315.) Appellant said, "Yes," and then asked, "[H]ow are we going to substitute this? Just the regular way?" (13RT 1315.)

The trial court then explained that it intended fill Mr. Baldwin's seat, No. 5, with the following procedure:

Here's the way we do it: Since he's one of the original 12 that you agreed to hear the case, we'll just vacate his seat, then I'll fill [the seat] with the next individual who will be No. 13 as soon as I fill No. 13. And then what I do is - - is open up the - - the process, the peremptory challenge process until both of you agree that seat . . . No.5 is acceptable to both sides. All of the others have been accepted by both sides.

(13RT 1316.) Appellant said, "Okay. ¶ So [alternate jury seat] 13 will be immediately filled, then [they] go to [seat] 5, right?" The court confirmed this would be the process, and that it would then "open up the peremptory challenge to that seat only until both of you are satisfied with who you have." (13RT 1316.) Neither party objected to the court limiting the peremptory challenges "to that seat only." (13RT 1316.) The court then clarified that the prosecutor had 10 peremptory challenges remaining for jury seat No. 5, and that appellant had 14. (13RT 1316-1317.)

The prosecutor asked one question to clarify: "Because it's now open again, we now have the remaining peremptories that we do, are we allowed to perempt [sic] any of the other individuals other than No. 5?" (13RT 1317.) The court answered, "No." When appellant asked, "[w]hat about [alternate juror seat] 16?" the trial court answered, "Oh, yes," and explained that it was only talking about selection "of the first 12." Appellant acknowledged, "Oh, the first 12, okay. All right." When the court added, "Just this one seat because both sides accepted everybody else," the prosecutor and appellant both said, "Okay." (13RT 1317.)

The parties then stipulated to excuse Mr. Baldwin from seat No. 5. (13RT 1318.) After additional voir dire and challenges for cause (13RT 1318-1329), seat No. 5 was filled from the pool of prospective alternates, and the parties began to exercise peremptory challenges as to that seat (13RT 1329). Appellant used seven of his fourteen remaining peremptory challenges, and the prosecution used three. (13RT 1329-1334.) The parties then accepted the panel of 12 jurors (13RT 1335), and the jury was sworn (13RT 1335-1337). At no time did appellant object to the procedure to fill seat No. 5, or to the final composition of the jury.

B. Appellant Forfeited His Complaint About The Selection Process By Failing To Object

Appellant now argues that the trial court should have allowed him to use his remaining peremptory challenges on all of the regular 12 jurors, rather than limiting the peremptory challenges to the vacated seat No. 5. Appellant contends that, upon the excuse of prospective juror Baldwin during the selection of the alternates, the court had the authority under *In re Mendes* (1979) 23 Cal.3d 847, and *People v. Armendariz* (1984) 37 Cal.3d 573, to allow appellant to exercise any of his remaining 14 peremptory challenges against any of the already seated jurors in the accepted—but unsworn—panel. Failure to do so, he argues, is cause for reversal. (AOB 150-156.)

In *Mendes, supra*, 23 Cal.3d 847, this Court held that for double jeopardy purposes, impanelment of a jury is not complete until the alternate jurors, if they are to be used, are sworn. (*Id.* at p. 853.) This Court further held that in a situation somewhat similar to this one, the discharge of a regular juror before empanelment of the jury has been completed—with the swearing-in of both the jury and the alternate jurors—does not amount to discharge of the jury for double jeopardy purposes. (*Id.* at pp. 852-856.)

Thus, under *Mendes*, when the trial court discharges a regular juror prior to the selection and swearing in of any alternate jurors, the court possesses authority to reopen jury selection completely to allow each of the parties to exercise any peremptory challenges remaining against any of the remaining regular jurors already sworn. (*Id.* at p. 855.) In reaching this conclusion, this Court observed that because “composition of the 12-member panel [would] . . . change,” there could be a “valid reason” for the trial court to allow the parties to exercise their remaining peremptory challenges against remaining regular jurors already sworn in order to “satisfy themselves to the best of their ability with the final composition of the jury.” (*Ibid.*)

In *Armendariz*, *supra*, 37 Cal.3d 573, this Court relied on *Mendes* to reverse a conviction where a trial court denied a defendant’s request to exercise some of his 22 unused peremptory challenges against already seated jurors after two jurors were excused prior to the swearing of five alternates. Applying the abuse-of-discretion standard (*id.* at p. 581), this Court found that the trial court in that case was unaware of its authority to reopen jury selection. Had it been aware of that authority, this Court reasoned, the trial court would have been required to grant the defendant’s request (*id.* at pp. 581-583.) On that ground, this Court reversed the judgment and remanded the matter for a new trial. (*Ibid.*)²⁹

Thereafter, in *Caro*, this Court considered a similar claim to appellant’s, but rejected the argument because the defendant did not object to the trial court’s procedure or request that the court reopen jury selection.

²⁹ Since the time of appellant’s trial, the law has changed to eliminate a trial court’s authority to reopen jury selection once the regular jury is sworn. (See *People v. Cottle* (2006) 39 Cal.4th 246, 254-255 [discussing the repeal of former section 1068].) In this case, however, there is no dispute that jury selection was not complete, because the jury panel, although accepted by the parties, had not been sworn in.

Because the defendant in *Caro* had not asked the trial court to reopen jury selection, this Court concluded he could not complain on appeal of the trial court's failure to do so. (*People v. Caro*, *supra*, 46 Cal.3d at pp. 1046-1047.) This Court reached the same conclusion in *People v. Griffin* (2004) 33 Cal.4th 536, 564-567. Therein, this Court applied the principles set forth above in *Mendes*, *Armendariz*, and *Caro* to reject a defendant's claim that the trial court erred by failing to reopen jury selection completely in order to allow him to exercise his remaining peremptory challenges against the remaining regular jurors already sworn, following the discharge of Juror E.L. and prior to the selection and swearing in of the alternate jurors. (*Id.* at pp. 566-567.) "As in *Caro*," this Court explained, "defendant did not seek any such action from the trial court." (*Id.* at p. 566.)

Applying these principles, respondent agrees with appellant that the trial court erred under *Mendes* and *Armendariz* by telling the parties that because they had accepted the jury panel they could use their remaining peremptory challenges only against those new prospective jurors who were placed in vacated seat No. 5. Under those cases, selection and swearing-in of both the jury and the alternate jurors had not taken place. Thus, although the parties had accepted a panel of 12 jurors and had moved on to the selection of alternates, the trial court erred following the discharge of Mr. Baldwin not reopening jury selection completely to allow peremptory challenges against any of the remaining regular jurors.

However, this Court's holding in *Caro* and *Griffin* preclude relief for such error, because appellant did not object to the court's procedure or request to reopen jury selection completely to allow peremptory challenges against any of the remaining regular jurors.

This case is very similar to *Caro*. In *Caro*, as in the instant case, one of the regular jurors was excused before the alternates were selected. The trial court proposed to select three alternates and to have one of them

replace the excused juror. Counsel agreed to the procedure. (*People v. Caro, supra*, 46 Cal.3d at pp. 1046-1047.) On appeal, the defendant complained that the trial court had not reopened jury selection completely. This Court acknowledged that the defendant “would have a claim for reversal under *Armendariz*,” but for his failure to object. (*Id.* at p. 1047.) This Court noted that there was “no indication that defendant was in any way dissatisfied with the panel as it was constituted,” and moreover, “defense counsel stipulated to the procedure.” (*Ibid.*) Furthermore, as in *Caro*, the trial court did not have a sua sponte duty to reopen jury selection in the manner that appellant now suggests. (See *People v. Griffin, supra*, 33 Cal.4th at p. 567 [discussing and following *Caro* to reject a claim similar to *Caro*].) As in *Caro* and *Griffin*, appellant did not request such action, and the trial court was under no obligation to act on its own initiative. (See also *People v. Johnson, supra*, 6 Cal.4th at p. 23 [rejecting a jury selection claim in light of *Caro*, noting, “The objection to the court’s allocation of peremptory challenges comes too late. Objections to the jury selection process must be made when the selection occurs”].)

As in *Caro*, appellant apparently agreed to the procedure—or at least did not object to it—when it was explained at the bench conference. (13RT 1316-1317.) When the trial court discussed the procedure, appellant repeatedly said, “okay” and “alright.” (13RT 1317.) Moreover, appellant failed to object at any point during the jury selection that followed. Under *Caro* and *Griffin*, therefore, the claim is not cognizable.

Appellant concedes that he “did not expressly object” to the procedure, yet he fails to acknowledge—let alone confront—this Court’s decisions in *Caro* and *Griffin*. (AOB 155.) His argument reveals why. Despite appellant’s concession that he did not object, he seems to make a half-hearted attempt to avoid the forfeiture doctrine by asserting—incorrectly—that the “prosecutor did question the court’s approach,” and

that his objection would have been futile. (AOB 155.) But that is not what happened, and the assertion is immaterial anyway. In fact, the prosecutor asked a clarifying question about the procedure—he never challenged, or “questioned” the validity of the procedure itself. (See 13RT 1317 [prosecutor stating, “Your Honor, just one question. Because it’s now open again, we now have the remaining peremptories that we do, are we allowed to perempt [*sic*] any of the other individuals other than No. 5?”].) When the court answered that question, both parties said, “Okay.” (13RT 1317.)

Appellant’s attempt to circumvent the forfeiture doctrine—by pointing to a question asked by the prosecutor—also finds no support in logic or law. First, this Court would need to find that the prosecutor’s clarifying question about the scope of the selection process was actually an unspecified objection. Next, this Court would need to find that the prosecutor’s unspecified “objection” was somehow sufficient to relieve appellant from his obligation to make his own timely and specific objection and to pursue it to a final ruling. But this Court need not engage in such legal acrobatics. Had appellant asked the trial court to reopen jury selection fully and been refused, or had appellant objected to the court’s procedure at all, he would have a cognizable claim for error under *Armendariz*. However, no such objection or request took place, and appellant never voiced any dissatisfaction with the final panel. Thus, as in *Caro* and *Griffin*, appellant’s current complaint about the validity of the jury selection procedure clearly comes too late. (*People v. Caro, supra*, 46 Cal.3d at p. 1047 [finding claim was forfeited because there was “no indication that defendant was in any way dissatisfied with the panel as it was constituted,” moreover, “defense counsel stipulated to the procedure”].) Appellant’s claim that he did not need to object because doing so would have been “futile” (see AOB 155-156) does not render the claim cognizable. Contrary to appellant’s suggestion, there is no “futility” exception to the forfeiture

stated in *Caro*. Appellant's belated objections to any statutory violations of the jury selection process were therefore forfeited at trial.

VI. THE TRIAL COURT DID NOT WRONGLY RESTRICT APPELLANT FROM USING PEREMPTORY CHALLENGES AGAINST ALTERNATE JURORS; APPELLANT'S CLAIM TO THE CONTRARY IS FORFEITED AND MERITLESS

The trial court ultimately decided to have seven alternate jurors, although it had initially intended to use more. The court had given each side 12 peremptory challenges for the alternates, and appellant had used seven challenges by the time the trial court indicated it would proceed with seven alternates. Both parties accepted the panel of seven alternates, and shortly after they were sworn, both parties expressly announced they were "satisfied with the seven alternates that [they had] accepted." (14RT 1573.) Appellant now contends the trial court wrongly limited his right to exercise his peremptory challenges, and that the error is reversible. (AOB 157-164.) Appellant forfeited the claim at trial by failing to object, by failing to exhaust his available peremptory challenges, and by expressly agreeing that he was "satisfied" with the seven alternates who were selected and sworn. In any event, reversal is not warranted. Appellant was given all the peremptory challenges he was entitled to, and he does not suggest that any juror who actually served on his case was not impartial.

A. Relevant Law And Procedure Concerning The Selection Of Alternate Jurors

It is a matter for the trial court's discretion if any, and how many, alternates will be chosen. (*People v. Armendariz, supra*, 37 Cal.3d at p. 581.) As section 1089 states in part:

Whenever, in the opinion of a judge . . . about to try a defendant against whom has been filed any indictment or information or complaint, the trial is likely to be a protracted one . . . the court

may direct the calling of one or more additional jurors, in its discretion, to be known as “alternate jurors.”

(*Ibid.*) When a trial court does exercise its discretion to use alternate jurors in a single-defendant prosecution, each side “shall each be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called.” (§ 1089.)

In this case, the trial court exercised its discretion to use alternate jurors, and decided to proceed with seven alternates, although the court’s first estimates were higher. Before selection of the alternates began, the court estimated, “I’m going to have at least ten alternates in this case so that if we run into a problem with vacation.” (11RT 943.) After the parties accepted the regular jury panel, the trial court reminded the parties that it had decided to use alternates jurors, and that “I’ve now decided to make it 12.” (12RT 1283.) Voir dire of the alternates then commenced. (12RT 1283-1299.) After the prospective alternates went home for the day, the court indicated it had directed the clerk to “order up another panel of, hopefully, 80 tomorrow,” with the understanding that “[h]alf of those will be excused, I’m sure, because of their limited time constraints.” (12RT 1300.) The court indicated it would seat 12 prospective alternates in a group, and that each side would have 12 peremptory challenges to use against them “any way you want.” (13RT 1301-1302.) The court also instructed, “You challenge any particular seat any number of times until you’re satisfied with who is sitting in that seat, but you’re limited to a total of 12 challenges.” (12RT 1302.)

Before adjourning for the day, the trial court noted that it had said that 10, and then 12, alternates would be selected. The court observed, however, that there were only a few people left to replace any more excused candidates from the 12-person panel of prospective alternates. (12RT 1304.) Thus, to avoid additional lengthy voir dire, the court noted that if the parties

agreed to excuse three or fewer prospective alternates, it “would be happy to go with nine.” (12RT 1304-1305.) Appellant, however, indicated, “I already marked four that I know that I want to excuse.” (12RT 1305.) The trial court therefore said to “forget it,” and, “we’ll have to go through the whole [voir dire] exercise.” (12RT 1305.)

When court resumed the following day, two prospective alternates were excused by stipulation due to hardships (13RT 1306, 1313-1314), and prospective juror Baldwin was replaced as discussed in the preceding argument (13RT 1313-1334). The panel of 12 regular jurors was then sworn, and selection of the alternates resumed. (13RT 1335-1337, 1342.) After reading the charges, the trial court explained that the jury had been selected, and that 12 alternate jurors would be picked from those in the panel. (13RT 1341-1342.) The trial court then conducted additional voir dire of the prospective alternates, and several were excused by stipulation. (13RT 1341-1358, 1363-1367, 1372-1405.)

After appellant stipulated to excuse one prospective alternate, he asked the court, “[W]ould you consider maybe going with less alternates? Would this alleviate some of the problems we’re experiencing right now?” The court answered, “No, it would not.” (13RT 1405.) Voir dire continued for the rest of the day, and court adjourned for the weekend. (13RT 1405-1478.) Voir dire continued the following Monday, May 16, 1994. (14RT 1479-1546.)

After voir dire concluded, the parties began to exercise their peremptory challenges. (14RT 1546.) The court said it would order another panel of prospective alternates during the lunch hour. (14RT 1548.) By the time court recessed for lunch, appellant had exercised five peremptory challenges. (See 14RT 1546-1549.) When court resumed after lunch, however, the court reported to the parties that the jury room had no additional jurors to send. (14RT 1550.) The court explained, “So what

we're going to do is I'm just going to continue on with the peremptory challenges here and see what we have left of our people. And then if it's going to be necessary to have an additional panel, we'll do it. But we'll have to wait for the jury room to send them up to us. If we don't need to go through that process, then we'll simply proceed." (14RT 1550-1551.)

When the sworn jurors and prospective alternates entered the courtroom, the court reiterated what it had just told the parties. (14RT 1551.) The trial court also stated, "So what I think we'll do is to just proceed with the exercise of the peremptories as far as the alternates are - - are concerned, and let's see what we end up with." (14RT 1551.)

Appellant exercised two additional peremptory challenges (for a total of seven), and the prosecutor exercised one. (14RT 1551-1552.) At that point, with seven prospective alternates seated, the prosecutor stated, "The People accept the alternates." (14RT 1553.) Appellant asked for a sidebar, but the trial court said, "Wait a minute. I don't think that is necessary at this point. Do you have another peremptory you'd like to exercise?" (14RT 1553.) Appellant answered, "Your Honor, I accept the panel at this time." (14RT 1553.) The court said, "All right," and inquired of the alternates whether they were feeling healthy. (14RT 1553-1554.) When they answered in the affirmative, the trial court stated, "I think we'll chance it, ladies and gentlemen, and I will go with - - seven alternates." (14RT 1554.) Appellant did not object, did not request to use additional peremptory challenges, and did not express any dissatisfaction with the final panel of seven alternates. The alternates were then sworn and admonished. (14RT 1554-1556.)

The jury was excused, and the trial court and the prosecution addressed an unrelated matter. (14RT 1556-1557.) Afterward, the court asked appellant what he had wanted to discuss at a bench conference. (14RT 1557.) Appellant answered,

Precisely what happened here, saving the peremptories for the possible fourth panel to try to find out maybe if we did exercise them, were we going to go with less or not. I didn't know that at first until when I accepted the panel and then you made up your mind it seems to me to not call the fourth panel and then you decided to go with only seven when I was under the impression that we were going to go with twelve. That's why I saved five peremptories. But that was just about the size of it.

(14RT 1557.) The court answered, "All right. But both sides . . . had accepted the seven that we have. That's why I made the inquiry if everybody was feeling in good health and so forth because I believe that we can conclude this case with the seven alternates as long as they are acceptable to both sides. And I think that will be adequate." (14RT 1558.) The court further explained, "I haven't any idea how long it would take us to get another panel. If they can't send us a panel on a Monday at two o'clock in the afternoon, who knows if they have a panel on Wednesday." (14RT 1558.) "So," the court continued, "as long as we have twelve jurors that are acceptable to both sides and we have seven alternates here, I think that that is sufficient for trial." (14RT 1558.) Appellant answered, "Okay, your Honor." (14RT 1558.)

To make absolutely certain that appellant was satisfied with those who would be seated on his regular and alternate jury, the trial court revisited the issue of "saving peremptory challenges" after the afternoon recess. The court stated, "Mr. Bankston, since you made mention of saving five peremptory challenges, are you in truth and fact satisfied with the seven alternates that you accepted?" Appellant answered, "Yes, I'm satisfied." (14RT 1573.) Turning to the prosecution, the court asked, "You're satisfied as well . . . ?," and the prosecutor replied, "Yes, your Honor." (14RT 1573.) Trial commenced, during which two of the alternates were called upon to serve on the jury. (See 15RT 1688-1689; 25RT 3110-3114.)

B. Appellant Forfeited Any Claim Of Error, And The Trial Court Did Not Err By Deciding To Proceed—With The Parties’ Assent—With Seven Alternates

To preserve a claim of error as to an allegedly erroneous restriction on the use of peremptory challenges, a defendant must make a timely and specific objection at trial. (*People v. Bolden, supra*, 29 Cal.4th at pp. 539-540.) As this Court explained in *Bolden*, whatever the merits of defendant’s claim concerning the limitation of peremptory challenges may be, “defendant’s objection ‘comes too late’ because ‘[o]bjections to the jury selection process must be made when the selection occurs.’ (*People v. Johnson, supra*, 6 Cal.4th at p. 23.)” (*Id.* at p. 540.) As in *Bolden*, appellant’s objection comes too late. During the selection process, the trial court indicated that due to a shortage of prospective jurors, the original plan to seat 12 alternates might not come to pass. (See 14RT 1548, 1550.) The court explained the situation to the parties and the prospective jurors, and stated, “So what I think we’ll do is to just proceed with the exercise of the peremptories as far as the alternates are - - are concerned, and let’s see what we end up with.” (14RT 1551.)

Within moments, appellant exercised two additional peremptory challenges and the prosecutor exercised one. (14RT 1551-1552.) The prosecutor then stated, “[The] People accept the alternates.” (14RT 1553.) When the trial court asked if appellant wanted to exercise another peremptory challenge, he answered, “Your Honor, I accept the panel at this time.” (14RT 1553.) The court said, “All right,” and inquired of the alternates whether they were feeling healthy. (14RT 1553-1554.) When they answered in the affirmative, the trial court stated, “I think we’ll chance it, ladies and gentlemen, and I will go with - - seven alternates.” (14RT 1554.) Appellant did not object. The alternates were then sworn and admonished. (14RT 1554-1556.) Again, appellant did not object, request

any additional peremptory challenges, or express any dissatisfaction with the final panel of seven alternates.

Later that afternoon—after the seven alternates had been accepted, sworn, and admonished—appellant told the court he had been “saving the peremptories” for a possible fourth panel from the jury room. (14RT 1557.) Although appellant seems to believe this statement was sufficient to preserve his claim of reversible error (see AOB 164), he is mistaken. A party must make a timely and specific objection to the manner in which a trial court conducts jury selection or the matter is forfeited for appeal. (*People v. Mills* (2010) 48 Cal.4th 158, 170, citing *People v. Holt*, *supra*, 15 Cal.4th at pp. 656-657.) In this case, appellant never objected to what had occurred, or otherwise argued to the trial court that it had erred. He merely explained to the trial court his strategy and his understanding that the court was still going to use 12 alternates despite the shortage of candidates. But an after-the-fact sharing of one’s thought process does not amount an “objection” to any ruling or proceeding. Even if appellant’s neutral statement could be viewed as a complaint, appellant offered no specific grounds for a legal objection. And besides, when the trial court explained why it had proceeded with seven—after the parties’ acceptance of the panel and further inquiry into the health of the prospective alternates—appellant simply responded, “Okay, your Honor,” and then began discussing a different topic. (14RT 1558.) Even when the trial court—in an apparent abundance of caution—revisited the issue of appellant “saving” his peremptory challenges, appellant expressly confirmed that he was “satisfied” with the panel of seven (14RT 1573), and the matter was not discussed again. Thus, a fair reading of the record shows that appellant agreed to the selection of seven alternates after exercising seven peremptory challenges. What the record lacks, however,

is a “timely and specific objection” to the selection process. (See *People v. Bolden*, *supra*, 29 Cal.4th at pp. 539-540.)

The claim also is forfeited because of the “long-held rule that a party objecting to errors in the jury selection process must exhaust all available peremptory challenges in order to preserve the objection for appeal. [Citations.]” (*People v. Caro*, *supra*, 46 Cal.3d at p. 1047, fn. 3; *People v. Hart*, *supra*, 20 Cal.4th at p. 589.) Here, despite having five peremptory challenges left, appellant said he was satisfied with the panel of seven alternate jurors. (14RT 1553.) Even after the jury was sworn, appellant did not object (14RT 1558), and when asked, he assured the court he was satisfied with the panel of seven alternates (14RT 1573). Furthermore, appellant did not allege at trial—and does not allege on appeal—that he was dissatisfied with the panel as a whole or that any alternate juror was actually biased. Of course, it would be too late now to complain that an alternate juror was somehow unsatisfactory. (*Hart*, *supra*, at p. 589 [capital defendant could not complain on appeal that jury was comprised of persons unacceptable to him, where defendant did not use all peremptory challenges available to him, and acknowledged to court that he was satisfied with the jury that had been selected]; *People v. Danielson* (1992) 3 Cal.4th 691, 713-714; *People v. Johnson* (1992) 3 Cal.4th 1183, 1211; cf. *People v. Bittaker* (1989) 48 Cal.3d 1046, 1088.)

Appellant’s tries, but fails, to preserve the claim by relying on the exception to the rule stated in *People v. Box* (1984) 152 Cal.App.3d 461. In that murder case, the defendant was entitled to 26 challenges, but was given only 10 (of which he exercised nine). He did not use his last challenge because he needed at least 10 more to make a difference, and feared he might be stuck with a worse jury if he exercised his last challenge than by settling for the jury as currently constituted. (*Id.* at p. 465.)

The circumstances of *Box*, which is an exception to the general rule that a defendant must exhaust her peremptory challenges to preserve a claim for appeal (see *People v. Coleman, supra*, 46 Cal.3d at pp. 770-771, fn. 14), are markedly different from those here. In *Box*, the defendant was deprived of over 60 percent of the peremptory challenges to which he was legally entitled, and used nine of ten which had been allowed to him. Thus, as the *Box* court noted,

This situation should be contrasted with the case where the defense has several peremptory challenges remaining unexercised when the jury is accepted. In the latter situation a strong inference arises that the defense was truly satisfied with the 12 jurors in the box otherwise counsel would have continued to exercise the peremptory challenges in the hope of getting a better jury.

(*People v. Box, supra*, 152 Cal.App.3d at p. 465.) And unlike in *Box*, appellant offers no legally sufficient excuse for his failure to object or to exhaust his peremptory challenges. (See *People v. Morris, supra*, 53 Cal.3d at p. 184 [discussing and distinguishing *Box*].) Also, as in *Morris*, appellant “indicated no dissatisfaction with the jury that heard his case—a jury that included *none* of the persons he unsuccessfully sought to challenge for cause.” (*Ibid.*)

Thus, the claim of reversible error for limiting his peremptory challenges is not cognizable on appeal. (See *People v. Bolden, supra*, 29 Cal.4th at pp. 539-540; see also, e.g., *People v. Caro, supra*, 46 Cal.3d at p. 1035 [defendant, who failed to object at trial to jury selection procedure under which, after jury was sworn, court selected three alternates rather than two originally planned was not entitled to reversal based on alleged error in jury selection process; defendant did not allege he was dissatisfied with jury panel].)

In any event, reversal is not warranted. As noted in the preceding arguments, the process of jury selection is not a constitutional matter, but is

a means to achieve the end of an impartial jury. (*People v. Chatman, supra*, 38 Cal.4th at p. 536; *People v. Robinson, supra*, 37 Cal.4th at p. 613.) The trial court had discretion how many, if any, alternates would be used at appellant's trial (*People v. Armendariz, supra*, 37 Cal.3d at p. 581), and allotted peremptory challenges in compliance with state statute (§ 1089). Appellant did not allege at trial—and does not allege on appeal—that he was dissatisfied with the panel of alternates or that anyone of them was biased. He is therefore not entitled to reversal for any statutory error concerning the process of selecting alternates. (Cf. *People v. Crowe* (1973) 8 Cal.3d 815, 831-832 [no prejudicial error where, after defendant exercised six peremptory challenges, court mistakenly announced defendant had completed his peremptory challenges and swore jury; after recess, court announced its error but counsel declined the court's invitation to exercise additional challenges].)

Appellant was not deprived of any statutory right in any event. As section 1089 states in part, when a trial court elects to use alternate jurors in a single-defendant prosecution, the defendant and the prosecution “shall each be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called.” (§ 1089.) The trial court ultimately chose to use seven alternate jurors. Appellant was allotted 12 peremptory challenges, and exercised seven. Thus, at the end of the day, appellant received everything he was entitled to under the law.

That appellant later told the trial court that he had “saved” his remaining challenges in anticipation of additional voir dire does not mean the court prejudicially restricted his use of peremptory challenges. (See *People v. Morris, supra*, 53 Cal.3d at p. 185 [“[A] party's failure to exercise available peremptory challenges indicates relative satisfaction with the unchallenged jurors. Having so indicated in this case, defendant cannot reasonably claim error”].)

Regardless, appellant's decision was, as he expressly conceded to the trial court, a matter of trial tactics. (14RT 1557.) Requiring a defendant to exercise a peremptory challenge to excuse a prospective alternate juror whom he or she deems objectionable is not, as appellant suggests, a "Hobson's choice" that somehow deprives a defendant of his or her rights to due process and a fair trial. (See AOB 163, citing *People v. Box*, *supra*, 152 Cal.App.3d at p. 465.) A Hobson's choice, i.e., a "take it or leave it" decision, is distinct from a choice between or among limited options—such as occurs during the selection of every jury—and the United States Supreme Court has recognized as much in rejecting similar claims about having to "save" peremptory challenges. For example, in *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 307-317 [120 S.Ct. 774, 145 L.Ed.2d 792], during jury selection, a juror opined a pro-prosecution position but the trial court refused to dismiss the juror for cause. The defense used a peremptory challenge to excuse the juror, and then (unlike appellant) subsequently exhausted his remaining peremptory challenges. The Supreme Court found that because the defense excused the juror who was the subject of the disputed challenge for cause, no Sixth Amendment right to an impartial jury was violated. The high court flatly rejected the claim that the trial court's purported error in denying a challenge for cause compelled the defense to challenge the juror peremptorily, "thereby reducing his allotment of peremptory challenges by one." (*Martinez-Salazar*, *supra*, at p. 315.) The court reasoned, "A hard choice is not the same as no choice. [The defendant] . . . received and exercised 11 peremptory challenges. . . . That is all he is entitled to under the Rule." (*Ibid.*)

Appellant was also given all the peremptory challenges he was entitled to under the law. (§ 1089.) He chose to use some of them to excuse certain alternate jurors who were unacceptable to him, and chose not

to use additional peremptories, despite the court's willingness to let him do so. (14RT 1553.) He does not allege that any biased person served as an alternate or actually sat on the jury that heard the case. As such, "he cannot tenably assert any violation of his Fifth Amendment right to due process." (*Martinez-Salazar, supra*, 528 U.S. at p. 317.) Appellant's claim must therefore be rejected.

**VII. THE TRIAL COURT PROPERLY REMOVED FOR CAUSE
SEVERAL PROSPECTIVE JURORS WHO INDICATED THEY
WOULD NOT IMPOSE THE DEATH PENALTY**

Appellant contends the trial court erred under *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] and *Wainwright v. Witt, supra*, 469 U.S. 412, in removing for cause eight prospective jurors from appellant's second trial who indicated they were unable or unwilling to impose the death penalty because of their personal views against it. Appellant claims the excusals were made after inadequate questioning during voir dire, thereby and therefore violated his constitutional right to due process and a fair trial, and his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 165-189.) To the extent appellant raises any state or federal constitutional or statutory issue not squarely grounded in *Wainwright v. Witt*, those issues were forfeited and are subject to procedural default since appellant failed to raise them in the trial court. (See *People v. Hines, supra*, 15 Cal.4th at p. 1035; *People v. Holt, supra*, 15 Cal.4th at pp. 666-667; *People v. Alvarez* (1996) 14 Cal.4th 155, 186.) In any event, appellant's contentions are meritless as explained below.

A. Applicable Law

A prospective juror in a capital case may be removed for cause “if his or her views on capital punishment ‘would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”” (*People v. Tully* (2012) 54 Cal.4th 952, 995-1003, quoting *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; see also *People v. Lynch* (2010) 50 Cal.4th 693, 733; *People v. Gray* (2005) 37 Cal.4th 168, 192.) The prospective juror’s bias against the death penalty need not be proven with “unmistakable clarity”; instead, an excusal may be warranted if the trial court “is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.” (*Gray*, *supra*, at p. 192, quoting *People v. Jones* (2003) 29 Cal.4th 1229, 1246-1247; *People v. Martinez*, *supra*, 47 Cal.4th at p. 425; accord, *Witt*, *supra*, at pp. 424-426.)

The trial court has broad discretion to assess the prospective juror’s qualifications, and this Court will uphold a trial court’s ruling on a challenge for cause “““if it is fairly supported by the record.”” [Citation.]” (*People v. Clark* (2011) 52 Cal.4th 856, 895.) As the United States Supreme Court explained, “Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.” (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 9; see also *People v. Avila*, *supra*, 38 Cal.4th at p. 529.)

When a prospective juror gives equivocal or conflicting responses about his ability to impose the death penalty, the trial court’s determination about the juror’s true state of mind, which may include an evaluation of the juror’s demeanor, is binding on the appellate court. (*People v. Lynch*, *supra*, 50 Cal.4th at pp. 733, 735; *People v. Solomon* (2010) 49 Cal.4th 792, 830; *Gray*, *supra*, 37 Cal.4th at p. 193; accord, *Uttecht v. Brown*,

supra, 551 U.S. at pp. 7-9.) As this Court recently observed, “In many cases, a prospective juror’s responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror’s probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court’s evaluation of a prospective juror’s state of mind, and such evaluation is binding on appellate courts.” [Citations.]” (*People v. Tully*, *supra*, 54 Cal.4th at p. 995, quoting *People v. Thomas* (2011) 51 Cal.4th 449, 462-463, additional quotation marks omitted.)

As shown below, the trial court personally questioned each of the eight prospective jurors at issue about their views on the death penalty, and each gave answers indicating they would not—or could not—impose the death penalty because of their bias against it. These were statements that the jurors “could not follow the law.” (*People v. Holt*, *supra*, 15 Cal.4th at p. 652.) The record thus supports the court’s orders removing these jurors for cause, and no violation of appellant’s right to an impartial jury occurred.

**B. The Trial Court Properly Removed For Cause
Prospective Jurors Who Indicated They Would Not
Impose The Death Penalty**

At the outset of voir dire at the second guilt phase trial, the trial court collectively instructed the pool of prospective jurors about the jury selection process, and swore them to be truthful. (See 29RT 3308-3310; 30RT 3383-3384; 31RT 3475-3476.) After hardship excusals, 99 prospective jurors remained (see 30RT 3391), and voir dire was conducted in groups of 25 (see 31RT 3475-3476). All the prospective jurors were collectively admonished and instructed that this was a death penalty matter. (31RT 3476-3479.) The eight prospective jurors at issue were in the courtroom when the trial court read instructions on the relevant legal

principles and asked hundreds of voir dire questions concerning biographical, non-biographical, and death-qualifying matters. (See 31RT 3480-3682 [Sept. 15, 1994]; 32RT 3694-3822, 3830-3841 [Sept. 16, 1994].)

During a recess on the second full day of voir dire, in an effort to streamline the selection process, the trial court told parties, "If there is an unequivocal statement, that means no doubt in that person's mind that they cannot under any circumstances impose the death penalty, what I would do is just go ahead and excuse the person as a People's challenge for cause and continue on, not have everybody walk out [of the courtroom] again." (32RT 3827.)³⁰ Appellant wanted the court to go further before excusing a prospective juror, by first asking them the complete list of "death qualification" questions. (32RT 3827-3828.) The parties stipulated that excusals under those conditions would be acceptable. (32RT 3829.)

Among the venire in appellant's second trial case were the following prospective jurors, whom appellant now contends the court removed without sufficient voir dire: Cruise, Ortega, Adamos, Nakamisha, Whitehead, Gilstrap, Johnson, and Perez. Respondent addresses each prospective juror in chronological order.

³⁰ The prosecutor in the second trial said she was uncomfortable approaching the bench with appellant, in part because he was "now a convicted murderer" and was facing substantial prison time. (30RT 3404, 3407-3408.) It was therefore not possible to hold sidebar discussions with the jury present. Thus, before trial, the trial court instructed that "rather than having everybody march out right at that time," the court would make a note of any objections and then rule on the matters outside the jury's presence. (30RT 3405.)

1. Prospective Juror Cruise

The individual questioning of prospective juror Cruise appears at pages 3847 through 3850 of the Reporter's Transcript (Vol. 32). After she provided her biographical information and discussed it with the court, the court asked, "Would any of your . . . answers to the questions which have been asked by the court over multitudinous hours differ in any way?" (32RT 3848-3849.) Ms. Cruise answered, "Yes," and explained, "I have a problem with the death penalty. I just don't think I could - - I believe in life imprisonment, but I don't think I could sentence someone to death." (32RT 3849.) After discussing other answers, the trial court stated, "Okay. I want to get back to your views on the death penalty. Are you telling me and Mr. Bankston and Miss Hunter that under no circumstances could you impose the death penalty?" (32RT 3849.) Cruise responded, "I have mixed feelings. I believe under certain circumstances I could, but I'd have to know more of the facts." (32RT 3849-3950.)

The trial court asked her to clarify, saying, "When you say certain circumstances, what is your mindset?" (32RT 3850.) Ms. Cruise explained,

If I was there, if I was on the premise [*sic*] if I knew with absolute certainty that he perpetrator had - - had committed the crime, then I would, rest assured then I would convict that person. But because there's a shadow of a doubt because I couldn't be thoroughly convinced that I - - that he or she was a killer, I couldn't do it, I couldn't put someone to death.

(32RT 3850.) Based on her answers, the trial court said, "All right, I'll treat that as a challenge for cause without spending any more time with Miss Cruise." (32RT 3850.) Ms. Cruise was then thanked and excused.

(32RT 3850.) Appellant did not object when Ms. Cruise was excused.

(32RT 3850.)³¹

Applying the above standards to the instant case, it is clear the trial court did not err in excusing prospective juror Cruise. Ms. Cruise plainly equivocated about whether she could impose the death penalty at all. Significantly, she asserted, “I don’t think I could sentence someone to death,” and when pressed, explained that she he had “mixed feelings” on whether she could impose the death penalty “under any circumstances.” (32RT 3849-3850.) She said she would convict a person if she had been present during the crime or if she otherwise knew with “absolute certainty” that the defendant was the perpetrator, i.e., a higher standard than reasonable doubt. (32RT 3850.) But even in that circumstance—and under that untenable standard of proof—Ms. Cruise equivocated about whether she could sentence the convicted perpetrator to death, and ultimately concluded she could not. “But because there’s a shadow of a doubt,” she explained, and “because I couldn’t be thoroughly convinced that . . . he or she was a killer, *I couldn’t do it, I couldn’t put someone to death.*” (32RT 3850, italics added.)

As noted by this Court in *People v. Roldan*, *supra*, 35 Cal.4th 646, a juror’s response that he would have a “hard time” voting for the death penalty or that he would find the decision “very difficult” “indicate a degree of equivocation on the juror’s part which, taken into account with the juror’s hesitancy, vocal inflection, and demeanor, can justify a trial

³¹ Nor did appellant object at a bench conference the following day, although he did specifically object to several other excusals for cause. (33RT 3946.) Nonetheless, appellant seemed to suggest that the trial court should have delved more deeply into Ms. Cruise’s death penalty views. Referring to Ms. Cruise, appellant simply noted that “she said she likes to hear all of the facts. Preferably she would rather be at the scene of the crime, but if not, she would want to hear all of the facts.” (33RT 3946.)

court's conclusion regarding the juror's mental state that 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.'" (*Id.* at p. 697.)

Jurors commonly supply conflicting or equivocal responses to questions directed at their potential bias or incapacity to serve. When such conflicting or equivocal answers are given, the trial court, through its observation of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach a conclusion regarding the juror's actual state of mind. (*People v. Hamilton* (2009) 45 Cal.4th 863, 890.) Thus, when conflicting or equivocal answers are given, such as those given by Ms. Cruise, reviewing courts "defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts. [Citations.]" (*People v. Tully, supra*, 54 Cal.4th at p. 995; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115 [while some answers showed willingness to follow the law and the court's instruction, other answers furnished substantial evidence of a prospective juror's inability to consider a death verdict].) Accordingly, the trial court was justified in concluding that Ms. Cruise could not carry out her obligations as a juror at the penalty phase. (See *People v. Griffin, supra*, 33 Cal.4th at p. 560 [holding that trial court properly excused for cause a prospective juror who stated on voir dire "she did not know whether she actually could vote to impose the death penalty"].)

2. Prospective Juror Ortega

Prospective juror Ortega took Ms. Cruise's empty seat. (32RT 3853.) The individual questioning of Ms. Ortega appears at pages 3853 through 3856 of the Reporter's Transcript (Vol. 32). After Ms. Ortega provided her biographical information and discussed it with the court, the court asked, "Did you hear all the questions which I've been asking - - over this period

of time?” (32RT 3854-3855.) Ortega answered, “And I did answer differently.” (32RT 3855.) She explained that she had friends in the Sheriff’s Department and the Los Angeles Police Department, and that her brother-in-law was an agent with the Department of Justice. (32RT 3855.) Ms. Ortega also said she did not “agree” with the death penalty. (32RT 3855.) The trial court stated, “Let’s get right down to the nitty-gritty here. [¶] Under any circumstances, because of whatever your personal beliefs may be, could you impose the death penalty?” Ms. Ortega, replied, “No.” When the court pressed her, asking, “Under no circumstances?” she echoed the court, confirming, “Under no circumstances.” (32RT 3855.) The court deemed her answers to be a challenge for cause, and Ms. Ortega was then thanked and excused. (32RT 3855.) Appellant did not object or ask the court to ask any additional questions.

The trial court did not abuse its discretion in removing Ms. Ortega, because her voir dire answers demonstrated that her views would prevent or substantially impair the performance of her duties as a juror in a capital case. (*People v. Taylor, supra*, 48 Cal.4th at p. 602.) Ms. Ortega flatly asserted that she would apply the death penalty “*Under no circumstances.*” (32RT 3855, italics added.) “This was a statement indicating that [she] could not follow the law” (*People v. Holt, supra*, 15 Cal.4th at p. 652), and therefore she was properly removed. (See *ibid.* [trial court properly removed a prospective juror who “stated unequivocally that he could not impose death” for a killing that occurred as set out in the charges].)

When, as in this instance, the record shows a clear refusal by a prospective juror to apply the death penalty “under any circumstances,” a trial court is justified in concluding that the juror could not carry out his or her obligations at the penalty phase. (*People v. Tully, supra*, 54 Cal.4th at p. 1000 [for-cause removal for juror who “stated unequivocally that, notwithstanding her support of the death penalty in the abstract, she could

not actually impose it”]; *People v. Cook, supra*, 40 Cal.4th at p. 1344 [trial court properly removed a prospective juror because her responses indicated she would not consider imposing the death penalty regardless what instructions she would receive]; see also, e.g., *People v. McKinnon, supra*, 52 Cal.4th at p. 629 [holding that prospective jurors in a capital cases may be disqualified on questionnaire responses alone and without further inquiry “if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law,” quoting *People v. Avila, supra*, 38 Cal.4th at p. 531].) The record therefore supports the trial court’s order removing prospective juror Ortega for cause.

3. Prospective Juror Adamos

Prospective juror Adamos took Ms. Ortega’s empty seat. (32RT 3856.) The individual questioning of Ms. Adamos appears at pages 3856 through 3857 of the Reporter’s Transcript (Vol. 32). After briefly listing her biographical information, Ms. Adamos stated her answers regarding the death penalty would differ from others, because “I oppose the imposition of the death penalty for religious reasons.” (32RT 3856.) The court pursued the matter further, stating, “Let me put the question to you so that the record is very clear. Are you telling me that under no circumstances could you impose the death penalty in this case - - or any other?” As the court was speaking, Ms. Adamos was nodding her head. (32RT 3856-3857.) When the court finished the sentence, Ms. Adamos answered, “Yes, your Honor.” (32RT 3857.) The court deemed her answers to be a challenge for cause, and Ms. Adamos was thanked and excused. (32RT 3857.)

The analysis for prospective juror Ortega is identical that of prospective juror Adamos. Like Ms. Ortega, prospective juror Adamos also unequivocally stated that she would apply the death penalty “*under no circumstance.*” (32RT 3856-3857, italics added.) Because “[t]his was a

statement indicating that [she] could not follow the law,” Ms. Adamos was properly removed. (*People v. Holt, supra*, 15 Cal.4th at p. 652; *People v. Tully, supra*, 54 Cal.4th at p. 1000; *People v. Cook, supra*, 40 Cal.4th at p. 1344; see also, e.g., *People v. McKinnon, supra*, 52 Cal.4th at p. 629.)

4. Prospective Juror Nakamisha

The individual questioning of prospective juror Nakamisha appears at pages 3873 through 3878 of the Reporter’s Transcript (Vol. 32). Ms. Nakamisha provided her biographical information and then discussed several matters in which her answers to the other voir dire questions differed from the panelists. (32RT 3873-3877.)

When Ms. Nakamisha was finished with the biographical and other non-biographical voir dire, she said, “And I do have a difference on the death penalty. I do not feel that I would be fair and impartial at this point.” (32RT 3877.) The trial court said, “Okay. Now let me ask you just a couple of the pertinent questions. Depending upon what your answers are, I may not have to go through this whole list. [¶] Assuming that the trial is completed and the jury has found Mr. Bankston guilty and you’re in the penalty phase of - - and deliberating in this case, could you, if the record justified it, impose the death penalty?” (32RT 3877-3878.) Ms. Nakamisha answered, “No.” (32RT 3878.) The court deemed her answers to be a challenge for cause, and Ms. Nakamisha was thanked and excused. (32RT 3857.) Appellant did not object.

For the same reasons addressed above, the court did not abuse its discretion in removing Ms. Nakamisha for cause. She too stated that she would not impose the death penalty, even if that penalty were justified by the record. (32RT 3877-3878.) Moreover, Ms. Nakamisha’s comments came as part of her explanation that her death penalty views prevented her from being “fair and impartial at this point.” (32RT 3877.) Ms. Nakamisha

therefore clearly demonstrated an unwillingness or inability to follow the law based on her views on the death penalty, and she was properly removed. (*People v. Tully, supra*, 54 Cal.4th at p. 1000; *People v. Cook, supra*, 40 Cal.4th at p. 1344; *People v. Holt, supra*, 15 Cal.4th at p. 652; see also, e.g., *People v. McKinnon, supra*, 52 Cal.4th at p. 629.) Finally, to the extent Ms. Nakamisha's answers were equivocal, this Court must defer to the trial court's evaluation of her state of mind. (*People v. Thomas, supra*, 51 Cal.4th at p. 462.)

5. Prospective Juror Whitehead

The individual questioning of prospective juror Whitehead took place the following day, and appears at pages 3917 through 3920 of the Reporter's Transcript (Vol. 33). Mr. Whitehead provided his biographical information and discussed it with the court. He indicated that he had been a juror on one prior civil case, one prior criminal case, and had been an alternate juror on a second criminal case. (33RT 3918.) When the court asked, "Would any of your [other] answers differ in any way?" (33RT 3917-3918.) Mr. Whitehead answered, "Yes. I have numerous friends, relatives, associates that are in the law enforcement field," which included members of the Sheriff's Department, LAPD, and the Compton Police Department. (33RT 3918.) Mr. Whitehead also discussed his military service, and his experience as a prior victim of vandalism and burglary. (33RT 3918-3920.) The court then asked, "If the record justified it, could you impose death?" (33RT 3920.) Mr. Whitehead answered, "No, I don't believe in the death penalty for the state of California, in particular the method used. So I could not render a verdict in that respect." (33RT 3920.) Based on his answers, the trial court said, "I'll consider that a challenge for cause," and Mr. Whitehead was thanked and excused. (33RT 3850.) Appellant did not object.

For the same reasons set forth above, the court did not abuse its discretion in removing Mr. Whitehead because of his unwillingness to impose the death penalty. Like Ms. Nakamisha, Mr. Whitehead stated that he “*I could not render a verdict*” in a death penalty case regardless of whether the record justified it. (33RT 3920, italics added.) Mr. Whitehead therefore clearly demonstrated an unwillingness or inability to follow the law based on his views on the death penalty, and he was properly removed. (*People v. Cook, supra*, 40 Cal.4th at p. 1344; *People v. Holt, supra*, 15 Cal.4th at p. 652; see also, e.g., *People v. Tully, supra*, 54 Cal.4th at p. 1002; *People v. McKinnon, supra*, 52 Cal.4th at p. 629; *People v. Solomon, supra*, 49 Cal.4th at p. 832.)

6. Prospective Juror Gilstrap

The individual questioning of prospective juror Gilstrap appears at pages 3932 and 3933 of the Reporter’s Transcript (Vol. 33). Mr. Gilstrap provided his biographical information and discussed it with the court. (33RT 3932-3933.) When the court asked, “If the record justified it, Mr. Gilstrap, could you impose death?” (33RT 3920.) Mr. Gilstrap answered, “No, I don’t believe so.” The trial court said, “I’ll consider that a challenge for cause,” and Mr. Gilstrap was thanked and excused. (32RT 3933.)

After voir dire of another juror, the trial court asked appellant at a bench conference whether he wanted to put something on the record. (32RT 3946.) Appellant objected to the for-cause excusals of prospective jurors Brittain, Johnson, and Gilstrap. As to prospective juror Gilstrap, appellant explained,

I’m focusing on Gilstrap for an excuse for cause. He don’t believe that he could impose the death penalty, and I thought a little bit more inquiry by yourself should have been given to maybe find out what this - - I don’t believe - - to me he was not making it unmistakably [*sic*] clear that he could not issue death if he felt, you know, that the evidence pointed that way.

[¶] . . . Then Mr. Gilstrap, when he said, specifically, he didn't believe he could, then he was immediately excused, that kind of bothered me. [¶] So I'm objecting to Mr. Gilstrap.

(32RT 3946.) The court replied, "All right. The record will reflect the objection. I based excusing each of those people and any others that we've excused where they indicated that they can't impose death based upon their answers to that question. [¶] If that is insufficient, and there is a conviction and appeal in this case, you can preserve your objection." (32RT 3749.)

There was no abuse of discretion in the trial court's removal of prospective juror Gilstrap. As this Court's recent *Tully* decision shows, a trial court may remove a prospective juror after brief voir dire and without further inquiry, if a juror's "No" answer indicates to the court that the juror could not impose the death penalty. In *Tully*, this Court upheld the removal of a juror who, when asked directly whether he could vote to impose death, simply replied, "No." (*People v. Tully, supra*, 54 Cal.4th at p. 1002.) No further questions were asked, and the juror was excused for cause. (*Ibid.*) This Court noted, "While voir dire was brief, he clearly indicated he could not vote to impose death in this case. The fact that neither the prosecution nor the defense asked him questions suggests that his position was so plain neither side believed it worthwhile to attempt to rehabilitate him." (*Ibid.*, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 727.)

In this case, of course, the trial court, rather than counsel, conducted the voir dire—in compliance with Proposition 115—and appellant remained silent until well after Mr. Gilstrap had already been thanked and excused. (32RT 3933.) Although appellant later objected at a bench conference, and suggested the trial court could have done "a little more inquiry," his suggestion was too late and too vague to make any difference. Appellant did not suggest what additional questions, if any, could have rehabilitated Mr. Gilstrap, or would have been satisfactory to appellant.

Nor did appellant contend that the trial court's questioning and excusal of Mr. Gilstrap conflicted with the procedure to which appellant had stipulated. As in *Tully*, Mr. Gilstrap's position was plain, and it appears that at the time he was excused neither the court nor the parties believed he could be rehabilitated. Thus, there was no error in the trial court's acceptance of Mr. Gilstrap's answer as definitive and its decision not to question him further. (See, e.g., *People v. Tully, supra*, 54 Cal.4th at pp. 1002-1003.)

If, on the other hand, Mr. Gilstrap's "No, I don't believe so" answer is interpreted as equivocal, then this presents a situation "that calls for deference to the trial court's evaluation of the prospective juror's mental state and demeanor." (*People v. Tully, supra*, 54 Cal.4th at p. 1002, citing *People v. Mayfield, supra*, 14 Cal.4th at p. 727.) The same is true if Mr. Gilstrap's answer merely showed he would have difficulty in carrying out his duties as a capital case juror. (See *People v. Roldan, supra*, 35 Cal.4th at p. 697 ["[W]e previously have held it permissible to excuse a juror who indicated he would have a 'hard time' voting for the death penalty or would find the decision 'very difficult.' [Citation.]"]; *People v. Griffin, supra*, 33 Cal.4th at p. 560 [holding that trial court properly excused for cause a prospective juror who stated on voir dire "she did not know whether she actually could vote to impose the death penalty"].)

Under either scenario, the trial court was entitled to conclude that Mr. Gilstrap clearly demonstrated an unwillingness or inability to follow the law based on his views on the death penalty, and he was properly removed. (*People v. Cook, supra*, 40 Cal.4th at p. 1344; *People v. Holt, supra*, 15 Cal.4th at p. 652; see also, e.g., *People v. Tully, supra*, 54 Cal.4th at p. 1002.)

7. Prospective Juror Johnson³²

The court questioned prospective juror Johnson next. (33RT 3933.) After Ms. Johnson briefly listed her biographical information and prior jury experience, the trial court turned immediately to her views on the death penalty. (33RT 3933-3935.) The court asked, "If the record justified, could you impose death?" (33RT 3935.) Ms. Johnson answered, "No. Religious." (33RT 3935.) The court said, "I'll treat that as a challenge for cause," and Ms. Johnson was thanked and excused. (33RT 3935.)

Shortly thereafter, at the bench conference described above, appellant objected to the for-cause excusals of prospective jurors Brittain, Johnson, and Gilstrap. (32RT 3946.) Appellant, however, did not explain his objection as to Ms. Johnson, and did not contend that any additional questioning would have rehabilitated her, or made any difference in the decision to excuse her for cause. After appellant briefly discussed prospective jurors other than Ms. Johnson, the court replied, as noted above, "All right. The record will reflect the objection. I based excusing each of those people and any others that we've excused where they indicated that they can't impose death based upon their answers to that question. [¶] If that is insufficient, and there is a conviction and appeal in this case, you can preserve your objection." (32RT 3749.)

Ms. Johnson was properly removed for the same reasons as Mr. Gilstrap. Her statement that she could not impose the death penalty—for religious reasons—was clear and unequivocal. (33RT 3935.) Appellant remained silent until after she had been excused, and never suggested that

³² In one instance, the Reporter's Transcript refers to this prospective juror as "Prospective Juror Formoso." (See 33RT 3935.) It is clear, however, from the court's comments and the prospective juror's statement of her name, that this discussion only involved prospective juror Johnson. (See 33RT 3933-3935.)

the court should ask additional questions. Nor did appellant object that the trial court's questioning and excusal of Ms. Johnson conflicted with the procedure to which appellant had stipulated. Thus, as in *Tully*, Ms. Johnson's position was plain, and it appears that at the time she was excused, neither the court nor the parties believed she could be rehabilitated. Moreover, removal for cause is appropriate when prospective jurors indicate their religious beliefs would conflict with their duties as a juror and would prevent them from imposing the death penalty. (*People v. Thomas*, *supra*, 51 Cal.4th 449, 471 [prospective juror properly removed in light of her consistent explanation that her religious beliefs would make it very difficult for her to vote for the death penalty and she did not think she could do it].)

Thus, there was no error in the trial court's acceptance of Ms. Johnson's answer as definitive and its decision not to question her further. (See, e.g., *People v. Tully*, *supra*, 54 Cal.4th at pp. 1002-1003; *People v. Thomas*, *supra*, 51 Cal.4th at p. 471.) Based on her definitive answer, the trial court was entitled to conclude that Ms. Johnson clearly demonstrated an unwillingness or inability to follow the law based on her religious views concerning the death penalty. The record therefore supports the trial court's order excusing Ms. Johnson. (*Thomas*, *supra*, at p. 471; see also, *Tully*, *supra*, at p. 1002; *People v. Cook*, *supra*, 40 Cal.4th at p. 1344; *People v. Holt*, *supra*, 15 Cal.4th at p. 652.)

8. Prospective Juror Perez

Prospective juror Perez's voir dire answer concerning the death penalty was identical to Ms. Johnson's. The individual questioning of prospective juror Perez's appears at pages 4000 and 4001 of the Reporter's Transcript (Vol. 33). Ms. Perez provided her biographical information and prior jury experience, and discussed it with the court. When the trial court

asked, “If the record justified it, could you impose the death penalty?” she answered, “No.” (33RT 4001.) The court asked, “That is because?” and Ms. Perez answered, “Religious beliefs.” (33RT 4001.) The court said, “Religious beliefs. All right. I’ll consider that a challenge for cause.” (33RT 4001.) Ms. Perez was then thanked and excused. (33RT 4001.) Appellant did not object to her excusal at any time or suggest that additional questions should be asked.

The analysis for Ms. Johnson and Ms. Perez is the same. Just as with Ms. Johnson, there was no error in the trial court’s acceptance of Ms. Perez’s answer as definitive and its decision not to question her further. (See, e.g., *People v. Tully*, *supra*, 54 Cal.4th at pp. 1002-1003; *People v. Thomas*, *supra*, 51 Cal.4th at p. 471.) Based on her definitive answer and her unequivocal, religious-based inability to impose the death penalty, the trial court was entitled to conclude that Ms. Perez clearly demonstrated an unwillingness or inability to follow the law based on her views on the death penalty. The record therefore also supports the trial court’s order excusing Ms. Perez. (*Thomas*, 51 Cal.4th at p. 471; see also, *Tully*, 54 Cal.4th at p. 1002; *People v. Cook*, *supra*, 40 Cal.4th at p. 1344; *People v. Holt*, *supra*, 15 Cal.4th at p. 652.)

C. Appellant Has Forfeited His Challenge To The Adequacy Of The Voir Dire, Which In Any Event Was Sufficient

Appellant’s chief complaint on appeal—that the voir dire was inadequate because the court failed to ask sufficiently probing follow-up questions when the prospective jurors expressed reservations about applying the death penalty—does not warrant reversal of the penalty verdict. (See AOB 170-189.) With the exception of vaguely suggesting the trial court should have made “a little bit more inquiry” as to prospective juror Gilstrap (see 33RT 3946), appellant did not otherwise object to how

the trial court questioned and excused the eight prospective jurors. By failing to object to the manner in which the trial court conducted voir dire, appellant forfeited any claim on appeal that it erred. (*People v. Tully*, *supra*, 54 Cal.4th at p. 996.)

Even if cognizable, appellant's inadequate voir dire claim fails. Appellant rests his challenge primarily on *People v. Stewart* (2004) 33 Cal.4th 425, in which the trial court excused five prospective jurors for cause based solely on their written answers to a single, defectively-phrased, multipart question concerning their views on the death penalty. (AOB 174-178.)

As this Court recently explained, "We concluded [in *Stewart*] the information elicited by the question, standing alone, was insufficient for determining bias under the *Witt* standard because the preface to the question asked the prospective juror whether he or she held "a conscientious opinion or belief about the death penalty which would prevent *or make it very difficult* for" the prospective juror to find the defendant guilty of first degree murder, find a special circumstance to be true, or vote to impose the death penalty." (*People v. Riccardi* (2012) 54 Cal.4th 758, 779, quoting *Stewart*, *supra*, at p. 442, italics added by this Court in *Riccardi*.) As this Court explained, the prefatory, "make it very difficult" language in the *Stewart* questionnaire "made it impossible to determine whether the prospective jurors' subsequent 'yes' or 'no' answers revealed that their personal views would have actually prevented or substantially impaired the performance of their duties as jurors under the *Witt* standard." (*Ibid.*) Thus, the question as phrased did not directly address the pertinent constitutional issue. As this Court reasoned,

"A juror might find it very difficult to vote to impose *the death penalty*, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by

weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.”

(*Ibid.*, quoting *Stewart, supra*, 33 Cal.4th at p. 447, and citing *People v. Avila, supra*, 38 Cal.4th at p. 530 [“we stressed a material flaw in the *Stewart* questionnaire itself”].) “We concluded, therefore, that the trial court [in *Stewart*] erred in excusing five prospective jurors for cause based only on their answers to this problematic question and without further inquiry.” (*Ibid.*)

In this case, the oral questions and answers do not suffer from the defect present in the written question posed in *Stewart*. First, trial court personally asked the questions in this case, and the court was in the unique position to hear and observe the jurors as they answered. Therefore, unlike the de novo standard applied to removal based solely on answers to written jury questionnaires (*People v. McKinnon, supra*, 52 Cal.4th at p. 647), substantial deference is owed to the trial court’s decision to remove a jury based on the court’s personal, oral voir dire (*Uttecht v. Brown, supra*, 551 U.S. at p. 9; *People v. Avila, supra*, 38 Cal.4th at p. 529). Second, the trial court’s questions were clearly-phrased, single-issue questions that called for a simple answer. They were not multi-part questions that would make it impossible to discern the meaning of a “yes” or “no” answer, as in *Stewart*. Third, and most important, the questions posed by the trial court went directly to whether the prospective jurors’ views on the death penalty would *actually* prevent them from imposing the death penalty, and therefore would interfere with their duties as jurors in a capital case. (See 32RT 3849 [asking prospective juror Cruise, “Are you telling me and Mr. Bankston and Miss Hunter that under no circumstances could you impose the death penalty?”], 3855 [asking prospective juror Ortega, “Under any circumstances, because of whatever your personal beliefs may be, could

you impose the death penalty?” and—seeking confirmation—asking, “Under no circumstances?”], 3856-3857 [asking prospective juror Adamos, “Let me put the question to you so that the record is very clear. Are you telling me that under no circumstances could you impose the death penalty in this case - - or any other?”], 3877-3878 [asking prospective juror Nakamisha, “Assuming that the trial is completed and the jury has found Mr. Bankston guilty and you’re in the penalty phase of - - and deliberating in this case, could you, if the record justified it, impose the death penalty?”]; 33RT 3920 [asking prospective juror Whitehead, “If the record justified it, could you impose death?”], 3920 [asking, “If the record justified it, Mr. Gilstrap, could you impose death?”], 3935 [same for prospective juror Johnson], 4001 [same for prospective juror Perez].)

Therefore, as in *Riccardi* and in contrast to the defective written question posed in *Stewart*, the court’s oral questions, by themselves, were sufficiently clear such that a “yes” or “no” answer to each of them would “leave no doubt” as to whether a prospective juror was “willing or able to set aside his or her personal views and follow the law.” (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 779-780, quoting *People v. Wilson* (2008) 44 Cal.4th 758, 787, 790.)

Appellant’s heavy reliance on *People v. Heard* (2003) 31 Cal.4th 946, is also misplaced. (See AOB 179-180, 186-189.) In *Heard*, this Court reversed the defendant’s death sentence because the trial court had erroneously excused a prospective juror whose statements indicated that he would not automatically vote for life without parole, regardless of the evidence. (*Heard*, *supra*, 31 Cal.4th at pp. 963-966.) In contrast to the instant case, the juror in *Heard* had clarified his jury questionnaire responses, and had indicated to the trial court that he *could*, in fact, follow the trial court’s instructions. (*Ibid.*) Unlike *Heard*, there were no jury questionnaires in this case, and the court’s voir dire of the eight prospective

jurors at issue did not reveal that they could, in fact, follow the law. To the contrary, their answers revealed just the opposite, and the court was therefore entitled to conclude that that their views would “prevent or substantially impair the performance of [their] duties as a juror in accordance with [the] instructions and [their] oath.” (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.)

In addition, once the trial court was left with the distinct impression that the prospective jurors in question were not willing or able to carry out their duties, no further inquiry was required. The law has been long-settled that no further examination is necessary once a court becomes satisfied that a juror has conscientious scruples against application of the death penalty. (*People v. Goldenson* (1888) 76 Cal. 328, 346.) For example, in *People v. Ketchel* (1963) 59 Cal.2d 503, the judge asked the panel of prospective jurors, “Now, is there anybody in the jury box that has certain beliefs or disbeliefs or scruples or in any way an opinion or fixation that would prevent you from voting for the death penalty simply because of the fact that it is the death penalty?” (*Id.* at pp. 528-529.) The court then excused the four jurors who raised their hands, despite counsel’s refusal to stipulate. This Court found no error, stating that “[t]he determination whether a juror has shown that he entertains ‘conscientious scruples against conviction where the penalty is death’ and to refuse further examination on the point [citation] reposes within the discretion of the court.” (*Ibid.*, citing *People v. Goldenson*, *supra*, 76 Cal at p. 346.) Although these cases were decided before the requirements of death-qualifying voir dire were refined in *Witherspoon*, *supra*, 391 U.S. 510 and *Witt*, *supra*, 469 U.S. 412, the trial court’s discretion in this regard remains intact. (See e.g., *People v. Harris* (2005) 37 Cal.4th 310, [prospective jurors’ responses in voir dire that they would always vote for LWOP indicated they lacked either the ability or the

willingness to perform their duties as jurors in a death penalty case, such that further voir dire was unnecessary].)

Moreover, a trial court has discretion to remove prospective jurors—without further questioning by the court or counsel—“if their ‘answers made their disqualification unmistakably clear’” (*People v. Virgil* (2011) 51 Cal.4th 1210, 1244; citing *People v. Bittaker*, *supra*, 48 Cal.3d at p. 1085; *People v. Nye* (1969) 71 Cal.2d 356, 364.) For each of the eight prospective jurors discussed above, the court’s questions and the jurors’ answers were sufficiently clear to leave the trial court “with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.” (*People v. Gray*, *supra*, 37 Cal.4th at p. 192; see *People v. Riccardi*, *supra*, 54 Cal.4th at pp. 779-780; *People v. Wilson*, *supra*, 44 Cal.4th at pp. 787, 790.) No further inquiry was therefore needed, and the record supports the trial court’s orders excusing these prospective jurors for cause.

Assuming this Court were to find that any prospective jurors had been erroneously excluded, the error was harmless. As the Chief Justice of this Court recently observed, in *Gray v. Mississippi* (1987) 481 U.S. 648, 666 [107 S.Ct. 2045, 95 L.Ed. 2d 622], the United States Supreme Court examined two theories upon which harmless error analysis might be applied to a violation of the review standard created under *Witherspoon-Witt*. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 840-846 (conc. opn. of Cantil-Sakauye, C.J.).) The majority in *Gray* rejected only one of those theories, however; that is, it rejected the contention that an erroneous *Witherspoon-Witt* exclusion had no effect on the composition of the jury. *Gray* found that the exclusion necessarily had an effect on the jury composition, even if one assumed that the prosecutor in any circumstance would have exercised a peremptory challenge against the death-scrupled prospective juror. Thus, as the Chief Justice concluded in *Riccardi*, “*Gray* stands for the proposition

that *Witherspoon-Witt* error is reversible per se because the error affects the composition of the panel “as a whole” [citations] by inscrutably altering how the peremptory challenges were exercised [citations].” (*Id.* at p. 842 (conc. opn. of Cantil-Sakauye, C.J.).) But as the Chief Justice also noted in *Riccardi*, one year after *Gray*, the high court in *Ross v. Oklahoma* (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80], rejected the *Witherspoon-Witt* remedy as well as the rationale developed for it in *Gray*, as applied to a wrongly included pro-death juror, explaining that the Sixth Amendment is not implicated simply by the change in the mix of viewpoints held by jurors (be they death penalty supporters or skeptics) who are ultimately selected. (*People v. Riccardi, supra*, at pp. 842-844 (conc. opn. of Cantil-Sakauye, C.J.).)

Notwithstanding the Chief Justice’s observations in *Riccardi*, this Court felt “compelled to follow that precedent that is most analogous to the circumstances presented here[,]” which was *Gray*, as opposed to *Ross*. (*People v. Riccardi, supra*, 54 Cal.4th at pp. 845 (conc. opn. of Cantil-Sakauye, C.J.).) Respondent respectfully asks this Court to revisit this conclusion in light of the observation that in *Gray*, the State (as well as the dissent) had argued the error had *no effect* on the case. Here lies “a reasoned basis” (*id.* at p. 844, fn. 2), for the different results in these cases. The “no-effect” rationale for adopting a harmless error rule only goes so far, and allowed the *Gray* Court to reject it so long as there was some effect on the jury composition. The State’s proffered rationale therefore never required the Court to account for the nature of a *Witherspoon-Witt* violation. Here, however, the People now ask the Court to do so. The appropriateness of harmless error analysis, we submit, should take into account the “differing values” particular constitutional rights “represent and protect[.]” (*Chapman v. California, supra*, 386 U.S. at p. 44 (conc. opn. of Stewart, J.).)

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

VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF APPELLANT'S PRIOR ACTS OF VIOLENCE

Appellant claims that the trial court committed federal constitutional error by admitting evidence of his prior criminal history at both of his guilt phase trials. Specifically, appellant contends the trial court erroneously admitted at his first trial highly prejudicial evidence of his prior acts of violence—as documented in his "rap sheet"—under Evidence Code section 1103, subdivision (b). (AOB 191-215.) He further contends that the same evidence was erroneously admitted at his second trial, because it was admitted as rebuttal evidence without sufficient limitations. (AOB 216-228.)

Appellant's claims fail. The trial court did not abuse its discretion by admitting evidence of appellant's prior violent acts at the first guilt phase trial after appellant presented evidence as to the victims' violent character. (See Evid. Code, § 1103, subd. (b).) Nor did the court abuse its discretion by admitting appellant's criminal history at the second trial to rebut the erroneous impression left by appellant that the printout from his gang database file was a full account of his criminal history. In any event, any error in admitting the evidence at either trial was harmless.

A. No Prejudicial Error Occurred In Admitting Evidence Of Appellant's Prior Acts of Violence At The First Guilt Phase Trial

1. Procedural Background

Benjamin and Linda Jones identified appellant at trial as the man who fatally shot Benson and wounded Benjamin on May 18, 1991 (Counts 2 & 3). Appellant attacked the prosecution evidence on many fronts during trial. Appellant challenged the validity of the eyewitness identifications and the credibility of the witnesses. (See, e.g., 15RT 1776-1778, 1782-1784; 16RT 1857-1858.) Appellant also theorized that Benson had actually been shot by a man named "Nate" as part of a violent domestic feud stemming from the fact that Benson's wife Debra was pregnant with Nate's child. (See 16RT 1851; 22RT 2764-2765.) As part of his defense theory, and as part of his general attack on the prosecution evidence, appellant sought to persuade the jury—with affirmative evidence and thorough cross-examination—that Benson and Benjamin were unsavory and potentially violent ex-convicts, and that one or both of them had been armed and dangerous at the time of the shooting. As appellant indicates on appeal, he also tried to show the shooting was not premeditated, but rather was "a rash

response to a confrontation that was escalating” between the shooter and two armed gang members. (AOB 194.)

To further these defense strategies, appellant elicited from Benjamin that Benson had been physically violent with his wife Debra. Through cross-examination, Benjamin confirmed that he and Linda had picked up Benson on the day of the shooting “because of the physical altercation [Benson] was involved in earlier” with Debra. (15RT 1761.) Linda Jones gave similar testimony under appellant’s cross-examination. (16RT 1850.) Appellant also elicited that Benjamin had been drinking alcohol before the shooting. (15RT 1780.) Appellant introduced evidence that the Jones brothers were both ex-convicts. He asked Linda Jones if she had picked Benson up that day because she “didn’t want him to go back to prison.” (16RT 1882.) Appellant elicited from Linda that Benson might have been sent back to prison if, during the “physical altercation” with his wife, he had “done something maybe stupid to her” or her “property or something.” (16RT 1883.)

Appellant also established that Benjamin was on parole at the time of the shooting. (15RT 1771.) Appellant then immediately asked Benjamin if he had “permits or anything to carry weapons” (15RT 1771), and established that Benjamin had testified at the preliminary hearing, “I have guns.” (33RT 1773.) Appellant disputed Benjamin’s claim that he was unarmed at the time of the shooting, and asked, “Is that the reason you advised your sister . . . to leave the scene, to take a weapon or anything that might be contraband away?” (33RT 1773.) When Benjamin answered “No,” appellant sought to demonstrate Benjamin’s gang membership by eliciting that Benjamin said “cuz” everyday, and that the term was associated with Crip gang members. (15RT 1773-1775.) Appellant suggested that using the term “cuz” was conduct that may have provoked the shooter. He asked Benjamin, “Are you aware of the dangers of using

the word 'cuz'," and elicited that Benjamin would use the word in Blood territory, such as the scene of the shooting, "regardless of the repercussions." (15RT 1776.) Appellant also elicited that Benson had been a Crips gang member. (15RT 1785.)

To further support the defense theory that the victims were armed and dangerous at the time of the shooting, appellant established through his examination of gang expert Lieutenant Wright that Benjamin and Benson were both founding members of the Atlantic Drive Crips and were active gang members at the time of the shooting. (20RT 2588.) Lieutenant Wright testified on cross-examination that if a rival gang member had addressed someone as "cuz" at that location—as Benjamin supposedly had—the speaker would likely be armed and violence might ensue. (20RT 2590-2591.) Appellant also elicited from Lieutenant Wright that it would be uncommon for a family member to leave a wounded member behind, and agreed that such a person might leave the scene to plan retaliation or to dispose of incriminating evidence. (20RT 2592-2593.) "All of this cross-examination," according to appellant, "went directly to the defense theory that the Jones brothers were armed when they went into rival gang territory, and that they escalated the confrontation—possibly with Nate—that resulted in Benson's death." (AOB 195.)

Thus, at a sidebar discussion, the prosecutor contended that appellant had opened the door to presenting evidence about appellant's character for violence. (20RT 2610.) The prosecutor explained,

Your Honor, during the cross-examination of Lieutenant Wright, I think there were several questions asked hypothetically or whether or not Benjamin and/or Linda and/or Benson, the victim in this case, had a propensity for violence, I think the door is more than sufficiently open at this point for me to put on investigator Riggs as my next witness to go through Mr. Bankston's - - specifically his rap sheet and whether or not the

information he has received, he can form an opinion as to whether or not Mr. Bankston possesses a character for violence.

(20RT 2610.) The trial court then held a hearing outside the jury's presence, and read Evidence Code section 1103, subdivision (b), concerning character evidence, into the record. (20RT 2617-2619.) Sergeant Doral Riggs then testified at the hearing about appellant's prior convictions, and opined that appellant had a propensity for violence. (20RT 2619-2627.) The prosecutor then argued in support of his motion that appellant had elicited through the victims and Lieutenant Wright that Benson had violent traits, that Benson was likely armed, and that just before the shooting Benson had been removed from a violent domestic dispute for reasons related to his propensity for violence. (20RT 2628.) The prosecutor further argued that appellant had asked Ernest Johnson—the alleged victim in the attempted murder count for which appellant was ultimately acquitted—about a prior conviction for assault on a police officer. (20RT 2628-2629.)

Appellant countered that he had brought up the information about Benjamin's gang affiliation "solely for impeachment purposes," and that the questioning of Johnson had taken place at a hearing outside the jury's presence. (20RT 2629-2630.) As to evidence about Benson, appellant claimed that "this was [introduced] just to get around the reason for them coming to Compton to get Benson Jones and then in return stopping at the liquor store. This wasn't for his character for violence. This was finding out why did they come to get this guy." (20RT 2630.)

The court explained, "The issue is whether or not in your questioning of prosecution witnesses, you have placed in to issue your character for violence as a result of eliciting testimony from these individuals, particularly Benson who his dead, Benjamin who testified, Linda who testified, and Earnest Johnson who testified." (20RT 2630-

2631.) The court later indicated that “it doesn’t matter what the purposes of those questions is, Mr. Bankston. If the answers to those questions bring into operation the provisions of section 1103 of the Evidence Code, and in this case 1103(b), then the court . . . may allow the evidence to be brought before the jury. And it would be recited or testified to by Mr. Riggs as he just testified a few minutes ago.” (20RT 2633.) The court then agreed with appellant’s request that Sergeant Riggs simply refer to incidents in the Department of Corrections, rather than referring to specific prisons. (20RT 2634.)

At another hearing the following day, the trial court reviewed the transcripts of Earnest Johnson’s testimony, and agreed with appellant that Johnson had testified outside the jury’s presence. (21RT 2638-2639, 2678-2679.) The court noted, however, that Johnson’s testimony “wasn’t the only testimony the court considered in making its ruling.” (21RT 2639.) Upon revisiting the ruling later that day, the trial court explained that “the questions put to the witnesses [other than Johnson] by Mr. Bankston has indeed raised the issue of a propensity for violence of these other individuals.” (21RT 2679.) The court also indicated that it “thought very carefully” about the Evidence Code section 352 analysis, and ruled that the “probative value outweighs the prejudice.” (21RT 2680.)

Sergeant Riggs then testified before the jury as to appellant’s history of violent acts. Based on a review of appellant’s criminal history—which involved only “crimes with weapons and violence” and no theft or drug offenses—Sergeant Riggs opined that appellant had a propensity for violence. (21RT 2683-2685, 2691.) To explain the basis for his opinion, Sergeant Riggs read the following entries from appellant’s “rap sheet”:

- On December 5, 1980, appellant was detained for having a firearm at a public school, being a minor in possession of a

concealed firearm with live ammunition, and carrying a concealed weapon on his person. (21RT 2685, 2687.)

- On November 23, 1983, appellant was charged with robbery and carrying a loaded firearm in public. Appellant was convicted for carrying the firearm. (21RT 2687.)
- On March 12, 1985, appellant was charged for assault with a firearm on a person. Appellant was convicted and sentenced to three years in prison. (21RT 2688.)
- On November 2, 1985, appellant was detained while in prison for being a prisoner in possession of a weapon. (21RT 2688.)
- On June 19, 1986, appellant was detained while in prison for assault by a prisoner, and possession of a weapon. (21RT 2689.)
- On August 28, 1987, appellant was detained while in prison for possession of a weapon (tear gas) in prison. He was convicted and sentenced to four years. (21RT 2689.)
- On November 28, 1988, appellant was detained while in prison for assault by a prisoner. (21RT 2690.)
- On October 29, 1989, appellant was detained for being a felon in possession of a firearm. (21RT 2690.)
- On January 10, 1990, appellant was detained for carrying a concealed weapon on his person, carrying a loaded firearm in a public place, and being a felon in possession of a firearm. (21RT 2690.)
- On January 29, 1990, appellant was detained for being a felon in possession of a firearm. (21RT 2690.)

2. The Evidence Of Appellant's Prior Violent Conduct Was Properly Admitted, And Any Error In Admitting The Evidence Was Harmless

Though all relevant evidence is generally admissible (Evid. Code, § 351), “evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.” (Evid. Code, § 1101, subd. (a).) The Legislature has provided an exception to this general rule of exclusion in Evidence Code section 1103, subdivision (b). Evidence Code section 1103, subdivision (a)(1) allows a defendant to admit evidence of the character or trait of character of the victim of the crime for which the defendant is being prosecuted when the evidence is offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. In turn, Evidence Code section 1103, subdivision (b) states:

In a criminal action, evidence of the defendant’s character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a).

Evidence admissible under this section is subject to exclusion pursuant to Evidence Code section 352. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827-828.) The admission of evidence is reviewed for an abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1118.)

Here, the trial court did not abuse its discretion in admitting the evidence of appellant’s character for violence to rebut the defense’s

evidence of the victims' character or trait for violence. As noted above, Evidence Code section 1103 "allows the introduction of evidence of a defendant's violent acts and reputation for violence, if a defendant presents evidence as to the bad acts or reputation of the victim of a crime" (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1169.) Such was the case here. Appellant presented evidence concerning "the bad acts or reputation" of Benson Jones to support the defense theory that Jones was a violent, armed, convicted gang member, who, prior to the shooting, had committed acts of domestic violence. Appellant bolstered this character evidence with similar insinuations that Benjamin was also an armed, dangerous, convicted gang member, who had illegally carried weapons prior to the shooting. In other words, appellant offered evidence of Benson's prior treatment of his wife, Benson's prior convictions, and the brothers' ongoing gang membership to suggest that Benson and Benjamin had violent characters. This evidence, in turn, helped appellant show that Benson and Benjamin acted in conformity with that character on the day of the shooting, when they supposedly armed themselves, entered rival gang territory, and instigated or escalated a violent confrontation. (See Evid. Code, § 1103, subd. (a).) Pursuant to Evidence Code section 1103, subdivision (b), the prosecution was permitted to rebut this evidence with specific instances of violent conduct that tended to show appellant's violent character. (Evid. Code, §§ 1100, 1103, subd. (b).)

Appellant's arguments to the contrary are unavailing. He complains on appeal that his record of violent crimes was "irrelevant." (AOB 199.) But appellant did not object to the introduction of the evidence on relevance grounds, and therefore forfeited that claim. (Evid. Code, § 353.) Regardless, when the trial court ruled, evidence of appellant's prior instances of violent conduct was highly probative to rebut the inference that the Jones brothers had instigated or escalated the deadly shooting. And,

because appellant adduced evidence from Lieutenant Wright that the Jones brothers would always carry a gun while in rival gang territory—an area they lived near and frequented—that evidence was relevant to show that “the victim had a character for violence or a trait of character tending to show violence,” thus triggering the prosecution’s right to present rebuttal evidence under Evidence Code section 1103, subdivision (b). The practice of carrying a gun on previous occasions—which was necessarily included in the hypotheticals that appellant posed to Lieutenant Wright—was character evidence that tended to show Benson and Benjamin acted in conformity with that character trait on the day they were shot. Specifically, the evidence suggested that the victims were more likely to have been armed and violent, and Evidence Code section 1103, subdivision (a) authorized the admission of the evidence for that purpose. Appellant also disputed that Benson and Benjamin were unarmed during the shooting, by eliciting opinion evidence that they probably always carried a gun while in that area, and Linda may have disposed of the gun after the shooting.

Prior acts of unpermitted, concealed gun possession, standing alone, are not necessarily proof that Benson had a “violent” nature. However, appellant elicited other testimony that Benson was a convicted felon, a member of a violent criminal street gang, and was violent with his wife. This gave Benson’s alleged practice of routine gun possession a much more menacing flavor, which of course, was helpful to the defense theory that the shooting was a “rash response to a confrontation that was escalating” (AOB 194), and that it was the Jones brothers, not the shooter, who “escalated the confrontation” (AOB 195). Thus, looking at the evidence as a whole, the trial court did not abuse its discretion in ruling that Benson’s violence against his wife, Benjamin’s and Benson’s alleged prior gun possession, their alleged gang membership, and their ex-con status indicated a “trait of character tending to show violence.” (Evid. Code, § 1103, subd. (b).)

Appellant also argues, as he did at trial, that he only intended to use the evidence about the victims to impeach their testimony. (See 20RT 2629-2630; AOB 204-205.) The trial court was right to reject that contention, and this Court should do the same. The evidence that appellant introduced was directly probative of Benson's, as well as Benjamin's, character for violent behavior on the fatal day. Thus, as this Court stated in rejecting a similar argument, "neither the court nor the prosecution was required to accept defendant's representation" that he had actually introduced the evidence for some other purpose. (*People v. Walton* (1996) 42 Cal.App.4th 1004, 1014-1015.) Hence, just as in *Walton*, there was no error in the introduction of appellant's character evidence. (*Ibid.*; see also *People v. Blanco, supra*, 10 Cal.App.4th at pp. 1171-1176.)

In any event, appellant himself told the jury in his opening statement, "I also intend to elicit testimony from the wife of the deceased, that [Benson's] character, that his conduct did not conform to the normal husband and wife relationship as we thought." (21RT 2732.) Appellant went on to tell the jury that Debra became pregnant before Benson "exited prison," and that because Benson was so upset, deputies had to remove him from the home. (21RT 2732-2733.) Appellant also said he intended to show that Benson's conduct led to his death, because the shooter "might have been obligated to give him deadly force." (21RT 2733.) At the close of trial, appellant expressly acknowledged the purpose of Benson's character evidence, persuading the trial court to give a special instruction that "[e]vidence was received of the violent character of the complaining witness." (See 3CT 586 [Defendant's Special Instruction No. 4].) Appellant then argued to the jury that on the day of the shooting, Benson had been violent with his wife, and was "very upset" upon leaving his home. (24RT 2995.) Appellant contended, "Maybe [the true shooter] felt threatened by Benson Jones being back on the streets" (24RT 2996.)

Appellant later argued that Benson was “confrontational” at the time of the shooting, and that “maybe his attitude at that time was in conformity with maybe the crimes that were committed against him.” (24RT 3005.)

Appellant suggested to the jury, “Whoever the perpetrator of these crimes was with myself might have been obliged to give these people deadly force.” (24RT 3005-3006.) There was no error in the introduction of appellant’s character evidence, as he opened the door to this evidence.

Relying on *People v. Myers* (2007) 148 Cal.App.4th 546, 552-553 (*Myers*), appellant also complains that the evidence concerning the Joneses was not character evidence at all, so he should have been permitted to admit it without opening the door to evidence of his own violent character. (AOB 202-209.) Appellant’s reliance on *Myers* fails. In *Myers*, the defendant was charged with resisting arrest and committing battery on an officer. (*Myers, supra*, 148 Cal.App.4th at p. 549.) The defendant complained that he did not open the door to evidence of his violent character by presenting evidence that the officer used excessive force moments before the defendant resisted. (*Id.* at pp. 552-553.) The Court of Appeal agreed and found that the victim’s conduct *at the time of the offense* is not character evidence under Evidence Code section 1103, because such evidence is not offered to show that the victim has a character trait with which he or she acted in conformity at the time of the offense. (*Ibid.*) Here, on the other hand, appellant did not elicit evidence of the victims’ conduct only at the time of the offense, i.e., that Benson or Benjamin acted violently only when they supposedly “escalated” the deadly confrontation. Appellant presented other evidence that both Benjamin and Benson were convicted felons, were gang members, and were on parole. Appellant further introduced evidence that as members of a criminal street gang who frequented rival gang territory, both men likely carried guns at all times, which necessarily included occasions prior to the shooting. Appellant further elicited that

Benson had previously engaged in a “physical altercation” with this wife, and that if he acted violently toward her again—e.g., by doing something “stupid” to her—he would be sent back to prison. In other words, appellant specifically introduced evidence of conduct *prior* to the fatal shooting, in order to prove a violent character trait and to prove that Benson and Benjamin acted in conformity with that trait at the time of the “confrontation” in question. Because appellant did not simply elicit evidence of an act of violence by Benson or Benjamin during the shooting, *Myers* does not apply.

Appellant also alleges that the evidence of his prior violent acts should have been excluded under Evidence Code section 352, and that the failure to exclude the evidence violated his constitutional right to due process. (AOB 209-215.) Appellant is again mistaken. Evidence Code section 352 confers upon the trial court broad discretion in determining if the probative value of the evidence is substantially outweighed by other competing factors. The exercise of that discretion “must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Wright* (1985) 39 Cal.3d 576, 587; *People v. Bradford* (1976) 17 Cal.3d 8, 20; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.)

Here, the trial court reasonably determined that the probative value of the evidence of appellant’s violent acts outweighed any prejudicial effect, and the ruling was not arbitrary, capricious, or patently absurd. The evidence of appellant’s violent character was highly relevant to rebutting his presentation of evidence that the shooter was “Nate” and that Benson and his brother had instigated or escalated a confrontation. The evidence of appellant’s prior acts cast doubt on these defense theories by suggesting

that appellant himself had a propensity to commit violent acts. As such, the evidence was highly probative.

Conversely, the prejudicial impact of the evidence was minimal. As this Court has explained, “prejudice” does not simply mean damaging to the defense case. To the contrary,

The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is ‘prejudicial.’ The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’”

(*People v. Karis* (1988) 46 Cal.3d 612, 638.)

The evidence of appellant’s prior criminal history involved the possession and/or use of weapons, but the most serious acts of violence were assaults. (See 21RT 2685-2690.) Thus, appellant’s prior conduct was far less serious and inflammatory than the present charges, which involved allegations of multiple cold-blooded murders and attempted murders. In other words, the present charges—combined with appellant’s visible “Crip Killer” tattoo (17RT 2041, 2077-2078) and his admission to the jury that he was a Blood gang member (21RT 2734; 24RT 2991)—painted appellant in a much more negative light than his rap sheet. Further, the jury knew from the rap sheet that appellant either had been convicted of the prior acts, or had already been incarcerated when they occurred. Thus, the jury would not have felt the need to punish appellant for his prior behavior. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1287 [where defendant had been convicted of prior offense, jury would not be tempted to punish him for

prior offense].) Thus, the potential for prejudice from the evidence was minimal.

Accordingly, it certainly was within the bounds of reason for the trial court to determine that the danger of undue prejudice did not substantially outweigh the significant probative value of this evidence. (Evid. Code, § 352.) For the same reasons, admission of the evidence did not violate appellant's federal constitutional right to due process. (See *People v. Roybal* (1998) 19 Cal.4th 481, 506, fn. 2 [where the trial court did not abuse its discretion, "there is thus no predicate error on which to base the constitutional claims"].)

3. Any Error In Admitting The Prior Conduct Evidence Was Harmless

In any event, any error in admitting the uncharged offense evidence at the first guilt phase trial was harmless error under *People v. Watson, supra*, 46 Cal.2d 818. (*People v. Malone* (1988) 47 Cal.3d 1, 22.) Generally, a trial court's discretionary ruling must not be disturbed on appeal unless the defendant can show that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1124.) In turn, a miscarriage of justice should be declared only if, in light of the entire record, it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the alleged evidentiary error of the trial court. (Cal. Const., art. VI, § 13; *People v. Watson, supra*, 46 Cal.2d at p. 836; see also Evid. Code, § 353, subd. (b); *People v. Earp, supra*, 20 Cal.4th at p. 878; *People v. Whitson* (1998) 17 Cal.4th 229, 251.) Moreover, the erroneous admission of other crimes evidence "results in a due process violation only if it makes the trial fundamentally unfair." (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

The admission of the uncharged crime evidence is “a garden-variety evidentiary issue under state law” that did not implicate defendant’s constitutional rights. (See *People v. Abilez*, *supra*, 41 Cal.4th at p. 503.)

The fact that the jury failed to convict appellant of the Sanchez murder (count 1), the Johnson attempted murder (count 6), or the assault with a deadly weapon on Linda Jones (count 4) demonstrates that the jury’s passions were not inflamed by exposure to the character evidence. (See *People v. Stewart* (1985) 165 Cal.App.3d 1050, 1057; see also *Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1150 [jury’s failure to convict on all counts demonstrated its ability to compartmentalize the evidence].) Furthermore, as explained above, the prior crimes evidence was not inflammatory compared to the charged offenses, and was not unduly prejudicial. Moreover, the evidence against appellant at the first trial concerning the murder of Benson and the attempted murder of Benjamin was strong. Two eyewitnesses identified appellant as the shooter, and the shooter’s description was immediately recognized as that of “Ant Dog,” i.e., appellant. Appellant’s insinuations that someone named “Nate” was the actual shooter, and that the shooting was not premeditated, were simply not credible.

Moreover, the jury knew appellant was presumed innocent, they were thoroughly instructed on how to consider and weigh the challenged character evidence, and were specifically told that the evidence of appellant’s prior conduct was not sufficient to prove the charged offenses and could not be considered as proof that appellant had a propensity to commit crimes. (See 3CT 568-569, 585.) The jury was also instructed that the “rap sheet” evidence was not offered to prove the truth of the matters stated in the document, but only offered to form the basis for Sergeant Riggs’s opinion about appellant’s character or propensity for violence. (3CT 588.) The jury also was instructed about the limited purpose of the

character evidence through appellant's own special instructions. (See 3CT 586-587 [Defendant's Special Instructions Nos. 4 ("violent character of the complaining witness"), and 5 ("violent character of the Defendant")].) This Court must presume the jury understood the instructions and followed them, and there is nothing in the record showing otherwise. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1115; *People v. Mullens* (2004) 119 Cal.App.4th 648, 658-659.) Thus, it is not reasonably probable appellant would have achieved a more favorable result even if, for some reason, he had been permitted to admit all the evidence of the victims' bad character, but the evidence of his own prior criminal history had been excluded. Accordingly, appellant's contention lacks merit.

B. No Prejudicial Error Occurred In Admitting Evidence Of Appellant's 1984 To 1989 Arrests At The Second Guilt Phase Trial

1. Procedural Background

At appellant's second guilt phase trial, the prosecution called the same two gang experts from the first trial: Deputy Andrew MacArthur, a gang expert assigned to the Operation Safe Streets gang unit at the time of the crimes, and Compton Police Lieutenant Reginald Wright, a gang expert who had led the Sheriff's gang homicide unit in 1991. (40RT 5127-5131; 41RT 5356-5357.) The gang experts' testimony at the second guilt phase trial was largely a repetition of their testimony from the first guilt phase trial.

Deputy MacArthur opined that appellant was an active member of the Nine Deuce Bishops street gang. As a basis for his opinion, Deputy MacArthur explained that his duties involved gathering gang intelligence by talking with gang members. (40RT 5130.) Deputy MacArthur had interviewed and photographed appellant before. He explained that

whenever gang members were contacted on the streets or taken into custody, police would complete field identification or "F.I." cards with the gang member's information. (40RT 5133.) Deputy MacArthur personally photographed and completed an F.I. card on appellant. The F.I. card was first created on October 31, 1984, and Deputy MacArthur updated it following appellant's arrest in October 1989. Appellant's F.I. card indicated his gang moniker was "Ant Dog." (40RT 5133-5135, 5189.) The card indicated that appellant was a member of 92nd or "9 Deuce" Bloods, a clique or sub-set of the Bishop Bloods gang. (40RT 5134.)

Deputy MacArthur explained that starting in the late 1980's, when police gather information on a gang member, the information is then added to a computerized gang database called the "G.R.A.T.E." system, which stood for "General Report Evaluation and Tracking." (40RT 5135-5136.)³³ A gang database file for appellant was opened on August 21, 1987. (40RT 5191.) Consistent with appellant's F.I. card, his file also showed that he was a Bishop Bloods gang member with the moniker "Ant Dog." The file also reflected appellant's "C.K." earlobe tattoo, which stood for "Crip Killer." (40RT 5136-5137; 43RT 5557.)

On cross-examination, appellant challenged the accuracy of the gang database system. (40RT 5188-5189.) He elicited from Deputy MacArthur that someone who had denied membership in a gang might still be listed as a gang member in the system. (40RT 5190.) Appellant asked if the system was purged, and Deputy MacArthur explained that individuals were automatically removed from the database if they had no gang-related contacts or inquiries in five years. (40RT 5190.) Appellant asked about entries in the file about his arrests in 1984, 1989, and 1991. (40RT 5194.)

³³ As noted above, at the first guilt phase trial, the acronym used in the reporter's transcript was "G.R.E.A.T." (See 17RT 2035-2040.)

Appellant elicited that between 1984 and 1989, and again between 1989 and 1991, there was no documentation in the gang database file of any contact between the sheriff's department and appellant. (40RT 5191-5192, 5195-5196, 5199.) Despite the gaps in time, however, appellant was still listed in the database file as an active gang member. (40RT 5198-5200.) Appellant elicited from Deputy MacArthur that an individual sentenced to life imprisonment would still be listed in the gang database file as an active gang member, but only for five years. (40RT 5200-5201.)

Following appellant's cross-examination of Deputy MacArthur, the prosecutor requested a hearing outside the jury's presence. (40RT 5202.) At the hearing, the prosecutor argued that appellant had introduced bad character evidence pertaining to victim Earnest Johnson by way of the gang database file, and that she should be allowed to introduce bad character evidence concerning appellant under Evidence Code section 1103. The prosecutor also argued that through his cross-examination of Deputy MacArthur, appellant had suggested that he had not been arrested between 1984-1987, and 1987-1991, which the prosecutor argued was not true. (40RT 5204.) The prosecutor argued that appellant's rap sheet showed several arrests during that time, and that appellant had opened the door to the introduction of evidence of arrests that were not reflected in the printout from the gang database. (40RT 5204.) The court agreed that a hearing on the issue would be set for the following morning, and the court read Evidence Code section 1103, into the record. (40RT 5205.)

When court reconvened the following morning, the prosecutor declined to pursue the motion to admit evidence pursuant to Evidence Code section 1103, but stated, "I will be asking at this point to get into the defendant's arrests, which are reflected in his rap sheet that is provided to him in discovery with the next witness, because Mr. Appellant went into great detail and asked several questions about [how] he had no arrests, or

the arrests were not reflected in the G.R.E.A.T., therefore, he had no arrests.” (41RT 5208-5209.) “So I’m not going to be bringing up 1103 evidence at this point, just his arrests.” (41RT 5209.)

Appellant argued in response, “[W]hen I went into the arrests, I went to arrests being documented on the G.R.E.A.T. form, which I feel that that revealed nothing, that I didn’t have any arrests. The arrests were not documented on that G.R.E.A.T. printout form as the deputy testified the contact would be documented on that form.” (41RT 5209.) “I believe,” appellant continued, “that goes to present to the members of the jury that this documentation of intelligence on gang members is not as accurate as the testifying witness would lead one to believe.” (41RT 5209.) Appellant contended, “I didn’t say I didn’t have arrests. I said the arrests were not documented from the ‘84 through ‘87 period at the inception of the G.R.E.A.T. system also from contact with the defendant that’s visible on that G.R.E.A.T. printout.” (41RT 5209.) Appellant contended that the lack of notation on the gang database file “just goes to the accuracy of that document.” (41RT 5210.)

The trial court noted that several inferences could be drawn from appellant’s cross-examination of Deputy MacArthur. (41RT 5210.) “One of which,” explained the court, “is that the defendant did not have any arrests other than what – or record other than what is reflected on the G.R.E.A.T. system computer printout.” (41RT 5210.) Another inference, the court stated, “is that the defendant didn’t have any arrests other than, or contact other than what is reflected on G.R.E.A.T.” (41RT 5210.) The court concluded that the prosecution had the right to have the jury draw the same inference that appellant was seeking—that appellant’s criminal activities were not fully documented on in the gang database file. (41RT 5211.)

Deputy MacArthur then testified on redirect examination as to appellant's criminal history between 1984 and 1989, and noted that appellant's rap sheet showed that he had the following arrests during that time:

- January 1984: carrying a loaded firearm in a public place, a misdemeanor. (41RT 52145.)
- March 1985: assault with a deadly weapon, at a correctional facility in Chino. (41RT 5215-5216.)
- November 1985: being a prisoner in possession of a weapon at Soledad prison. (41RT 5216.)
- June 1986: assault by a prisoner and possession of a weapon at Folsom prison. (41RT 5216.)
- August 1987: possession of a weapon or tear gas by a prisoner. (41RT 5216-5217.)
- November 1988: assault by a prisoner at Tehachapi prison. (41RT 5217.)
- October 1989: possession of a weapon by an ex-felon. (41RT 5217.)

Deputy MacArthur opined that when someone is in custody, the arrests would not be reflected in the gang database file. (41RT 5217-5218.) Deputy MacArthur further opined that appellant had remained an active Bishop Blood gang member for this entire time, regardless of whether he was in or out of prison. (41RT 5218.)

2. The Trial Court Acted Within Its Discretion In Admitting The Evidence, And Any Error Was Harmless

“An appellate court applies the abuse of discretion standard to review any ruling by a trial court on the admissibility of evidence” (*People v.*

Cox, supra, 30 Cal.4th at p. 955.) That means reversal is not appropriate unless the reviewing court is compelled to conclude that the trial court ““exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]” [Citation.]” (*People v. Williams* (2008) 43 Cal.4th 584, 634-635.) Further, because an expert’s need to consider extrajudicial matters, and a jury’s need for information sufficient to evaluate an expert opinion, may conflict with an accused’s interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court’s sound judgment. (*People v. Nicolaus* (1991) 54 Cal.3d 551, 582; see *People v. Cole* (1956) 47 Cal.2d 99, 105.)

Appellant’s chief complaint at trial was not that the evidence was legally inadmissible, but that the trial court had made an erroneous factual finding concerning the inferences the jury could draw from appellant’s cross-examination. Appellant contended that he had not been trying to suggest that he had been arrest-free between 1984 and 1989, but rather that he had been trying to show that the gang database printout was not accurate, and was therefore unreliable. (41RT 5209-5210.) But the trial court was not compelled to accept appellant’s self-serving argument, and was instead entitled to find that appellant’s cross-examination tended to falsely suggest that he had no arrests or police contacts other than what was on the printout. (See 41RT 5210 [trial court discussing the inferences raised by appellant’s questions].) Because that inference was, of course, patently false, appellant had no right to raise it before the jury without rebuttal from the prosecution. Thus, the trial court reasonably decided that the prosecution could rebut the false impression left by appellant with the evidence reflected on appellant’s rap sheet that he had, in fact, been arrested several times between 1984 and 1989.

Appellant, however, argues that even if the evidence was admissible to rebut the false inference raised by his cross-examination, the trial court failed to limit the evidence to the mere fact that appellant had been arrested more frequently than shown on the gang database printout. (AOB 221-224.) Analogizing the case to *People v. Coleman* (1985) 38 Cal.3d 69, appellant contends that the additional information reflected in his rap sheet should have been excluded because it was “inflammatory and otherwise inadmissible character evidence.” (AOB 221-224.) Appellant, however, never objected at trial that the evidence was “inflammatory” or otherwise inadmissible pursuant to Evidence Code section 352, and therefore forfeited such claims. (Evid. Code, § 353.)

In any event, appellant’s reliance on *Coleman* is misplaced. The defendant in *Coleman* was tried for the murders of his wife, son, and niece. He asserted diminished capacity and insanity defenses, and both sides presented extensive psychiatric and psychological testimony. (*People v. Coleman, supra*, 38 Cal.3d at pp. 74-75, 78.) Three “highly emotional and inflammatory letters” written by the defendant’s wife “long before the murders” were admitted for the limited purposes of impeaching the defendant’s credibility and explaining and challenging the bases for the various doctors’ expert opinions. (*Id.* at pp. 74, 81.) In addition to describing the defendant’s paranoia, the wife stated in her letters that the defendant had “‘twice before’ tried ‘to hurt’ her, that he had ‘many times’ threatened to kill the family, that he did not want his children going through life as he had, and that his wife feared that he would ‘do this to us and then find out’ [that she was not involved in what he believed was a conspiracy against him].” (*Id.* at p. 82.) “[V]ia a series of largely unsuccessful attempts to fashion proper questions” during his cross-examination of the defendant, the prosecutor managed to present the most prejudicial portions

of the letters before the jury. (*Id.* at p. 86.) One expert was later permitted to read the entirety of two of the letters into the record. (*Id.* at p. 88.)

In holding that the trial court abused its discretion in allowing these “[a]ccusatory statements ‘from the grave’” to come into evidence over the defendant’s Evidence Code section 352 objection, this Court noted that the prosecutor could have impeached the defendant “without revealing to the jury those details of the letters which did not impeach the veracity of [his] testimony” (*People v. Coleman, supra*, 38 Cal.3d at pp. 87, 88, 93.) Emphasizing that “the letters were only a small portion of the material on which the psychiatrists based their opinions and were not cited by them as items of major significance in their evaluation of the defendant’s mental capacity,” the court also observed that “those portions of the letters which the prosecutor legitimately offered to challenge the psychiatric opinions could have been selected and presented in a fashion that would have lessened their emotional impact and would have avoided the improper inference that the victim’s accusations were true.” (*Id.* at p. 93.)

This case is not like *Coleman*. No “[a]ccusatory statements ‘from the grave’” came into evidence. (*People v. Coleman, supra*, 38 Cal.3d at p. 87.) No irrelevant yet highly prejudicial evidence was presented through bungled prosecutorial questions or otherwise. (*Id.* at p. 86.) Deputy MacArthur simply listed the dates of the arrests between 1984 and 1989, and the reason for each arrest. He explained that the arrests that occurred while appellant was in custody would not appear on the gang database printout. (41RT 5218.) The testimony was directly responsive to the false impression appellant put before the jury through cross-examination, namely that he had had not been arrested between 1984 and 1989. The prosecutor made this point briefly in rebuttal argument to the jury (see 43RT 5667-5668), but otherwise neither party revisited the matter. The rebuttal of

testimony about the arrests was also pertinent to the issue raised by appellant about the alleged inaccuracies in the database.

In any event, as with the previous claim, any error in admitting the arrest evidence was harmless error under *People v. Watson, supra*, 46 Cal.2d 818. (*People v. Malone, supra*, 47 Cal.3d at p. 22.) Generally, a trial court's discretionary ruling must not be disturbed on appeal unless the defendant can show that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez, supra*, 8 Cal.4th at p. 1124.) As noted, the erroneous admission of other crimes evidence "results in a due process violation only if it makes the trial fundamentally unfair." (*People v. Partida, supra*, 37 Cal.4th at p. 439; see also *People v. Abilez, supra*, 41 Cal.4th at p. 503 [admission of prior bad act evidence is "a garden-variety evidentiary issue under state law" that does not implicate defendant's constitutional rights].)

The evidence concerning appellant's prior arrests was not "inflammatory." Moreover, the prosecutor raised the point briefly in rebuttal argument to the jury (see 43RT 5667-5668), but otherwise neither party revisited the matter. At no time did the prosecution contend that appellant's arrests were indicative of a trait or character for violence, or that appellant acted in conformity with such a trait or character.

Moreover, the fact that the jury acquitted appellant of the attempted murder of Johnson (count 6) demonstrates that the jury's passions were not inflamed by exposure to appellant's prior arrests. (See *People v. Stewart, supra*, 165 Cal.App.3d at p. 1057; see also *Park v. California, supra*, 202 F.3d at p. 1150 [jury's failure to convict on all counts demonstrated its ability to compartmentalize the evidence].) Furthermore, as argued above, the evidence was far less serious, and no more inflammatory, than the present charges, which—combined with appellant's visible "Crip Killer"

tattoo and his admitted gang membership—painted appellant in a much more negative light than his prior arrests evidence.

Also, the evidence against appellant presented at the second trial concerning the murder of Sanchez and the assault of Linda Jones was strong. Melendez identified appellant as the man who shot at him and Sanchez on May 10, 1991. (35RT 4298-4300, 4302, 4319, 4321-4322.) Melendez saw that appellant cocked the assault rifle, and the men made eye contact. (35RT 4302.) Lopez and Franco were behind the shooter's car, which they identified as similar to appellant's. (37RT 4527; 39RT 5016.) Franco later identified appellant as a man who looked like the shooter from a six-pack photographic lineup in 1994, and again in the courtroom during trial. Franco indicated that appellant looked "a lot" like the shooter—especially his eyes, which "[she] could not forget," and which were "kind of out of orbit"—and that she was "95 percent" sure of her identification. (39RT 5012-5016; 40RT 5054-5055, 5063, 5065-5066.) Appellant's friend Torrez testified that appellant's came to his house the next day and bragged about the shooting, and about "putting in work" for his gang. (37RT 4558-4560, 4573-4574.) Appellant said he had shot the C.C.G. member on Thorson, which was in C.C.G.'s territory, and had used an AK-47 assault rifle. (37RT 4562-4563.) Torrez testified that appellant had the AK-47 with him, which Torrez identified as the same AK-47 that police found in appellant's lap during the traffic stop. (37RT 4584 [People's Exh. 1], 4608-4609.)

As to the assault with a firearm on Linda, Benjamin and Linda both gave credible eyewitness accounts of the shooting, and identified appellant as the shooter. (38RT 4775-4776, 4805-4806, 4816-4817, 4819, 4826-4828.) Linda testified that after seeing appellant essentially execute Benson with a close-range gunshot, appellant aimed the gun at her with both hands. She testified that she and another person "jumped into the

street” (38RT 4811-4812; 39RT 4865-4866), that appellant fired, and that she “almost got hit” (38RT 4811).

Thus, it is not reasonably probable appellant would have achieved a more favorable result even if the evidence of his prior arrests had been excluded. Accordingly, appellant’s contention lacks merit.

C. The Use Of The Rap Sheet At Appellant’s Trials Did Not Violate The Confrontation Clause

Appellant also contends that the trial court’s admission of his rap sheet as evidence of his violent character at the first guilt phase trial, and to rebut his suggestion at the second guilt phase trial that he had not been arrested between 1984 and 1989, violated his Sixth Amendment right to confrontation. (See AOB 229-230, 241-250, 252-256.) Appellant’s attempt to frame the issue as a Confrontation Clause violation fares no better.

1. Appellant Forfeited His Confrontation Clause Claim By Failing To Specifically Object At Trial

A claim based on a purported violation of the Confrontation Clause must be timely asserted at trial or it is waived on appeal. (*People v. Burgener* (2003) 29 Cal.4th 833, 869; see also *People v. Redd* (2010) 48 Cal.4th 691, 730 [holding that a hearsay objection does not preserve a Sixth Amendment confrontation claim]; *People v. Chaney* (2007) 148 Cal.App.4th 772, 778-779 [confrontation analysis under *Crawford* is “distinctly different than that of a generalized hearsay problem”].) Appellant failed to interpose a timely and specific objection to the admission of the rap sheet on Confrontation Clause grounds. Appellant’s only complaint concerning the use of the rap sheet at his first trial was that he had not opened the door to evidence of his own bad character under Evidence Code section 1103. (See 20RT 2629-2630.) Although appellant

did argue at his second trial that the rap sheet should not be used, he provided no legal grounds to exclude it, and made no specific legal “objection” at all. Thus, because appellant did not object on Confrontation Clause grounds at trial, he forfeited this claim on appeal.

2. The Admission Of The Rap Sheet Evidence Did Not Violate Appellant’s Rights Under The Confrontation Clause

Even assuming appellant’s Confrontation Clause claim is cognizable, it is meritless. The United States Supreme Court held that out-of-court statements by a witness that are “testimonial” are barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. (*Crawford v. Washington* (2004) 541 U.S. 36, 68 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*)). Although *Crawford* did not specifically define the term “testimonial,” the United States Supreme Court did provide examples of testimonial statements, including: “(1) plea allocutions showing the existence of a conspiracy; (2) grand jury testimony; (3) prior trial testimony; (4) ex parte testimony at a preliminary hearing; and (5) statements taken by police officers in the course of interrogations.” (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 172, citing *Crawford*, *supra*, at pp. 51-52.) *Crawford* also noted that statements could be “testimonial” if they were “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” (*Crawford*, *supra*, at p. 52; see also *People v. Pedroza* (2007) 147 Cal.App.4th 784, 792-793.)

In California, rap sheets are not subject to *Crawford*’s confrontation requirements. In *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1221, the appellate court held that “records of prior convictions are not ‘testimonial’” and thus not subject to *Crawford*’s confrontation requirements. “*Crawford*

supports a conclusion that the test for determining whether a statement is 'testimonial' is not whether its use in a potential trial is foreseeable, but whether it was obtained for the purpose of potentially using it in a criminal trial or determining if a criminal charge should issue." (*Id.* at p. 1224.) The Court of Appeal found *Crawford*'s mention that business records were not "testimonial" was "enlightening." (*Ibid.*) It concluded that prior conviction records under section 969b "are prepared to document acts and events relating to convictions and imprisonments. Although they may ultimately be used in criminal proceedings, as the documents were here, they are not prepared for providing evidence in criminal trials or for determining whether criminal charges should issue. Therefore, these records are beyond the scope of *Crawford*" (*Id.* at p. 1225.) That reasoning was reiterated in *People v. Morris* (2008) 166 Cal.App.4th 363, 373. There, the defendant challenged the admission of a certified CLETS rap sheet to prove his alleged prison priors. The appellate court agreed with *Taulton* that CLETS rap sheets were not testimonial hearsay, and their admission did not violate the defendant's confrontation rights under *Crawford*. (*Ibid.*)

Appellant contends that the decision in *Morris* "makes no sense," and was made without the benefit of *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314] (*Melendez-Diaz*). (AOB 224.) There, the United States Supreme Court found that three "certificates of analysis" showing the results of forensic analysis performed on seized cocaine fell within the "core class of testimonial statements" and that their admission violated *Crawford*. (*Melendez-Diaz, supra*, 557 U.S. at p. 310.) Appellant contends that the rap sheet evidence is testimonial under *Melendez-Diaz*. (AOB 244.) Appellant's argument is not persuasive.

In *Melendez-Diaz*, the United States Supreme Court held that notarized affidavits admitted as the sole evidence to establish that the

substance the defendant possessed was cocaine were testimonial statements, and the analysts were “witnesses” for purposes of the Sixth Amendment. (*Melendez-Diaz*, *supra*, 557 U.S. at p. 310.) Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to “be confronted with” the analysts at trial.” (*Id.* at p. 311, quoting *Crawford*, *supra*, 541 U.S. at p. 54.)

In *Bullcoming v. New Mexico* (2011) 564 U.S. ____ [131 S.Ct. 2705, 180 L.Ed.2d 610] (*Bullcoming*), the United States Supreme Court again held that an analyst’s certificate was a testimonial statement that could not be introduced unless the analyst was unavailable for trial and the defendant had a prior opportunity to confront that witness. (131 S.Ct. at p. 2710.) Bullcoming’s blood sample was sent to a state lab for testing after he was arrested for drunk driving. The analyst who tested Bullcoming’s blood sample recorded the results on a state form that included a “certificate of analyst.” There was also a certificate of a reviewer. (*Id.* at pp. 2710-2711.) At Bullcoming’s trial, the analyst who tested his blood sample did not testify because he had been placed on disciplinary leave. The prosecution called another analyst who was familiar with the lab’s testing procedures but had not participated in or observed the test on Bullcoming’s sample. (*Id.* at pp. 2711-2712.)

The plurality opinion in *Bullcoming* explained that the surrogate analyst was an inadequate substitute for the analyst who performed the test. The testimony of the surrogate could not convey what the actual analyst knew or observed, and would not expose “any lapses or lies” by the certifying analyst. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2708.) The court stated that, if the Sixth Amendment is violated, “no substitute procedure can cure the violation.” (*Id.* at pp. 2708, 2716.) *Bullcoming* reiterated the principle stated in *Melendez-Diaz* that a document created solely for an

evidentiary purpose in aid of a police investigation is testimonial. (*Id.* at p. 2717.) Even though the analyst's certificate was not signed under oath, as occurred in *Melendez-Diaz*, the two documents were similar in all material respects. (*Ibid.*)

Contrary to appellant's suggestion, the decisions in *Taulton* and *Morris* survive *Melendez-Diaz* and are applicable in appellant's case. A rap sheet is analogous to the clerk's certificate, not the forensic analysis in *Melendez-Diaz* concluding the substance the defendant possessed was cocaine. As *Taulton* and *Morris* both noted, rap sheets are not testimonial because they are prepared to document the acts and events related to previous arrests and convictions, rather than to prove events relevant to a criminal trial. Although these records may ultimately be used in a criminal prosecution, that is not the reason for their creation. (*People v. Morris*, *supra*, 166 Cal.App.4th at p. 371, fn. 9; *People v. Taulton*, *supra*, 129 Cal.App.4th at p. 1225.) Rather, the information concerning appellant's criminal history was collected in a rap sheet in order to serve the needs of all law enforcement. (Gov. Code, § 15151.) In *Melendez-Diaz* on the other hand, the Court reasoned that the certification was, in essence, testimony, since it was the equivalent of a declaration made for the purpose of establishing or proving a fact at trial. The Court emphasized that the "sole purpose" of the document was "to provide 'prima facie evidence of the substance's composition, quality, and the net weight.'" (*Melendez-Diaz*, *supra*, 557 U.S. at p. 311.) And, although appellant suggests that *Melendez-Diaz* undercut *Morris* (AOB 244), the Supreme Court itself in *Melendez-Diaz* did not believe that its decision marked a substantial change in confrontation clause law, stating that its conclusion "involve[d] little more than the application of our holding in" *Crawford*. (*Id.* at p. 329.) Accordingly, there is no reason to conclude that *Melendez-Diaz* compels a

different result than that reached in *Morris*, which took full account of *Crawford*.

Thus, unlike *Melendez-Diaz*, the rap sheet at issue here is nothing more than a compilation of preexisting records and documents related to appellant's prior arrests and convictions. It is not a memorialization of investigations newly undertaken in connection with this case. Accordingly, the admission of the rap sheet evidence did not violate appellant's confrontation rights.

In any event, for the reasons explained above, the alleged evidentiary error was harmless under either *People v. Watson, supra*, 46 Cal.2d at page 836 or *Chapman v. California, supra*, 386 U.S. at page 24. As explained above, the alleged error, which did not even involve the erroneous admission of any testimony, was negligible when compared to the prosecution's cases against appellant. In addition, the trial court's instructions minimized any possible prejudice.

IX. THE TRIAL COURT PROPERLY ALLOWED THE GANG EXPERTS TO RELY ON APPELLANT'S F.I. CARD AND GANG DATABASE PRINTOUT

Appellant contends the trial court erred in allowing the prosecution's gang experts to rely on information recorded in appellant's F.I. cards and gang database printout when forming their opinions. Appellant argues—just as he did with his rap sheet claim—that under *Crawford*, the F.I. cards and the gang database printout amounted to “testimonial hearsay” that was used at trial in violation of his confrontation rights. (AOB 229, 233-240, 252-253.) He maintains the error was not harmless beyond a reasonable doubt at either guilt phase trial because the cases were close and were founded on “shaky” and “dubious” eyewitness identifications. (AOB 248-250, 253-256.) Respondent disagrees. As with his rap sheet claim, the Confrontation Clause claim concerning the F.I. cards and gang database file

is forfeited and meritless. And as appellant acknowledges, California courts have held that *Crawford* does not apply to the admission of hearsay statements collected by the police and used in support of a gang expert's testimony: (AOB 239.)

**A. Expert Testimony Concerning Appellant's F.I. Cards
And Gang Database Printout**

As discussed at length in the Statement of Facts and appellant's opening brief (AOB 230-232), the prosecution called two gang experts to testify at appellant's guilt phase trials: Deputy Andrew MacArthur and Lieutenant Reginald Wright. (17RT 2032-2034 [Deputy MacArthur]; 20RT 2568-2572 [Lieutenant Wright].)

In addition to testifying at length about the relevant territories of the rival gangs, gang culture and hierarchy, and gang membership, Deputy MacArthur opined that appellant was a Blood and that the Jones brothers were Crips. As a basis for those opinions, Deputy MacArthur explained that his duties entailed gathering gang intelligence by talking with gang members. (17RT 2038.) He explained that whenever gang members were taken into custody, O.S.S. investigators would interview them, photograph them, and complete field identification or "F.I." cards with the gang member's information. The gang member's information was then added to a computerized gang database database, or "G.R.E.A.T." system. (17RT 2035-2040.) Benjamin's gang database file suggested to Deputy MacArthur that Benjamin was an active gang member. (17RT 2095.) Benjamin and Benson lived in an area of Compton that was an area claimed by the Atlantic Drive Crips gang, or "A.D.C.," which was a subset of the Crips. (15RT 1754-1756.)

Deputy MacArthur also opined that appellant was a hard-core gang member. (17RT 2118.) He knew appellant to be affiliated with the 9

Deuce Bishop Bloods, which was also known as the Eastside Bishops. (17RT 2043.) Deputy MacArthur had interviewed and photographed appellant before. Deputy MacArthur had an F.I. card on appellant from October 31, 1984, which Deputy MacArthur then updated following appellant's arrest in October 1989. (17RT 2040-2041, 2073, 2082.) Deputy MacArthur testified that appellant's F.I. card indicated his gang moniker was "Ant Dog." (17RT 2040-2041.)

Deputy MacArthur further testified that the gang database files are created when someone is determined to be an active gang member. (17RT 2092.) According to Deputy MacArthur, appellant's file was created on August 21, 1987. (17RT 2088.) Consistent with appellant's F.I. card and his admission to Deputy Patterson on May 21, 1991, appellant's gang database file also showed his moniker was "Ant Dog," and reflected his "C.K.," or "Crip Killer" earlobe tattoo. (16RT 1947-1948; 17RT 2078-2079, 2088, 2119.)

Deputy MacArthur gave similar testimony at appellant's second guilt phase trial about the F.I. cards and gang database file—and how they were indicative of appellant's gang membership. (See 40RT 5130, 5133-5135, 5189 [F.I. cards], 5135-5137, 5191; 43RT 5557 [gang database file].)

B. Appellant Forfeited His Confrontation Clause Claim

Appellant never objected to the gang expert's testimony on the ground raised on appeal. Appellant did not object at either trial that the expert testimony was based on inadmissible hearsay contained in the F.I. cards or gang database printout, or that the testimony violated his confrontation rights.

As to the documents themselves, when the F.I. card and the gang database printout were offered into evidence at the end of the first guilt phase trial, appellant objected that the documents were "full of hearsay,"

but the trial court overruled the objections. (21RT 2708-2710.) Appellant did not object to the admission of the documents on Confrontation Clause grounds. (21RT 2708-2709.)

When the same documents were offered into evidence at the end of the second guilt phase trial, appellant only objected to the F.I. card, but offered no legal grounds. He merely observed that the F.I. card “has so much biological information of the defendant on there.” The trial court replied, “Okay. That’s overruled.” (42RT 5517.) When the gang database printout was offered into evidence, appellant stated, “No objection.”

Under these circumstances, appellant forfeited appellate review of any claim that the gang experts were allowed to rely on the investigation of other officers, or that the alleged errors resulted in constitutional violations, as his failure to timely raise these specific claims deprived the trial court of the opportunity to rule on the claims or cure any constitutional infirmity. (Evid. Code, § 353; *People v. Kipp* (2001) 26 Cal.4th 1110, 1122; *People v. Williams* (1997) 16 Cal.4th 153, 250.)

Appellant’s attempt to skirt the forfeiture rule is unavailing. Contrary to appellant’s suggestion (AOB 232), his “hearsay” objection to the documents themselves—made long after the expert testimony was rendered, and made at his first trial only—was insufficient to preserve his instant confrontation claim. As the above authorities show, a purported violation of the Confrontation Clause must be timely asserted at trial or it is forfeited on appeal. (See also *People v. Redd, supra*, 48 Cal.4th at p. 730 [holding that a hearsay objection does not preserve a Sixth Amendment confrontation claim]; *People v. Burgener, supra*, 29 Cal.4th at p. 869; *People v. Chaney, supra*, 148 Cal.App.4th at pp. 778-779 [confrontation analysis under *Crawford* is “distinctly different than that of a generalized hearsay problem”].) Thus, because appellant did not object at all when the experts rendered their testimony, and did not object to the documents themselves

on Confrontation Clause grounds at the end of trial, he forfeited this claim on appeal.

C. There Was No Error Under State Evidentiary Law

Assuming this Court reaches the merits of the claim despite appellant's failure to object at trial, the claim is meritless. It is well settled that a jury may rely on expert testimony about gang membership, culture, habits, and activities to reach a finding on a gang allegation. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944; *People v. Gardeley* (1996) 14 Cal.4th 605, 617-620; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931.) In turn, "[t]he rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay." (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 153, quoting *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210, and citing *Gardeley, supra*, 14 Cal.4th at pp. 618-619; Evid. Code, § 801, subd. (b) [an expert's opinion may be based on matter "whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates"].) For example, gang experts may rely on conversations with gang members, information gathered by other law enforcement officers, their own personal investigations of gang-related crimes, and other information to render their opinions. (*Gardeley, supra*, 14 Cal.4th at pp. 618-620; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463.) The trial court has ample discretion to admit expert testimony, and its ruling must be upheld on appeal absent a manifest abuse of discretion. (*Gardeley, supra*, at p. 619; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

In the case at bar, there is no dispute that Deputy MacArthur and Lieutenant Wright were qualified to render opinions about the Crips and the

Bloods, and appellant's gang membership. The experts relied on their own personal contacts with appellant, their personal expertise, training, and experience, as well as information gathered by others, to form their own opinions. Certainly, the experts were not required to conduct separate and independent investigation or evaluation of appellant's gang membership to corroborate the investigation already done by other officers. (See *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426.)

In sum, there was no violation of any state evidentiary law. (See, e.g., *People v. Gardeley, supra*, 14 Cal.4th at pp. 619-620; *People v. Duran, supra*, 97 Cal.App.4th at pp. 1463-1464; *People v. Valdez, supra*, 58 Cal.App.4th at pp. 509-511; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384-1385; *People v. Gamez* (1991) 235 Cal.App.3d 957, 966-969, disapproved on other grounds by *Gardeley, supra*, at p. 624, fn. 10.)

D. The Admission Of Evidence From The F.I. Card And Gang Database Printout Did Not Violate Appellant's Rights Under The Confrontation Clause

In *Crawford*, the high court held that "testimonial" out-of-court statements are inadmissible at trial unless the declarant is unavailable and the defendant had the opportunity to cross-examine the declarant. With respect to nontestimonial hearsay, the *Crawford* court left it to the states to apply their own hearsay laws. The high court concluded the trial court violated the Confrontation Clause in admitting for its truth a recording of statements the defendant's wife made to the police during a custodial interrogation, since the wife was not subjected to cross-examination. (*Crawford, supra*, 541 U.S. at pp. 52-54, 68-69.)

Appellant acknowledges that "some" California courts have held that "*Crawford* simply does not apply to the admission of hearsay statements collected by the police and used in support of a gang expert's testimony, regardless of why those statements were collected." (AOB 239.) The law,

in fact, is well settled and consistent, and appellant has not cited any contrary authority. The Court of Appeal recently stated the rule quite plainly, “As our appellate courts have repeatedly found consistent with the Supreme Court’s Sixth Amendment precedent: ‘Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned.’” (*People v. Sisneros, supra*, 174 Cal.App.4th at p. 153, quoting *People v. Ramirez, supra*, 153 Cal.App.4th at p. 1427, citing in turn *People v. Thomas, supra*, 130 Cal.App.4th at p. 1210.)

In *Sisneros*, the Second Appellate District agreed with the reasoning of the Fourth Appellate District, and noted,

[A]dmission of expert testimony based on hearsay will typically not offend confrontation clause protections because “an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert’s opinion.”

(*People v. Sisneros, supra*, 174 Cal.App.4th at p. 154, quoting *People v. Thomas, supra*, 130 Cal.App.4th at pp. 1209-1210.)

In *People v. Ramirez, supra*, 153 Cal.App.4th 1422, a different division of the Second Appellate District rejected a *Crawford* claim involving gang expert testimony. In that case, a law enforcement officer gave expert opinions about the gang membership of those involved in the predicate crimes and about the gang-related nature of these prior crimes. Relying on *Crawford*, the defendant complained the officer’s opinions were based on testimonial hearsay. (*Id.* at p. 1426.) The Court of Appeal first correctly stated that experts may give opinion testimony that is based on hearsay. (*Ibid.*; Evid. Code, § 801, subd. (b).) The court then pointed out, “Hearsay in support of expert testimony is simply not the sort of testimonial hearsay the use of which *Crawford* condemned.” (*Ramirez, supra*, at p. 1427.) In this context, the court noted that experts are subject to cross-examination and that

the information on which experts base their opinions is not elicited for the truth of its contents but is examined to assess the weight of the experts' opinions. (*Ibid.*; see also *People v. Cooper* (2007) 148 Cal.App.4th 731, 746-747; *People v. Thomas, supra*, 130 Cal.App.4th at pp. 1208-1210 [no *Crawford* violation in the admission of hearsay evidence in the form of the gang expert's conversations with gang members in which they identified the defendant as a gang member].)

In the instant case, as in *Sisneros*, *Ramirez*, and *Thomas*, the challenged testimony involved the usual type of information about gang affiliation relied upon by gang experts in forming their opinions with respect to gang membership and gang-related crimes. Contrary to appellant suggestion (AOB 240), the statements and information relied upon by the experts were not elicited for the truth of their contents. Instead, information about appellant's gang affiliation, activities, and statements (regardless of its alleged hearsay nature) was admissible for the jury to assess the weight of the gang experts' opinion that appellant had been an active gang member at the time of the crimes. And appellant had the opportunity to cross-examine both experts about their opinions, and about the process of gathering information for F.I. cards and the gang database file.

Accordingly, the alleged error did not violate appellant's constitutional rights. (See *People v. Dungo* (2012) 55 Cal.4th 608, 621 [holding that autopsy reports admitted in a criminal prosecution are simply official explanations of an unusual death, "and such official records are ordinarily not testimonial"]; *People v. Sisneros, supra*, 174 Cal.App.4th at p. 153; *People v. Ramirez, supra*, 153 Cal.App.4th at pp. 1426-1427; *People v. Thomas, supra*, 130 Cal.App.4th at pp. 1208-1210; *People v. Gamez, supra*, 235 Cal.App.3d at p. 969.)

E. Any Error Was Harmless

In any event, the alleged evidentiary error was harmless under either *Watson, supra*, 46 Cal.2d at page 836 or *Chapman, supra*, 386 U.S. at page 24. As explained above, the alleged error was negligible when compared with the prosecution's strong case against appellant, the inevitable admissibility of expert testimony on gang affiliation and activities, and the cold-blooded and despicable nature of appellant's crimes. In addition, the trial court's instructions minimized any possible prejudice.

First, the allegedly "testimonial" evidence on the F.I. cards and the gang database printout was merely one of the bases for the gang experts' opinion that appellant was a Nine Deuce Bishop Bloods member. Deputy MacArthur testified at both trials that he had *personally* photographed and completed an F.I. card on appellant. Deputy MacArthur testified that the F.I. card was first created on October 31, 1984, and that he had updated it following appellant's arrest in October 1989. (17RT 2040-2041, 2073, 2082 [first trial].) Appellant's F.I. card indicated his gang moniker was "Ant Dog," and that appellant was a member of the "9 Deuce" Bloods. (17RT 2040-2041 [first trial]; 40RT 5134 [second trial].)

Appellant had a "C.K." earlobe tattoo, which was visible in the courtroom, and which Deputy MacArthur explained stood for "Crip Killer." (17RT 2041, 2077-2078 [stipulation as to the "C.K." tattoo at the first trial], 2086-2087; 20RT 2598.) Deputy MacArthur opined that such a tattoo meant the wearer was claiming to be a Crip killer (17RT 2119 [first trial]), which further supported Deputy MacArthur's opinions that appellant belonged to the 9 Deuce Bishop Bloods (40RT 5138 [second trial]).

The gang experts also based their opinions on the photo album that Deputy MacArthur found in appellant's motel room, which was in territory claimed by the 9 Deuce Bishops. (17RT 2070.) Based on the album and writings therein, the experts opined that appellant was a hard-core, devoted

member of the Bloods gang. (See, e.g., 17RT 2064, 2069; 20RT 2599-2602 [first trial]; 40RT 5139-5140, 5144, 5146, 5167, 5171, 5180-5181; 43RT 5551-5553 [second trial].) Under hypothetical facts based on appellant mouthing threatening words in court in response to testimony about the term “cuz,” the experts also opined at both trials that such conduct supported their opinions that appellant was a hard-core gang member with the 9 Deuce Bishop Bloods. (20RT 2602-2603 [first trial]; 40RT 5180-5181; 43RT 5557 [second trial].) At both trials, Deputy MacArthur testified that the numbers “9-2”—which appellant had written on many of his pro per submissions to the court—were associated with the 9 Deuce Bishops, and that appellant had used those numbers to reference his gang. (17RT 2079 [first trial]; 40RT 5182-5183 [second trial].) Moreover, there is no dispute herein that either expert was a qualified gang expert and was properly allowed to give opinions about the 9 Deuce Bishops and its members and activities. So, regardless of the alleged error, the jury would have heard about appellant’s gang membership and activities.

Second, the trial court repeatedly instructed the jury that the information relied upon by the expert witnesses was admitted only to explain witness’s opinion and was not received for its truth. (6RT 1555-1556, 1558.) The court also properly instructed the jury as to how to weigh and consider expert testimony. (3CT 593, 806 [CALJIC No. 2.80 [expert testimony]]³⁴;

³⁴ CALJIC No. 2.80, as read to the jury at appellant’s trials, provides:

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. [¶] A duly qualified expert may give an opinion as to questions in controversy at a trial. To assist you in deciding such a question, you may consider the opinion or the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert.

(continued...)

see § 1127b [requiring the trial court, when the opinion of any expert is received in evidence, to instruct in substantially the terms set forth in CALJIC No. 2.80, and stating no further instruction on the subject of opinion evidence need be given].)

Finally, the allegedly erroneous admission of “testimonial hearsay” about appellant’s gang association was not prejudicial when compared with the cold-blooded and despicable nature of the crimes committed by appellant. Also, as already stated, the jury was entitled to hear about appellant’s gang membership and the gang’s culture and activities regardless of the alleged error. Under these circumstances, it is not reasonably probable that but for the admission of evidence from appellant’s F.I. card and gang database file, he would have received a more favorable verdict. Accordingly, the alleged error was harmless. (See, e.g., *People v. Valdez*, *supra*, 58 Cal.App.4th at pp. 511-512.)

X. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY ABOUT THE “U.B.N.” PRISON-GANG

Appellant contends the trial court erroneously admitted evidence at both guilt phase trials that he had belonged to a prison gang while incarcerated. (AOB 257.) Specifically, he argues that Deputy MacArthur and Lieutenant Wright were only *street*-gang experts—and thus should have been precluded from giving any testimony concerning *prison*-gang evidence found in appellant’s motel room. (AOB 262-266.) Appellant also contends that the evidence was irrelevant and unduly prejudicial as to the guilt and penalty phase verdicts. (AOB 266-277.) The trial court properly

(...continued)

[¶] You are not bound to accept an expert opinion as conclusive, but should give to it the weight to be [sic] which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

admitted the experts' brief testimony pertaining to the "U.B.N." prison gang.

A. Gang Evidence In Appellant's Photo Album³⁵

1. First Guilt Phase Trial

As discussed at length in the Statement of Facts and in the preceding argument, the prosecution called two gang experts to testify at appellant's guilt phase trials: Deputy Andrew MacArthur and Lieutenant Reginald Wright. (17RT 2032-2034 [Deputy MacArthur]; 20RT 2568-2572 [Lieutenant Wright].)

Deputy MacArthur testified at length about the relevant territories of the rival gangs, gang culture and hierarchy, and gang membership. (17RT 2034-2038.) He also testified that on the evening of appellant's arrest, he searched appellant's motel room. (17RT 2043.) In the closet, deputies found a gray and black striped sweat suit that matched the description of the shooter's clothing, as well as a photo album. (17RT 2044-2046.)

Deputy MacArthur testified that the inside cover of the photo album had "gang script writing," "the most predominant letters being UBN." (17RT 2046.) The prosecution asked whether Deputy MacArthur was familiar with what U.B.N. stood for. Without objection, Deputy MacArthur said he was, and that U.B.N. "relates to United Blood Nation, which is a prison gang." (17RT 2046.) When asked, Deputy MacArthur said that he was familiar with the four primary prison gangs in California, which he listed as the Black Gorilla Family, the Mexican Mafia, the Aryan Brotherhood, and U.B.N. (17RT 2046.) Appellant objected on relevancy

³⁵ Very little of this gang evidence involved "prison gangs" at all, and none of it established that appellant "had been a member of a prison gang," as appellant suggests. (See AOB 257.) Nonetheless, respondent recounts the evidentiary proceedings in some detail to provide context to the claim.

grounds, and the trial court held a hearing outside the jury's presence. (17RT 2046-2047.)

When invited to expound any further on his relevance objection, appellant simply repeated his contention that evidence about "prison affiliation" was not relevant. (17RT 2047.) When the trial court asked why the evidence was offered, the prosecutor explained that it was offered to show motive and intent. (17RT 2047-2048.) The prosecution further argued,

It did in fact go to the fact that he is a member of a street gang, Nine Deuce Bishops, which in prison there is a similar gang that takes in Blood members, which is known as United Blood Nation.

We have at least four victims that are, in fact Crip members: Atlantic Driyes Cript [*sic*], the Joneses, Hat Gang Cript [*sic*], which was Mr. Johnson, and as an offer of proof, Mr. Bankston was an affiliate or associate of the CV-70 which do not get along with Noel Sanchez, which is the victim of the Compton murder, which was CCG.

I believe it's highlyly [*sic*] relevant that he associates. And, as an offer of proof, those writings deal with Nine Deuce Bishops, UBN, all over that photo album. It does go to motive and intent.

(17RT 2048.)

Appellant noted there had been no offer of proof that the prison gangs mentioned admitted only Bloods, but he did not otherwise object to the evidence. However, in an effort to minimize the jury's exposure to the contents of the photo album (see 17RT 2054-2055), appellant offered to stipulate that (1) Deputy MacArthur's gang expertise included prison gangs; (2) that appellant was a member or associate of the U.B.N. prison gang; and (3) that the writings, drawings, and beliefs documented in the photo album were an "accurate portrayal of the defendant." (17RT 2049,

2053.)³⁶ The prosecution, however, felt that Deputy MacArthur's testimony about the writings would tend to show the author's motive, and was relevant to prove the identity of the shooter. The prosecution, therefore, declined to enter into appellant's proposed stipulation. (17RT 2053-2054.) The trial court found that the information concerning the United Blood Nation was relevant to show motive, intent, and possible bias, but that evidence concerning the other three prison gangs was not relevant. (17RT 2055-2056.)

Appellant then objected that any testimony that the author appeared to be "anti-Crip" because he used "K's" instead of "C's" would be "unduly prejudicial." (17RT 2056.) The trial court overruled the objection. (17RT 2057.)

When Deputy MacArthur resumed his testimony, he opined the person who wrote in the photo album was a Blood gang member, in part because the author used a "K" in place of many letter "C's," such as references to "Afrika." Deputy MacArthur testified that Bloods usually avoid the use of the letter C because of its association with the Crips.

³⁶ In its entirety, appellant's proposed stipulation was as follows:

Anthony Bankston, defendant in pro per, proposed stipulation to prison gang membership:

The evidence now before the court regarding the defendant's association and/or membership in the U.B.N., i.e. United Blood Nations be deemed true thereof. Any writings, drawings, or philosophical beliefs the prosecution is in possession of is also deemed to be an accurate statement of the defendant in pro per.

It is also proposed that Deputy Alexander MacArthur, having testified in these proceedings of the superior court, be deemed to have given an accurate account in his expert capacity on prison gangs, specifically for People's 23 [photo album] for identification.

(17RT 2053.)

(17RT 2062-2065, 2095, 2118.) The album also had several references to “E.S.B. 92,” which referred to the East Side Bishops 92nd Street, another name for appellant’s gang. (17RT 2043, 2062.) The album also had references to CV 70, or Compton Vario 70. (17RT 2062.) There were additional references to the Blood gang, Bloods of Watts, Bishop Bloods of Watts, and appellant’s “Ant Dog” moniker. (17RT 2062.)

Given the size, placement, and style of the gang writing, Deputy MacArthur opined that the author gave most importance to the United Blood Nation, followed by the East Side Bishops, and then CV 70. (17RT 2064.) Deputy MacArthur also testified that the Bloods and Crips had always been enemy gangs. (17RT 2099.)

Deputy MacArthur explained that inside the photo album were additional pages with gang writing—in the same script as the cover—including references to “The U.B.N. Warrior,” and to warriors, guns, the killing of enemies, and violence to society. (17RT 2063-2070, 2098.) Deputy MacArthur read several of the passages aloud, including the following:

I thee true gangster! Shall walk this impoundable earth! I’m the autobiography of man. Now suggest that “I,” thee true gangster “am” in “Afrika” a warrior of exotik quintessence of a universal gangster. Thee true gangster.

I’ve lost by force, my land, my language, and in a sense my life. But so help me, I will sieze [*sic*] it back. If necessary, “I,” thee true gangster, will krush the korners of the earth and the world shall “forever tremble” in fear when “I,” the true gangster, emerge upon society, the most hated, feared, loved & respected Blood gangster the world has ever known.

Mr. Ant Dog, O.G.

(1CT Supp. II 64 [“k’s” used for “c’s” in original]; 17RT 2068-2069.)

Deputy MacArthur explained that “O.G.” refers to “original gangster.” The

sign-off was followed by references to CV 70, East Side Bishops, and 92nd Street Bishop Bloods gang. (17RT 2069-2070.)

The prosecution also sought to have Deputy MacArthur testify about one page of writing from the photo album, which was described as a “U.B.N. Warrior” poem. (1CT Supp. II 216 [photocopy]; 7RT 2103-2104 [People’s Exh. 25].) At a hearing on the matter, appellant objected that the document, although contained within the photo album (People’s Exh. 23), was “just literally sprung on the defense today” (17RT 2105.) Other than the allegedly late disclosure, however, appellant said he had “no problem” with the document. (17RT 2105.)

Given that the poem was inside the photo album, the trial court noted that appellant “could hardly claim surprise,” and allowed the prosecution to admit the evidence. (17RT 2105.) Deputy MacArthur subsequently read the following poem—titled “U.B.N. warrior” and adorned with drawings of dripping swords—to the jury:

From this day forward I shall not slip nor falter! I will remain
forever firm and with rage undamned! I’ll give them what they
give me. If war is the outcome, then I shall proceed with force
and strength of a dragon, for I’ve kommitted myself to
excellence and aktion. I am the young brave Blood of the
Umoja Damu tribe . . . we are the righteous krowd. The men
who fear not a thousand kuts.

(1CT Supp. II 216 [“k’s” used for “c’s” in original, additional quotation marks omitted]; 17RT 2125.) On cross-examination, Deputy MacArthur opined that the text was gang writing, due to the style of the lettering and the substitution of “k’s” for “c’s.” (17RT 2128-2129.)

The prosecution also asked Lieutenant Wright on redirect-examination to review the photo album writings to determine whether the author was an active gang member or an associate. (20RT 2599.) After doing so it, he opined, “Without a doubt, [appellant is] an active Blood member.” He said that the author had deeper ties than merely the 9 Deuce

Bishops, noting, "One of the boldest acronyms within this particular book on the cover is U.B.N. . . ., which is a prison gang basically which composes of the United Bloods from all Blood sets that are within the institution basically. So if he authored this, that being Mr. Bankston, it would show his commitment to – to being a Blood." (20RT 2600.) Lieutenant Wright opined that the references to "CV 70" showed that appellant was indicating "his association or giving some recognition to that particular set." (20RT 2600.) Lieutenant Wright further opined that the poem in the album entitled "Poison of The Blood Streme" (see 1CT Supp. II 66) strengthened his opinion that appellant was an active Blood member, and that appellant had put a lot of thought and care in the writings, which contained rhymes and substitutions for many letter C's. (20RT 2601-2602.) As Lieutenant Wright summarized, "This [author] is a devoted Blood gang member with a lot of feelings about the superiority within the Blood Nation or the need for it." (20RT 2602.) Lieutenant Wright noted that the writings also suggested the Crips gang was an enemy. (20RT 2608.) On recross-examination, appellant asked Lieutenant Wright if he was familiar with prison organizations or gangs, and Lieutenant Wright answered that he had "some familiarity." (20RT 2607.)

At the end of the first trial, when the photo album (People's Exh. 23) was offered into evidence, appellant stated, "I object. Highly prejudicial." The court overruled the objection. (21RT 2709.) When the "U.B.N. warrior" poem (People's Exh. 25) was offered into evidence, appellant stated, "I object to this document as being untimely pursuant to discovery." The court overruled the objection. (21RT 2711.)

2. Second Guilt Phase Trial

Similar evidence concerning appellant's photo album writings was introduced at the second guilt phase trial. Deputy MacArthur testified

about finding numerous items belonging to appellant in the motel room, including the sweat suit like the one worn by the shooter, a bill addressed to appellant, the red "notebook-type photo album" containing photographs, drawings, and writings (People's Exh. 41), and the sheet of paper from the album with the U.B.N. warrior poem (People's Exh. 42). (40RT 5140-5144.)

Without objection, Deputy MacArthur testified that the photo album contained gang writing, including the letters "U.B.N.," which referred to the prison gang United Blood Nation. (40RT 5144, 5146, 5167.) The album also had the words "92nd Street Bishop Bloods gang of Watts," and additional references to the Blood gang, Bloods of Watts, Bishop Bloods of Watts, appellant's "Ant Dog" moniker, and "Harry with OG." (40RT 5144-5145, 5169.) The album also had several references to "E.S.B. 92," which also referred to appellant's gang, and to the East Side Bishops, 92nd Street, and CV 70. (40RT 5145, 5170, 5172.)

Deputy MacArthur testified without objection that U.B.N. was a prison gang. (40RT 5146.) When the prosecution asked if there were four major prison gangs, appellant stated, "Objection, your Honor, this is irrelevant." (40RT 5146-5147.) The trial court then conducted a hearing outside the jury's presence. (40RT 5147.)

At the hearing, appellant clarified his position that reference to prison gangs other than U.B.N. "has no relevancy to the issues of this case, which are street gang retaliatory issues here. Not prison gang hits or nothing of that nature. Not even an organized crime element. So that's why I raised the irrelevancy objection." (40RT 5147.) The court noted that the question pending was whether the witness was aware of the four state prison gangs. (40RT 5148.) The court sustained the objection, explaining, "If it's just to demonstrate that there is more than one prison gang, then I believe the objection is well taken." (40RT 5148.)

Because Deputy MacArthur was going to testify about gang graffiti confiscated from appellant while in custody (People's Exh. 29) and the writings found within the album (People's Exhs. 41 & 42), the trial court took the opportunity to hold an admissibility hearing on those items. (40RT 5148-5149.) Deputy MacArthur read the "U.B.N. warrior" poem signed by "Ant Dog" (40RT 5150), read the poem from the photo album entitled "Poison Of The Blood Streme" (40RT 5151; 1CT Supp. II 66), and read gang graffiti referring to killing the "sheriff," "judge," and "d.a." (40RT 5152). Deputy MacArthur opined that writing in all three documents was consistent, and that the author was a committed Blood member who sought high esteem and "true gangster" status within the gang. (40RT 5151-5154.)

Appellant did not cross-examine Deputy MacArthur at the hearing (40RT 5154-5155), but argued that the documents had not been sufficiently linked to him to show ownership "other than they were confiscated out of the motel room." (40RT 5155-5156.) When the trial court inquired whether appellant had any questions concerning the documents, appellant said he did not. (40RT 5156-5157.) Concerning the "Poison Of The Blood Streme" poem, appellant asked that Deputy MacArthur "be allowed to read the whole document in its entire context, your Honor, not take it out of context." (40RT 5156.) Appellant also argued that the documents, "pursuant to Evidence Code 801B, I believe they would speak for themselves." (40RT 5160.)³⁷

³⁷ Evidence Code section 801, subdivision (b) permits an expert witness to render an opinion: "Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which
(continued...)

After hearing the prosecution's argument that the documents were relevant to show identity, motive, and intent (40RT 5157-5159), the court indicated it would grant appellant's request to read the entire "Poison Of The Blood Streme" poem into the record (40RT 5160; 1CT Supp. II 66). When the court asked appellant for any specific objections to the photo album and poem, appellant simply answered, "People's 41 and 42 are Evidence Code 801B." (40RT 5161.) The trial court permitted the items to be admitted, explaining:

The relevance of that particular document goes to the fact that it was recovered in a motel room which allegedly was occupied by you, as was the sweatsuit and the red album and the poem and so forth. ¶ What I wanted to indicate to you was now that this witness has taken the stand, he has stated his qualification for the record. He has qualified as an expert and he has testified as to what these writings mean to him.

I am going to allow the witness to testify as to whatever's on the inside front page of People's 41, which is a red photo album. I am going to permit him to read the entire poem "Poison Of The Bloodstream."

(40RT 5162-5163.)

When Deputy MacArthur's trial testimony resumed, he opined that the author of the photo album writings—"Ant Dog"—was a hard-core Blood member, in part because the author used a "K" in place of many letter "C's" throughout the album, such as references to "Afrika." (40RT 5167-5171, 5176-5177.) As he did at the first trial, Deputy MacArthur further testified that inside the photo album was the statement, "A warrior does what he has to do. A soldier does what he's told." (40RT 5171.) Deputy MacArthur explained that the most hard-core gang members refer

(...continued)

his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

to themselves as warriors or soldiers, and that such gang members are “often used to do shootings of rival gangs and they have a higher status in that gang, by doing these types of crimes.” (40RT 5171.)

Writings inside the album included “I, thee true gangster” (40RT 5172.) Deputy MacArthur opined that a gang member can reach that “true gangster” status by “shooting or killing many rival gang members.” (40RT 5172.) Deputy MacArthur also read aloud the “U.B.N. Warrior” and “Poison of The Blood Streme” poems. (40RT 5173-5175.) He opined that the “Poison of The Blood Streme” poem was another reference to the Blood gang. (40RT 5175; see 1CT Supp. II 66, 216 [photocopies].) In another part of the album were the words Ant Dog, followed by “CK” with two lines drawn through the “C.” (40RT 5178.) This writing—like appellant’s “CK” earlobe tattoo—was typical of what Bloods gang members wrote. (40RT 5178.) All of this evidence, and a photograph of appellant wearing a red handkerchief, strengthened Deputy MacArthur’s opinion that appellant was a 9 Deuce Bishop Blood member. (40RT 5180-5181.)

Lieutenant Wright rendered a similar expert opinion. (43RT 5557.) Concerning the photo album writings, Lieutenant Wright also opined that the author had put a lot of thought and care in the writings, which contained rhymes and substitutions for many letter C’s. (41RT 5375.) As Lieutenant Wright summarized, the author was “not the average Blood gang member,” and was someone “very committed.” (41RT 5375; 43RT 5551.) Lieutenant Wright opined the author was definitely associated with CV 70 and the 9 Deuce Bishops, was a “hard-core” gang member, and was “very committed” to Blood gang culture. (43RT 5551-5553.)

At the end of the second trial, only the writings in the photo album were offered into evidence, and appellant stated he had “no objection” to the evidence. (42RT 5519-5520; People’s Exh. 41.) Appellant also stated

he had “no objection” to the “U.B.N. Warrior” poem. (42RT 5519-5520; People’s Exh. 42.)

**B. Appellant’s Claim Concerning The Admissibility Of
“Prison-Gang” Evidence Has Been Forfeited And Is
Meritless In Any Event**

Appellant contends that testimony about the meaning of “U.B.N.” and about the “U.B.N. Warrior” poem was inadmissible evidence that appellant “while incarcerated on unrelated offenses—had been a member of a prison gang.” (AOB 261.) He raises the following three grounds in support:

(1) the street gang experts were not qualified to opine about prison gangs and prison gang writing (AOB 262-265); (2) the evidence was not relevant; and (3) the evidence was too prejudicial (AOB 266-277). Appellant, however, failed to assert any of these theories below and/or pursue them to a final ruling, and therefore forfeited the ability to raise the claim on appeal. Even assuming this Court addresses the claim on the merits, the trial court properly admitted the evidence.

First, contrary to appellant’s suggestion, no witness ever rendered an opinion or otherwise testified that appellant “while incarcerated on unrelated offenses—had been a member of a prison gang.” (See AOB 261, 264.) Nor did any witness testify about “appellant’s prison-gang writings.” (AOB 264.) In fact, no witness testified when the author made the writings, let alone that they were done while the author was in prison, or while a member of a prison gang. And, while appellant offered to stipulate at the first trial that he was member of the U.B.N. prison gang, that stipulation was rejected, and very little, if any, “prison gang” evidence was actually introduced at either trial. At both trials, Deputy MacArthur merely testified without objection that the U.B.N. initials in the photo album related to United Blood Nation, which he explained was a prison gang. (17RT 2046 [first trial]; 40RT 5146 [second trial].) Lieutenant Wright gave a similar

explanation, and noted that the gang was composed of Bloods. (20RT 2600.) The poem entitled “U.B.N. Warrior” was read aloud at both trials. (17RT 2125 [first trial]; 40RT 5150, 5173-5175 [second trial].) Although the experts opined that appellant was a Blood—which he did not dispute—they did not specifically opine that the author had been a member of any prison gang while incarcerated. Furthermore, the trial court excluded any discussion at either trial of the other three major prison gangs. (See 17RT 2055-2056 [first trial]; 40RT 5148 [second trial].) Thus, appellant’s contention that “prison-gang evidence so permeated” both trials as to render them constitutionally unfair (see AOB 257) is not borne out by the record, which shows that of all the gang evidence admitted, only a trifle pertained to prison gangs. To the extent “prison gangs” were even mentioned by the gang experts, the purpose was simply to explain what “U.B.N.” meant, a meaning that appellant did not dispute in any event.

Second, appellant’s claims about the admissibility of the U.B.N. acronym and poem have been forfeited. Appellant argues on appeal that that the evidence was inadmissible because Deputy MacArthur and Lieutenant Wright were only street gang experts—and thus were not qualified to provide opinions about prison gangs. (AOB 262-266.) Appellant also claims on appeal that the prison gang evidence was irrelevant, and was substantially outweighed by the danger of prejudice. (AOB 266-277.) At trial, however, Deputy MacArthur testified *without objection* that U.B.N. “relates to United Blood Nation, which is a prison gang.” (17RT 2046.) Although appellant later contended that “prison affiliation” evidence was not relevant (17RT 2047), and vaguely mentioned that Deputy MacArthur had not testified about working in prisons (17RT 2050), he never pursued either assertion to a final ruling. To the contrary, appellant *offered to stipulate* that the witnesses’ expertise included prison gangs, that appellant was a member or associate of the U.B.N. prison gang,

and that any gang writing was “an accurate statement of the defendant.” (17RT 2049, 2053.) Thus, appellant’s proposed stipulation shows that he abandoned any initial qualms he may have with the admissibility (or the truth) of the experts’ testimony. (See *People v. Holloway* (2004) 33 Cal.4th 96, 133 [even a tentative evidentiary ruling does not preserve the issue for appeal if the appellant could have, but did not, renew the objection and press for a final ruling].)

At the end of the first trial, when the photo album (People’s Exh. 23) was offered into evidence, appellant stated, “I object. Highly prejudicial.” (21RT 2709.) This was not a timely and specific objection to any particular writing, let alone a specific objection aimed at “prison-gang” evidence. Appellant’s blanket objection to the entire photo album was not a valid objection—and was insufficient to preserve his claim about prison-gang evidence—because he did not specify the statements, if any, to which he was objecting. (See *Ballos v. Natural* (1928) 93 Cal.App. 601, 608.) A party objecting to evidence must not only specifically state the grounds for the objection, but also must direct the objection to the particular evidence sought to be excluded. (*People v. Harris* (1978) 85 Cal.App.3d 954, 957.)³⁸

Appellant did object at the first trial to the “U.B.N. Warrior” poem, but only on the ground that it had not been timely disclosed to him. (17RT 2105.) Appellant explained, “Other than that, I have no problem.” (17RT 2105.) And when the actual “U.B.N. warrior” poem was offered into

³⁸ Although appellant did not say so precisely, he was likely re-raising his previous objection concerning the contents of the photo album, i.e., his prejudice objection concerning testimony that the author seemed “anti-Crip” because he used “K’s” for “C’s.” (See 17RT 2056.) That claim, however, was unrelated to “prison-gang” evidence, and is not raised on appeal in any event.

evidence, appellant only stated, “I object to this document as being untimely pursuant to discovery.” (21RT 2711.) Appellant, however, does not repeat that discovery claim on appeal.

The forfeiture of this claim is even more evident at the second trial. There, Deputy MacArthur again testified without objection that the letters “U.B.N.” referred to the United Blood Nation, and that this was a prison gang. (40RT 5144, 5146, 5167.) Appellant’s only objection was to the relevancy of any discussion about *other* prison gangs—which he named—and that objection was sustained. (40RT 5146-5148.) Following an Evidence Code section 402 hearing on the writings, appellant’s only complaint was that the items in his motel room had not been sufficiently linked to him—an observation that went to the weight, not the admissibility, of the evidence. Moreover, appellant did not object to the admission of the writings at all; he simply suggested that the words “speak for themselves” and thus did not require an expert to read them aloud. (See 40RT 5160-5161.) And at the end of second trial, appellant expressly stated he had “no objection” to the admission of the photo album, and “no objection” to the admission of the “U.B.N. Warrior” poem. (42RT 5519-5520.)

Therefore, appellant forfeited his appellate arguments regarding opinion testimony concerning prison gangs by failing to raise them properly before the trial court. (*People v. Partida, supra*, 37 Cal.4th at p. 434.)

In any event, the trial court acted within its discretion in permitting the gang experts to briefly explain what “U.B.N.” stood for and to read the U.B.N. poem found in appellant’s motel room. A trial court’s decision to admit expert testimony is reviewed for abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1222.) In determining the admissibility of expert testimony, “the pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury.” (*Ibid.*) This Court has admitted expert testimony regarding

gang culture and witness intimidation by gang members. (*People v. Gonzalez, supra*, 38 Cal.4th at pp. 944-949.)

This Court has also recognized the subject matter of the culture and habits of criminal street gangs satisfies the criterion of admissible expert testimony under Evidence Code section 801. In *People v. Champion and Ross* (1995) 9 Cal.4th 879, 922, this Court approved the admission of a juvenile gang expert's testimony on the defendants' gang membership as relevant to establish their identities as perpetrators of the charged offenses and to explain why the victims, who were not gang members, were targeted. Likewise, as the trial court reasonably found in this case, Deputy MacArthur's and Lieutenant Wright's testimony about the violent, Blood-authored, anti-Crip gang writing was relevant to establish the motive, intent, and identity of the shooter in the charged offenses. (See 17RT 2049-2050.) Moreover, despite appellant's claim to the contrary, the gang experts in this case were entitled to explain to the jury what "U.B.N." stood for. The gang experts were sufficiently familiar with Blood gangs and gang members in general to understand that abbreviation, and appellant's readiness to stipulate to the truth of their testimony belies his current claim that the evidence should have been excluded.

Assuming for the sake of argument that the court erred by admitting testimony about the meaning of "U.B.N." or reading the "U.B.N. Warrior" poem, the error was harmless because there is not a reasonable probability of a more favorable result if the evidence had been excluded. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)³⁹ The brief mention that U.B.N. was a

³⁹ The trial court's exercise of its discretion in the course of making the evidentiary rulings appellant challenges did not affect his federal constitutional rights. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611 ["[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense"].) Therefore, (continued...)

prison gang did not change the outcome of this case. That information was merely one item in a veritable mountain of virtually uncontested gang evidence that showed appellant to be a devoted Blood member. Appellant did not dispute the gang evidence against him at trial. In fact, appellant admitted to the jury he was a Blood member (see, e.g., 21RT 2734; 24RT 2991; 52RT 6542-6543), and wanted to stipulate that his membership continued while he was in prison. Moreover, as with the rap sheet evidence, the prejudicial effect of the prison gang evidence was minimal in comparison to the impact of the charged offenses, as discussed previously.

Thus, the juries at each trial—which were clearly capable of viewing the evidence against appellant carefully and did not convict him of all counts—did not convict appellant simply because they concluded he had been affiliated with the Bloods while in prison. Appellant’s evidentiary claim must be denied.

XI. THE TRIAL COURT PROPERLY REFUSED TO SEVER THE ASSAULT WITH A DEADLY WEAPON COUNT

Appellant next contends the trial court abused its discretion in failing to sever the assault with a deadly weapon count from the other charges at his second guilt phase trial. According to appellant, the court’s error rendered his second trial fundamentally unfair. (AOB 278-317.) The claim lacks merit.

A. Relevant Background

At the first guilt phase trial, the jury found appellant guilty of the murder of Benson Jones, the attempted murder of Benjamin Jones, and

(...continued)
contrary to appellant’s assertion, the state standard for harmless error applies. (See AOB 274.)

possession of a firearm by a felon. The jury was unable to reach verdicts on the murder of Noel Enrique Sanchez on May 10, 1991 (count 1), the assault with a firearm on Linda Jones on May 18, 1991 (count 4), and the attempted murder of Earnest Johnson on May 10, 1991 (count 6), and the People elected to retry those counts. (3CT 664-666.)

Prior to the retrial of those three counts, appellant made an oral motion to sever count 4 (assault with a firearm on Linda Jones) from the remaining counts. (3CT 720.) Appellant's argument in support of his motion to sever was rather unclear, because he argued simultaneously that he was the victim of "vindictive prosecution" (29RT 3349, 3364, 3369), that retrial was a new proceeding rather than a continuation of the first proceeding (29RT 3362), and whether the jury could be informed of his conviction for murdering Benson in light of the multiple-murder special circumstance allegation (see 29RT 3352-3353). Nonetheless, it appears that appellant primarily sought to sever count 4 in order to keep the jury from learning about his murder and attempted murder of Linda's brothers. (See 29RT 3349-3351 [imploing the court, "How could I keep this from coming before the members of the jury?"].) The trial court assured appellant, however, that prior to reaching any guilt phase verdict, the jury would not be advised about the multiple-murder special circumstance or the first degree murder conviction from the first trial. (29RT 3353.)

After appellant's advisory counsel interjected and restated the severance request (29RT 3354-3355), the trial court sought clarification from appellant that "[W]hat you're really asking now, Mr. Bankston, is that I sever count 4 from the trial of counts 1 and 6 so that Miss Jones . . . , who is the alleged victim in count 4, doesn't get up here on the witness stand and inadvertently or intentionally testify that her brother Benson was murdered." (29RT 3335.) "Exactly," appellant replied. (29RT 3335.)

Appellant also argued that Linda Jones had a problem “controlling her utterances,” and that severance would prevent “any spill-over effect of her testimony to the members of the jury on the Sanchez killing and the Earnest Aaron Johnson attempted homicide.” (29RT 3356-3357.) The trial court disagreed, finding, “I believe that if Miss Jones is admonished by the court and by the district attorney that she is not to mention certain things in her testimony, that she will heed the court’s admonition.” (29RT 3357.)

After appellant’s arguments once again digressed into topics of “vindictive prosecution” and whether he had suffered a “prior conviction” for murder (see 29RT 3362-3364), the trial court chastised appellant for failing to follow the procedure for motions. The court noted that such motions should have been filed and served on the People “at least two weeks ago,” but that appellant had not done so. (29RT 3364.) The court also noted, “Today is the first day that you mentioned this motion to sever count 4.” (29RT 3364.) Appellant did not dispute that the motion to sever was untimely, but alleged that the prosecution had failed to give him timely notice of the multiple-murder special circumstance. (29RT 3364-3365.)

The trial court noted that the special circumstance had “never changed,” and stated—with apparent incredulity at appellant’s assertions—“I can’t even respond to that. I mean I just can’t even respond to that.” (29RT 3365-3366.) The court then instructed appellant to put his requests in writing “so that everybody is crystal clear as to what your position is on these issues” (29RT 3366; see also 3367 [giving appellant an opportunity to “put in writing whatever he wants the court to consider”]; 3369-3370 [same, despite noting that motions should have been filed two weeks before that day, which was “58 of 60”].)⁴⁰

⁴⁰ Despite the court’s instructions, appellant never filed a written motion to sever any counts.

The following day, after conducting hardship voir dire, the trial court clarified that the multiple-murder special circumstance allegation would be bifurcated from the trial on the underlying charges. (30RT 3457.) As to appellant's oral motion to sever, the court noted that the issue concerned the permissible scope of Linda Jones's testimony. (30RT 3457.) The prosecution argued she should be able to testify as to "what she observed happening on that day which involves her," which included hearing "What's up, Blood," the shots fired at both brothers, and the gun pointed at her. (30RT 3457-3458.) The prosecutor said the witnesses would be admonished "not to say anything about a conviction." (30RT 3458.) The trial court explained to appellant that Linda Jones was competent to testify about her observations, and, "You are going to be permitted to cross-examine her on anything that she testified to regarding her observations at the date in question, including Etta Jones." (30RT 3459.) Appellant complained, "I don't want the jury knowing I shot Benson Jones," but the trial court stated, "Unfortunately, she can testify to that." (30RT 3459.) The trial court further ruled that Linda's observations were relevant and were not outweighed by prejudice, but that she would be prohibited from testifying that appellant had been convicted of counts 2, 3, and 5. (30RT 3461.)

Appellant again requested that count 4 be severed or bifurcated, and suggested that a single jury could separately consider count 4 along with the multiple-murder special circumstance allegation. (30RT 3465-3466.) Appellant again asserted that the spill-over effect from Linda Jones testifying "that she saw the defendant shoot somebody and then subsequently point a gun at herself" would be prejudicial. (30RT 3464.) The trial court acknowledged that it had discretion to sever counts under section 954, but also observed that, among other reasons to consolidate charges, "there is a policy of having cases tried together for judicial

economy.” (30RT 3465, 3467.) In closing, the court ruled that there would not be any bifurcation or severance of count 4. (30RT 3467.)

B. The Trial Court Did Not Abuse Its Discretion

The consolidation or joinder of charged offenses is the course of action preferred by the law because it ordinarily promotes efficiency. (*People v. Soper* (2009) 45 Cal.4th 759, 771-772; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*); *People v. Smith* (2007) 40 Cal.4th 483, 510.) Consistent with this mandate, section 954 allows the charging of different offenses connected together in their commission or of different offenses of the same class of crimes. (*Smith, supra*, at p. 510.) In the instant case, it is undisputed the section 954 statutory requirements for joinder or consolidation were met, because all of the offenses charged (murder with a firearm, attempted murder with a firearm, and assault with a firearm) were of the same class forceful behavior and involved common elements of assault on a victim and use of a firearm. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243; see also *People v. Balderas* (1985) 41 Cal.3d 144, 170; see AOB 229.)

Because the consolidation or joinder of the counts herein was statutorily authorized, the trial court’s ruling in favor of consolidating the counts must be affirmed unless appellant clearly established at trial that there was a “substantial danger of prejudice requiring that the charges be separately tried.” (*People v. Soper, supra*, 45 Cal.4th at pp. 773-774; *Smith, supra*, 40 Cal.4th at p. 510; *People v. Marshall, supra*, 15 Cal.4th at p. 27.) Pertinent factors on the issue of prejudice include whether: (1) evidence on the crimes jointly tried would not have been cross-admissible in separate trials; (2) certain of the charges were unusually likely to inflame the jury against the defendant; (3) a “weak” case was joined with a “strong” case, so that the “spillover” effect of aggregate evidence on:

several charges might well have altered the outcome of some or all; and (4) one of the charges is a capital offense, or joinder of them turns the matter into a capital case. (*Soper, supra*, at pp. 774-775; *Smith, supra*, at pp. 510-511; *Marshall, supra*, at pp. 27-28.) This Court has clarified that, in the context of properly joined offenses, the defendant “must make a *stronger* showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial.” (*Soper, supra*, at p. 774, emphasis in original and internal quotation marks omitted.)

When the evidence underlying the charges would be cross-admissible in hypothetical separate trials of other charges, the trial court is usually justified in refusing to sever the charges as any potential prejudice is dispelled. (*People v. Lynch, supra*, 50 Cal.4th at p. 736; *People v. Soper, supra*, 45 Cal.4th at pp. 774-775; *People v. Stitely* (2005) 35 Cal.4th 514, 531-532.) The cross-admissibility need not be complete or “two-way,” as it is sufficient the evidence as to count “A” would be admissible in the trial of count “B” but not vice versa. (*Alcala, supra*, 43 Cal.4th at p. 1221.) In determining the cross-admissibility of evidence under Evidence Code section 1101, subdivision (a), the least degree of similarity is required in order to prove intent. The evidence just has to be sufficiently similar to support an inference that the defendant probably harbored the same intent in each instance. (*Id.* at pp. 1222-1223; *Lynch, supra*, at p. 736.)

An appellate court reviews the denial of a motion for severance under the abuse of discretion standard, assessing the trial court’s use of discretion in light of the facts known and showings made at the time of the motion. (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1244; *People v. Arias* (1996) 13 Cal.4th 92, 127.) The party seeking severance bears the burden of demonstrating an abuse of discretion. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030.)

1. The Trial Court Applied The Correct Standard

Appellant first contends the trial court used the wrong standard in denying his motion to sever, arguing the court “denied severance on the erroneous belief that simply keeping from the jurors the fact of appellant’s earlier murder *conviction* was a sufficient prophylactic measure.” (AOB 339, original emphasis.) The contention is meritless.

The record clearly shows the trial court considered the appropriate factors regarding severance. The trial court specifically noted it had considered appellant’s oral severance motion during two days of argument. The trial court cited the governing statute, section 954, noted that it had discretion to sever counts, and acknowledged there were various factors pertaining to consolidating charges, including the “policy of having cases tried together for judicial economy.” (30RT 3465, 3467.) The trial court reviewed the charges and the impact of Linda Jones’s testimony carefully. The court ultimately concluded that her observations were relevant to the charges, and that the probative value of the evidence was not outweighed by prejudice. The court carefully limited her testimony, however, to prohibit her from testifying to the fact that appellant had been convicted of counts 2, 3, and 5. (30RT 3461.) In light of the foregoing, appellant’s argument that the trial court used the wrong standard in denying his motion to sever should be rejected. Moreover, a review of the relevant factors shows that there was no abuse of discretion.

2. Cross-Admissibility

Ignoring the totality of evidence surrounding the May 18, 1991 shooting, appellant contends that evidence of his assault with a firearm on Linda Jones was not cross-admissible as to the other crimes. (AOB 303-306.) Not so. The evidence was cross-admissible in the instant case to show motive, i.e., appellant’s hostility toward members of rival gangs, and

his effort to achieve “true gangster” status. Appellant’s conduct at the time he shot at Linda and her brothers was also relevant as to the identity of the perpetrator in the Sanchez case. As the prosecution correctly argued, Linda and Benjamin Jones would be was entitled to testify about everything that they observed during the shooting. Moreover, as the prosecution argued, Benjamin’s testimony about the shooting proved both “identity and motive.” The evidence, therefore, would include testimony that appellant said, “What’s up, Blood,” and then shot at the Jones brothers—one of whom was allegedly a Crip—and then shot at Linda. This evidence of motive and intent could have been admissible to show motive, intent, and premeditation in a similar gang-motivated fatal shooting of Sanchez that had occurred just days earlier.

In this regard, it is significant that a trial court’s discretion under section 954 to consolidate the counts and deny severance is broader than its discretion to admit evidence of uncharged crimes under Evidence Code section 1101. (*People v. Soper, supra*, 45 Cal.4th at pp. 772-774, 779-780; *Alcala, supra*, 43 Cal.4th at p. 1221; *People v. Geier* (2001) 41 Cal.4th 555, 575.) Similarly, severance is not required “merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried.” (*Soper, supra*, at p. 781.)⁴¹

Appellant, however, argues that evidence of separate charges is admissible only if there is an evidentiary connection between the charges, such as common “distinctive marks.” (AOB 303.) In *People v. Zambrano, supra*, 41 Cal.4th at page 1129, this Court rejected a similar argument,

⁴¹ If this Court finds the evidence to be cross-admissible, then any “spillover” effect would have been entirely proper. (*People v. Ruiz* (1988) 44 Cal.3d 589, 606-607.)

reasoning that “common marks are not crucial where the mere *fact* that the defendant committed a prior offense gives rise to an inference that he had a motive to commit a later one.” (Italics in original.) Like in *Zambrano*, common marks between the May 10 and May 18 shootings were not crucial. In any event, each of the shootings was motivated by gang enmity manifesting itself in an attempt to kill and intimidate enemy gang members.

Even if the evidence in the cases was not cross-admissible, section 954.1 expressly provides that when crimes of the same class are charged together, such as in the instant case, “evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together” (§ 954.1.) “Cross-admissibility suffices to negate prejudice, but is not essential for that purpose.” (*People v. Jenkins, supra*, 22 Cal.4th at p. 948.) “[C]ross-admissibility is not the sine qua non of joint trials.” (*People v. Geier, supra*, 41 Cal.4th at p. 575.) Lack of cross-admissibility is not, by itself, sufficient to show prejudice and bar joinder. (*Ibid.*)

Furthermore, none of the other factors for assessing prejudice arising from joinder supports appellant’s claim that the trial court abused its discretion by denying severance. (*People v. Mendoza, supra*, 24 Cal.4th at p. 161.)

3. Inflammatory Charges

Appellant next asserts that joinder of the charges inflamed the jury and invited them to convict appellant of the Sanchez killing “because he had killed before.” (AOB 307.) This claim should be rejected. Notably, appellant scrupulously avoids the key fact that undermines his entire premise—that the jury *acquitted* him of the attempted murder of Johnson in count 6. This acquittal, by itself, is fatal to appellant’s theory that the jury

only rendered a guilty verdict as to Sanchez because of “undue prejudice” flowing from count 4.

Further, appellant must demonstrate the evidence pertaining to one of the offenses was “significantly more inflammatory” than evidence in the other offenses (*People v. Jenkins, supra*, 22 Cal.4th 900, 949) or an “extreme disparity” existed between inflammatory and non inflammatory offenses (*Belton v. Superior Court* (1993) 19 Cal.App. 1279, 1284). Appellant fails to make this showing. Indeed, he presents no argument that one set of crimes—i.e., one of his three, gang-motivated shootings on either May 10, 18, or 22, 1991—was more inflammatory than any other. (AOB 306-308.) Further, because all of the offenses involved appellant’s assaultive behavior and were of a similar class, “[i]f one [offense] was inflammatory, all were.” (*People v. Memro* (1995) 11 Cal.4th 786, 851.)

Moreover, appellant improperly relies upon the prosecutor’s arguments to the jury in arguing the trial court abused its discretion in denying his motion to sever. (See, e.g., AOB 285-293.) This Court reviews a trial court’s denial of a motion to sever based on the record when the motion was heard. (*People v. Cook* (2006) 39 Cal.4th 566, 581.) Here, appellant’s motion to sever was made pre-trial, before any arguments were made to the jury.

4. Joining A Weak Case And A Strong Case

Appellant further argues the joinder of the charges prejudiced him because it permitted the linking of a strong case—the shooting of the Joneses—to the Sanchez case, which appellant describes as “weaker.” (AOB 306-307.) This contention is meritless.

As a preliminary matter, appellant never made this “strong case/weak case” argument at trial. (2RT 204; see 2RT 210 [same].) Appellant’s current argument should be rejected because it is not the same claim

presented to the trial court. (See *People v. Cook, supra*, 39 Cal.4th at p. 581 [denial of severance motion is based on record at time the motion was heard].) Moreover, evidence known to the trial court when it ruled strongly suggested that appellant was guilty of both the May 10 and May 18 shootings. Neither the case for shooting the Joneses or the case for shooting Sanchez was so weak in evidentiary support that the aggregate evidence was likely to have affected the jury's verdict—and it clearly did not affect the jury's decision to acquit appellant on count 6. Nor was the strength of evidence of the Joneses' shooting the critical factor that resulted in appellant's conviction of the Sanchez murder after the first jury hung on that count. Rather, the key difference in the two trials was the testimony of eyewitness Florentino Melendez. Unlike the first trial, Melendez testified at the second trial that appellant was the shooter. (35RT 4294-4297, 4316-4318.) Melendez testified that from about 45 feet away, he saw appellant driving his gray car at the intersection (35RT 4298-4300, 4319, 4321-4322), saw and heard appellant cocking a rifle, and saw the barrel of the rifle above the edge of appellant's driver door (35RT 4300-4301, 4348; 36RT 4368, 4370).

Melendez also reasonably explained why this powerful identification evidence had not been presented previously. Melendez testified that he did not identify appellant during the first trial because Melendez was a Chicano Compton gang member, and that his fellow gang members had pressured him not to be a "snitch." (35RT 4299-4300, 4336-4337; 36RT 4367, 4372.) As a former gang member whose family still lived in the area, Melendez testified that he still feared reprisals from the gang for his testimony. (35RT 4336-4338.)

Thus, both sets of counts were supported by strong evidence, and there was not spillover effect.

5. Capital Case Considerations

Capital charges were not the result of joining the assault with a firearm charge with the other counts. (*People v. Mendoza, supra*, 24 Cal.4th at p. 162.) Rather, capital charges were filed because of the multiple-murder special circumstance, and the special circumstance was bifurcated from the guilt phase retrial of counts 1, 4, and 6. Moreover, “joinder of a death penalty case with noncapital charges does not by itself establish prejudice. [Citation.]” (*People v. Marshall, supra*, 15 Cal.4th at p. 28.) Joinder is proper in such cases where the evidence is so strong as to each charge that consolidation is unlikely to affect the verdict. (*People v. Manriquez* (2005) 37 Cal.4th 547, 574-575.) As previously noted, the evidence as to both the firearm assault against Linda and the murder of Sanchez was strong.

In sum, appellant has not demonstrated that the potential for substantial prejudice from joinder of the charges outweighed the benefits of joinder to the state, nor has he shown the trial court’s denial of his motion to sever was unreasonable. Accordingly, the trial court’s denial of appellant’s motion to sever was not an abuse of discretion.

6. Due Process

Finally, appellant contends that joinder resulted in a denial of his right to due process under the state and federal Constitutions. (AOB 315-316.) But appellant did not set forth at trial any argument explaining why joinder violated due process, and did not argue any constitutional grounds during the hearing on his motion. His failure to press for a ruling on the issue constitutes a forfeiture of the constitutional claim on appeal. (*People v. Pinholster* (1992) 1 Cal.4th 865, 931; see also *People v. Catlin* (2001) 26 Cal.4th 81, 162.)

Even assuming appellant's claim that joinder resulted in a due process violation is cognizable, it lacks merit. "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.' [Citation.]" (*People v. Mendoza, supra*, 24 Cal.4th at p. 162.) Appellant fails to make that showing. He simply repeats his previous arguments that the material was prejudicial, and that joinder resulted in the jury "being overwhelmed with a flood of otherwise inadmissible evidence" (AOB 316.) That argument is meritless for the reasons addressed above.

As discussed above, the evidence was cross-admissible, and even if it was not, the jury clearly was not "overwhelmed" by it, as evinced by the jury's not guilty verdict on count 6. Even assuming the trial court erred in denying the motion to sever, the evidence in support of counts 1 and 4 was strong and none was inflammatory as to the other counts as discussed above. Accordingly, any error did not amount to a death penalty violation and was harmless, since it is not reasonably probable that appellant would have received a more favorable result if the charges concerning Linda Jones and Sanchez had been tried separately. (*People v. Manriquez, supra*, 37 Cal.4th at p. 576.)

PENALTY PHASE

XII. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMITTING THREATENING GANG GRAFFITI OR ANY OTHER EVIDENCE AT THE PENALTY PHASE TRIAL

Appellant contends that at the penalty phase, the trial court erroneously admitted evidence concerning threatening gang graffiti that appellant made while in custody awaiting trial, as well as several instances of noncriminal conduct while in custody. No prejudicial error occurred. Appellant forfeited his claim concerning the admissibility of threatening

gang graffiti, and the trial court properly admitted the evidence in any event. The testimony about four noncriminal acts while in custody—although initially admitted in error—was struck by the trial court, and any potential for prejudice was adequately addressed by the court’s instructions.

A. Evidence Concerning Gang Graffiti On The “Out Of Order” Sign

1. Relevant Facts And Proceedings

During the second guilt phase trial, the prosecution sought to admit gang graffiti appellant made in 1994 while in custody awaiting trial. The evidence consisted of an “out of order” sign (“sign”) on the copy machine in the jail library. (2CT Supp. II 405 [People’s Exh. 29].) The following phrases had been written on the sign in handwriting that was identical to the handwriting found in appellant’s photo albums: “Antt Dogg [*sic*] CK,” “Antt Dogg,” “92nd St Watts Gang,” “Harry,”⁴² “East Side Bishops Blood” (twice) and “Watts Life.” (*Ibid.*) Underneath these phrases were the words: “Sheriff,” Judge” “DA,” “Anybody.” Each of these words had been crossed out, and each crossed-out word was followed by a letter “K.” Underneath the crossed-out words was the word “Killa!!” (*Ibid.*)

At several hearings on the matter (see, e.g., 39RT 4868-4883), the prosecution argued the writings on the sign were probative of the shooter’s identity, motive, and intent (39RT 4870-4871, 4874). Appellant asserted that the evidence would be appropriate for a penalty phase, but not the guilt phase of trial. (39RT 4872.) As to the phrases pertaining to his gang moniker and gang references, however, appellant conceded, “I feel that can go to identity.” (39RT 4873; see also 39RT 4874 [appellant stating he had

⁴² Appellant explained at an admissibility hearing that “Harry” is “a sign for original and Eastside Bishop Bloods” (39RT 4873.) Deputy MacArthur confirmed this meaning at a later hearing. (40RT 5154.)

“no problem at all” with the prosecution introducing the “Ant Dog” graffiti from the sign].) Appellant, however, contended that the “other graffiti . . . about the sheriff killer . . . judge killer, district attorney killer and anybody killer, that does not go to identity, your Honor,” and also objected that the document was inflammatory and prejudicial. (39RT 4873-4874, 4877-4878.) Appellant also claimed that use of the document at trial would violate his right to free expression under the First Amendment. (39RT 4877.)

After weighing the evidence under Evidence Code section 352, the trial court ruled that the sign could be admitted at the guilt phase trial, but without reference to the “killer” portion, which the court deemed too prejudicial. (39RT 4878.) The court expressly overruled appellant’s First Amendment objection. (39RT 4879-4880.) As to appellant’s argument that the document could be admitted at a penalty phase, however, the trial court stated, “I agree with you. That will go before this jury if there is a penalty trial.” (40RT 5163.) At a subsequent hearing, the court repeated that there was “no question” that the evidence would be admissible at any penalty phase, but that the “killer” language would be redacted from the guilt phase evidence. (41RT 5393-5395, 5397.)

A redacted version of the sign was later admitted into evidence at the second guilt phase trial. (1CT Supp. II 265 [People’s Exh. 29-A]; 43RT 5508-5509.) Lieutenant Wright later opined that “without a doubt,” the author of the sign was an East Side Bishop Bloods member. (43RT 5557-5559.)

Before the penalty phase trial began, the prosecution said it intended to introduce the confiscated “out of order” sign and expert testimony about it. (46RT 5818.) The trial court noted that it had “kept out the ‘killa’ business during the guilt phase trial, but this is proper evidence in the

penalty phase, so that one can come in total.” (47RT 5883.) Appellant did not object. (47RT 5883.)

At the penalty phase, and without any objection from appellant, Deputy MacArthur testified about the sign. (49RT 6108.) He described the additional “killer” writing that had been redacted from the sign at the guilt phase trial. (49RT 6108-6109; see 2CT 405 [People’s Exh. 29].) Deputy MacArthur noted that the writing on the sign included “Ant Dog, C.K.,” referring to Crip Killer, and “92nd Street Watts Gang East Side Bishops Blood.” Deputy MacArthur explained that underneath these phrases were the words: “Sheriff,” Judge” “DA,” “Anybody.” Each of these words had been crossed-out and each was followed by a letter “K.” Underneath the crossed-out words was the word “Killa!!” Deputy MacArthur opined without objection that this writing—like appellant’s reference to being a Crip Killer—meant “Sheriff Killer,” “Judge Killer,” “D.A. Killer,” and “Anybody Killer.” (49RT 6109-6110.)

When the prosecution asked for Deputy MacArthur’s expert opinion as to the “attitude” of the author, appellant made his one and only penalty phase objection to the evidence, stating, “This calls for speculation.” (49RT 6110.) The objection was overruled. (49RT 6110.) Deputy MacArthur then opined that the author “had graduated or been affected by the criminal justice system somehow and has graduated to sheriff, judge, D.A., and anybody killer. . . . What used to be a Crip Killer mentality has now branched into anybody.” (49RT 6110-6111.) Deputy MacArthur further testified that appellant had personally admitted to him that he was a 92 East Side Bishop Blood, and that his moniker was Ant Dog. (49RT 6118.)

After the People rested, a hearing was held regarding penalty phase jury instructions. The prosecution noted that in the first draft of the instructions, the threats of violence on the “out of order” sign had been

omitted inadvertently from the aggravating circumstances set forth in CALJIC No. 8.87. (51RT 6408; 4CT 912.) The trial court noted, “I believe that that does fall within 190.3,” and explained that appellant’s conduct was arguably a criminal threat in violation of section 76. (52RT 6433-6434.) “So I believe,” explained the court, “that the ‘out of order’ sign is properly admissible and arguable before the jury as well as – as a factor to be instructed on.” (52RT 6436.) Appellant did not object, or move to strike the sign or any related testimony on any ground. (52RT 6434.)⁴³

The jury was subsequently instructed that it could consider, among other acts, the following criminal activity if proven beyond a reasonable doubt: “threats of violence on the ‘Out of Order’ sign on February 7, 1994 which involved the express or implied use of force or violence or threat of force or violence.” (4CT 912 [CALJIC No. 8.87 “Penalty Trial — Other Criminal Activity — Proof Beyond A Reasonable Doubt”].)

2. Appellant Forfeited His Claim That The Sign-Related Evidence Was Inadmissible At The Penalty Phase

To preserve for appellate review a claim that evidence of unadjudicated criminal activity was wrongly introduced at the penalty phase of a capital trial, a defendant must make a timely and specific objection at trial. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1175; see also *People v. Hamilton, supra*, 45 Cal.4th at pp. 933-934 [defendant’s claim challenging the sufficiency of the evidence of the crimes presented during the penalty phase was forfeited because defendant did not challenge

⁴³ As discussed in detail in the next section of this argument, appellant did object to evidence and instructions concerning several instances of noncriminal conduct while in custody, which the court subsequently instructed the jury to disregard.

the sufficiency of the evidence at trial, and did not object to the evidence when it was introduced]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1052-1054 [defendant's claim that the acts presented during the penalty phase did not satisfy the "crime" and/or "violence" requirements of section 190.3, factor (b) were forfeited under both statutory and constitutional law because he failed to object to the evidence].)

Here, appellant argues for the first time that the "killer" writing on the sign, and related expert testimony, was not admissible evidence of ~~unadjudicated criminal activity under section 190.3, subdivision (b)~~ ("factor (b)"), which permits the jury to consider evidence of a defendant's criminal activity that "involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (See AOB 328-355.) Specifically, appellant contends that the "killer" portion of the writing did not amount to a criminal threat under state law (AOB 330-339), and that it was constitutionally-protected free speech in any event (AOB 339-346). Appellant further contends the gang expert should not have been permitted to opine at the penalty phase that appellant's violent attitude had expanded beyond Crips to include sheriffs, judges, district attorneys, and "anybody." (AOB 347-348.)

These claims are not cognizable because appellant failed to object at the penalty phase to any of the sign-related evidence below, let alone object on the specific theories he now raises. (*People v. Tully, supra*, 54 Cal.4th at p. 1054; *People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1052.) He therefore has forfeited his appellate claims under both statutory (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 588) and constitutional law (*People v. Partida, supra*, 37 Cal.4th at p. 435). (*Lewis, supra*, at p. 1052.) At no time prior to the admission of the graffiti evidence at the penalty phase trial—and the expert testimony about its meaning—did appellant object that the evidence was inadmissible. (See 47RT 5883 [no objection at

Evidence Code section 402 hearing]; 49RT 6108 [no objection to Deputy MacArthur's penalty phase testimony describing the "killer" writings]; 52RT 6436 [no objection to including the evidence in CALJIC No. 8.87 as evidence of an "express or implied use of force or violence, or a threat of force or violence"].) When Deputy MacArthur was asked to render an expert opinion about the author's attitude—based on a set of hypothetical facts concerning the photo album and the out of order sign—appellant's sole objection was that the question called for "speculation," a theory he does not repeat on appeal. (49RT 6110.) This single objection—to the form of the question—was unrelated to his current challenges to the sign-related evidence, and therefore did not alert the trial court to appellant's instant claims concerning the evidence.

Several passages in appellant's opening brief appear to be half-hearted attempts to avoid the forfeiture doctrine, but none of the assertions renders the claim cognizable. For example, while referring to the sign graffiti, appellant notes in a footnote that he objected to the evidence at the *guilt phase* trial. (AOB 328, fn. 126.) But appellant's guilt phase objections were merely that—objections that the "killer" writings were inadmissible at the guilt phase because they were irrelevant and prejudicial. (39RT 4872.) The objections were unrelated to whether the evidence might be admissible at some future potential penalty phase as factor (b) evidence or for any other purpose. Regardless, appellant expressly asserted at the guilt phase trial that the sign evidence *would* be admissible against him at any future penalty phase. (39RT 4872.) And as the trial court later observed, without any correction from appellant, "I agree with you. That will go before this jury if there is a penalty trial." (40RT 5163.)

After citing his irrelevant guilt phase objections, appellant then asserts that he "objected to the admissibility of the evidence at the penalty phase as well," and provides three record citations. (AOB 328, fn. 126, citing 51RT

6370-6375, 6408; 53RT 6415.) But these cited proceedings cannot help appellant because they took place: *after* the trial court had ruled without objection that the entire sign would be admitted (47RT 5883); *after* Deputy MacArthur had testified without objection about the contents and meaning of the sign (49RT 6108-6111); *after* the prosecution had concluded its penalty-phase presentation of evidence (51RT 6355); and *after* the trial court had indicated without objection that the evidence could be considered by the jury under 190.3, subdivision (b) (52RT 6436). Evidentiary objections must be timely, or they are forfeited. (Evid. Code, § 353⁴⁴; *People v. Sassounian* (1986) 182 Cal.App.3d 361, 401, fn. 39.)

Discussions that take place long after a court has admitted evidence and the jury has heard it are not “timely objections” to the admission of evidence.

Regardless, the pages that appellant cites contain no objection to the sign-related evidence. (See AOB 328, fn. 126, citing 51RT 6370-6375, 6408; 53RT 6415.) At pages 6370-6375 of the reporter’s transcripts, the parties argued about whether to instruct the jury about five *different* instances of appellant’s in-custody conduct: (1) removal of handcuffs in 1993; (2) possession of a handcuff key in 1993; (3) a challenge to Deputy Orellana in 1992; (4) a potential escape risk in 1992; and (5) possession of

⁴⁴ That section provides:

A verdict or finding shall not be set aside, nor shall the judgment or decision—based thereon be reversed, by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

dangerous material in 1986. The trial court confirmed that those were the only “five” matters at issue, and appellant said, “Yes, your Honor.” (52RT 6373-6375.) There was no mention of the “out of order” sign at the pages cited by appellant.

Next, at page 6408 of the reporter’s transcripts, the prosecution noted that it wanted to submit the original of the sign, rather than a photocopy. (See 51RT 6407-6408.) Appellant asked the court to “keep that under submission until we come to a further conclusion, what we’re going to do about the March 8th [1992 potential escape] incident? This could be included with that package.” (51RT 6407-6408.) The prosecution agreed, and noted that it had omitted the threatening sign graffiti from the statement in aggravation, and that it would amend it to the next draft of CALJIC No. 8.87. (51RT 6408.) Appellant made no retroactive objection to the admissibility of the sign.

Finally, at page 6415, the prosecutor concluded her argument that the People should be permitted to argue about all of appellant’s in-custody conduct, including several nonviolent and noncriminal escape attempts. (See 52RT 6412-6415.) Appellant responded with a general assertion that “we’re leaving out a major issue of Penal Code section 190.3, that these force and violence [*sic*] - - or this implied or express threat of force and violence has to violate a penal code, your Honor.” (52RT 6415.) But the only specific conduct or evidence that appellant mentioned was testimony “about me taking off handcuffs,” which appellant argued was prejudicial. (52RT 6415.) Appellant never retroactively objected or moved to strike the sign-related evidence, and never argued that the sign was inadmissible on any of the grounds now raised on appeal.

Appellant also points out that he objected to the sign-related evidence two months later in the context of a motion for a new trial. (AOB 327-328.) As this Court has ruled, however, subsequent arguments in a motion

for new trial are not a substitution for a timely objection. (See *People v. Williams, supra*, 16 Cal.4th at p. 254.)

Notably, appellant's decision not to object to the sign-related penalty phase evidence was clearly deliberate and considered. Indeed, appellant announced his decision beforehand, when he asserted at the guilt phase trial that the sign would be appropriate evidence and admissible against him at any penalty phase. In sum, appellant's claim that the sign-related evidence was inadmissible at the penalty phase is not cognizable because appellant failed to raise any of the instant objections at trial. (See *People v. Livingston, supra*, 53 Cal.4th at p. 1175.)

3. The Trial Court Acted Within Its Discretion In Admitting The Sign-Related Evidence At The Penalty Phase

Assuming this Court addresses the claim despite appellant's failure to object, the evidence was admissible at the penalty phase, and any error in admitting it was harmless in any event.

Evidence of unadjudicated criminal activity presented at the penalty phase pursuant to section 190.3, subdivision (b) is limited to evidence of conduct that demonstrates the commission of a crime, specifically, the violation of a penal statute. (*People v. Phillips* (1985) 41 Cal.3d 29, 72 (*Phillips*); *People v. Boyd* (1985) 38 Cal.3d 762, 778.) That crime must include a requisite degree of force or violence. (*Boyd, supra*, at pp. 776-777.) The prosecution must prove each element of the factor (b) offense beyond a reasonable doubt. (*Id.* at p. 778.) It is the responsibility of the trial court to determine that the factor (b) evidence meets this high standard of proof. (*Ibid.*) A trial court's determination to admit factor (b) evidence is reviewed for abuse of discretion. (*People v. Smithey* (1999) 20 Cal.4th 936, 991.)

In this case, the trial court acted within its discretion in finding that appellant's "killer" writing amounted to an express or implied threat of force or violence against a judge, in violation of section 76 as it existed in 1994.⁴⁵ Deputy MacArthur rendered expert testimony that the "killer" writing was analogous to appellant's claim to be a "Crip Killer" (a claim appellant had shown was true). (49RT 6109.) By crossing out those officials who were directly involved in the criminal case against him—i.e., the sheriffs, the district attorney, and the judge—Deputy MacArthur opined that appellant was now identifying himself as a "killer" of those individuals as well, and that he had a "focus of violence" directed at them. (49RT 6109-6111.)

Moreover, the trial court could find that by identifying himself as a "judge killer" while proceeding as a pro per convicted murderer in a capital case, appellant was, at very least, making an express or implied threat of violence against the judge. Indeed, there was ample evidence that appellant

⁴⁵ As it existed in 1994, section 76—"Threatening certain officials, appointees, judges, or his or her immediate family; intent and ability to carry out threat; punishment"—stated in relevant part:

(a) Every person who knowingly and willingly threatens the life of, or threatens serious bodily harm to, any elected state official, exempt appointee of the Governor, or judge, or immediate family of the appointed official, appointee, or judge, with the specific intent that the statement is to be taken as a threat, and the apparent ability to carry out that threat by any means, is guilty of a public offense . . . :

(c) For purposes of this section, the following definitions shall apply:

(1) "Apparent ability to carry out that threat" includes the ability to fulfill the threat at some future date when the person making the threat is an incarcerated prisoner with a stated release date.

(2) "Serious bodily harm" includes serious physical injury or serious traumatic condition.

had been extremely violent and dangerous both in and out of custody, and had specifically shown both the desire and ability to harm public officials. While in custody, appellant had been caught possessing numerous deadly weapons and had attacked others with deadly weapons. (See, e.g., 49RT 6145-6146 [possession of seven shanks], 6149-6155 [assault with a spear], 6124-6128 [assault with a shank]; 48RT 6042-6044 [possession of a shank], 6080-6084 [assault with a shank]; 47RT 6007-6012 [possession of a shank].) Appellant had previously attacked sheriff deputies while in custody. (See, e.g., 47RT 5970-5977.) The trial court had also heard testimony that while awaiting trial in the instant case, appellant had managed to remove his handcuffs on one occasion, and had been found in possession of a handcuff key on another occasion. (See 52RT 6373-6375.)

Thus, under the totality of circumstances, the trial court could reasonably conclude that by crossing out “judge” and writing “K” and “Killa!!” after it, appellant specifically intended his writing to be taken as a threat against a judge. Moreover, appellant wrote the threatening graffiti in 1994 while representing himself at trial, and left the graffiti where it would be promptly found by deputies. Thus, when he wrote the graffiti, appellant was appearing each day in the courtroom—without shackles and within feet of the judge. Accordingly, the trial court could further conclude that when appellant had written the threatening graffiti, he had the apparent ability to carry out the express or implied threat of great bodily harm. There was therefore no abuse of discretion in admitting this as factor (b) evidence at the penalty phase.

Appellant contends that his conduct did not violate section 76 because there was no evidence that the sign graffiti “caused anyone to actually fear for his her safety.” (AOB 334-335.) Appellant’s argument is misplaced,

because that required element—codified in subdivision (c)(5)⁴⁶—did not become effective until July 12, 1995, after appellant’s trial. (See Stats. 1994, c. 820 (S.B.1463), § 1; Gov. Reorg. Plan No. 1 of 1995, § 42, eff. July 12, 1995.) At the time of appellant’s trial and as relevant here, section 76 punished “[e]very person who knowingly and willingly threatens the life of, or threatens serious bodily harm to, any . . . judge, or the immediate family of the . . . judge, with the specific intent that the statement is to be taken as a threat, and the apparent ability to carry out that threat by any means” (*People v. Gudger* (1994) 29 Cal.App.4th 310, 315.) As such, this claim—along with appellant’s related observation that Judge Brown did not determine at the guilt phase whether the threat was meant for her or a different judge (see 41RT 5395; AOB 323)—is irrelevant to whether the matter was properly submitted to the jury as a threat under section 76.⁴⁷

⁴⁶ Effective July 12, 1995, section 76 was amended to include, inter alia, the following:

(c) For purposes of this section, the following definitions shall apply:

...

(5) “Threat” means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat *so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.*

(§ 76, subd. (c); see Stats.1994, c. 820 (S.B.1463), § 1; Gov. Reorg. Plan No. 1 of 1995, § 42, eff. July 12, 1995.)

⁴⁷ The bulk of appellant’s briefing on this claim concerns his assertion that he did not violate *other* sections of the Penal Code, namely sections 69 and 71. (See AOB 328-339.) But the trial court only found that the conduct violated section 76 (see 52RT 6433-6434), and with good reason. Section 69 prohibits threats and violent conduct in an attempt “to deter or prevent an executive officer from performing any duty imposed
(continued...)

Furthermore, because the writing was obviously gang-related and because the author was clearly a Bloods gang member, gang expert MacArthur was entitled to testify about what the writings meant to him and why.

In the alternative, the evidence of the threatening gang graffiti was also admissible because it was relevant to the circumstances of the crimes. (§ 190.3, subdivision (a).) If the challenged evidence is admissible on any ground—not just those stated by the parties or the trial court—there is no error. (*People v. Zapien* (1993) 4 Cal.4th 929, 976 [“No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion” (citation omitted)]; see also *People v. Smithey*, *supra*, 20 Cal.4th at p. 972 [affirming correct evidentiary ruling made for the wrong reasons].)

(...continued)

upon such officer by law.” (See *People v. Lacefield* (2007) 157 Cal.App.4th 249, 255.) There does not appear to be evidence in this record, however, that appellant intended to influence the performance of any official duty. Similarly, a violation of section 71 requires: “(1) A threat to inflict an unlawful injury upon any person or property; (2) direct communication of the threat to a public officer or employee; (3) the intent to influence the performance of the officer or employee’s official duties; and (4) the apparent ability to carry out the threat.” (*People v. Hopkins* (1983) 149 Cal.App.3d 36, 40-41.) Again, there does not appear to be evidence in this record that appellant intended to influence the performance of any official duty. Moreover, there does not appear to be evidence in this record that appellant, “directly communicated” the threat to a public official. Accordingly, when discussing whether the threatening gang graffiti constituted factor (b) evidence, respondent focuses solely on the statute identified by the trial court, i.e., the 1994 version of section 76.

Here, the graffiti was attributed to appellant and specifically referenced his moniker and gang affiliation, and therefore demonstrated that appellant was “Ant Dog” and a East Side Bishop Bloods gang member. (See 2CT 405 [the “out of order” sign].) The Ant Dog moniker, the gang affiliations, and the handwriting itself were consistent with the photo album found in appellant’s motel room, and thus further linked both writings to appellant. (Cf. 2CT Supp. II 405 [the “out of order” sign] with 1CT Supp. II 64-67, 216 [photo album and “U.B.N. Warrior” poem].) The “killer” writing on the sign—like the violent musings in the photo album—was particularly relevant to the gang-motivated shootings, and indicative of appellant’s brazen willingness to kill in order to obtain “true gangster” status. As the prosecutor also noted, when appellant began to associate with CV 70, he sought to expand his range targets—and therefore his reputation as a hard-core gang member—beyond merely being a “Crip Killer.” (52RT 6496-6497.) Thus, the threatening gang graffiti on the sign—which also reflected appellant’s desire to expand his range of targets—was admissible as relevant to the circumstances of the offenses under factor (a) of section 190.3. (*People v. Blair, supra*, 36 Cal.4th at p. 749.)

4. Appellant’s First Amendment Claim Is Forfeited And Meritless

Appellant also repeats and expands upon his argument from the guilt phase that the “killer” portion of the graffiti was constitutionally protected speech. (AOB 339-347.) As noted, however, he never raised that objection at the penalty phase, and therefore forfeited his constitutional claim. (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1052; *People v. Partida, supra*, 37 Cal.4th at p. 435.) Even if cognizable, appellant’s violation of section 76 was not protected speech. Contrary to appellant’s

claim, the “killer” portion of his writing was a “true threat” and therefore not protected by the First Amendment. (See AOB 339-347.)⁴⁸

A state may penalize criminal threats, even those consisting of pure speech, so long as the pertinent statute singles out threats falling outside the scope of the First Amendment’s protection for punishment. (*In re M.S.* (1995) 10 Cal.4th 698, 710, citing *Watts v. United States* (1969) 394 U.S. 705, 706-708 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *People v. Toledo* (2001) 26 Cal.4th 221, 233.) In this regard, it is important to recall that the First Amendment’s aim is to protect expression that in some way engages in public dialogue, i.e., “communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one’s beliefs” (*In re M.S.*, *supra*, at p. 710, quoting *Shackelford v. Shirley* (5th Cir. 1991) 948 F.2d 935, 938; *Toledo*, *supra*, at p. 233.) Thus, as the speech at issue strays from the protected values of persuasion, dialogue and free exchange of ideas and beliefs, and moves toward willful threats to perform illegal acts, the state is afforded great latitude in regulating such expression. (*In re M.S.*, *supra*, at p. 710; *Shackelford*,

⁴⁸ Notably, section 76 (along with the other sections that criminalize threats of violence against public officials) are constitutional, and appellant does not contend otherwise. (See *People v. Dunkle* (2005) 36 Cal.4th 861, 919 [First Amendment challenge to Penal Code section 71, prohibiting threatening public officers, employees, and school officials]; *People v. Monterroso* (2004) 34 Cal.4th 743, 776 [First Amendment challenge to Penal Code section 71, prohibiting threatening public officers, employees, and school officials]; *People v. Jackson* (2009) 178 Cal.App.4th 590, 598 [challenge to instruction regarding crime of attempted criminal threat]; *People v. Barrios* (2008) 163 Cal.App.4th 270, 276-278 [instructional challenge to CALCRIM No. 2650, which tracks the language of Penal Code section 76, threatening certain public officials]; *People v. Gudger*, *supra*, 29 Cal.App.4th at pp. 318-321 [First Amendment challenge to Penal Code section 76, threatening certain public officials].)

supra, at p. 938; *Toledo*, *supra*, at p. 233.) Accordingly, “true threats” of physical violence are not protected by the First Amendment. (*Virginia v. Black* (2003) 538 U.S. 343, 359 [123 S.Ct. 1536, 155 L.Ed.2d 535]; *In re M.S.*, *supra*, 10 Cal.4th at p. 714.)

The “true threats” exception had its origins in *Watts v. United States*, *supra*, 394 U.S. 705. The defendant in *Watts* was convicted of “knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States” (*Id.* at p. 705, quoting 18 U.S.C. § 871(a).) *Watts* was convicted based on his statement at a rally against the Vietnam War that, “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” (*Id.* at p. 706.) In examining the statute, the Supreme Court first noted that it was constitutional on its face. “Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.” (*Id.* at p. 707.) In overturning the defendant’s conviction, the Court held that the threat must be construed in the light of First Amendment principles that encouraged uninhibited debate on public issues. In this light, Watt’s statement was not a true threat, but rather was a “kind of political hyperbole.” (*Id.* at p. 708.) Because the Court determined that the defendant’s statement was not a threat, it did not address the mens rea requirement necessary to proscribe a threat consistent with the First Amendment.

Thirty-four years after *Watts*, the high court defined the term in *Virginia v. Black*, *supra*, 538 U.S. 343:

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. (See *Watts v. United States*, *supra*, at p. 708 (“political hyperbole” is not a true threat); *R.A.V. v. City*

of *St. Paul*, *supra*, 505 U.S. at p. 388.) The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” (*Ibid.*) Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

(*Virginia v. Black*, *supra*, 538 U.S. at pp. 359-360.)

In this case, under the totality of circumstances described above, the trial court reasonably determined that appellant’s threatening gang graffiti amounted to a criminal threat of force or violence in violation of section 76. The “killer” portion of the writing was reasonably viewed as a “true threat” against a judge and was therefore not protected free speech. Appellant’s attempt to couch his writings as merely “expressing himself” provides him no cover under the First Amendment. What appellant “expressed” was a serious expression of an intent to commit an act of unlawful violence, i.e., murder, against a particular individual or group of individuals, namely a judge. It cannot be said that such “expression” by a hard-core violent gang member, made in the midst of a capital trial involving multiple counts of gang violence, and made by a pro per defendant who previously demonstrated both an intent and ability to harm public officials—even while in custody—was merely a joke or hyperbole. So construed, the admission of appellant’s threatening gang graffiti did not violate the First Amendment. (See *People v. Lowery* (2011) 52 Cal.4th 419, 427.)

Appellant’s other attempts to find shelter under the First Amendment are also unavailing. Appellant reads a case from the Second Circuit Federal Court of Appeals, *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, as requiring both specific intent and an immediacy requirement to render any speech prohibited. (See AOB 341-347.) However, neither *Kelner* nor the

subsequent California cases cited by appellant impose a requirement that a statute contain the elements of specific intent and apparent ability in order to comply with the constitutional mandates of the First Amendment. Nonetheless, appellant contends that there is no evidence that any person “took the graffiti as conveying an immediate prospect that the alleged threat would be executed.” (AOB 346.) As this Court recently noted, however,

Nothing the high court said [in *Black*] suggests that speech threatening bodily harm is entitled to First Amendment protection, and thus is immune from criminal prosecution, absent proof that the speaker intended to inflict the threatened harm immediately, or had the apparent ability to do so.

(See *People v. Lowery*, *supra*, 52 Cal.4th at p. 428.)

Appellant also contends that no one who saw the gang graffiti “actually experienced any fear whatsoever—much less a sustained fear—for his or her own safety” (AOB 346.) Again, appellant reads too much into what is required before a threat may be criminally actionable. Neither “actual fear” nor “sustained fear” is required—in fact, a threat need not even be communicated to the proposed victim. (See *United States v. Stewart* (9th Cir. 2005) 420 F.3d 1007, 1016 [finding that under a federal statute that criminalizes threatening enumerated officials, “receipt of the threat only by a third party is sufficient,” where threat was communicated to fellow inmate]; *United States v. Chase* (9th Cir. 2003) 340 F.3d 978, 980 [affirming conviction for threatening a federal law enforcement officer when threat was made to a telephone operator at the defendant’s psychiatrist’s office]; *United States v. Martin* (10th Cir. 1998) 163 F.3d 1212, 1216 [holding that threats made to a third party, the defendant’s associate, were sufficient to sustain conviction for threatening a law enforcement officer].)

In sum, appellant is simply wrong that his “killer” writing was protected free speech.

5. Assuming Arguendo That The Sign-Related Evidence Was Erroneously Admitted, Such Error Was Harmless

State law error at the penalty phase is reviewed under a “reasonable possibility” standard. This Court examines whether there is a reasonable possibility that a sentence of life without possibility of parole would have been returned absent the error. (*People v. Hamilton, supra*, 45 Cal.4th at p. 912; *People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) California’s reasonable possibility standard for assessing penalty phase error is the same in substance and effect as the beyond a reasonable doubt standard of *Chapman v. California, supra*, 386 U.S. 18. (*People v. Ochoa* (1998) 19 Cal.4th 353, 479.)

In this regard, this Court’s recent decision in *People v. Moore* (2011) 51 Cal.4th 1104 is instructive. There, the capital defendant claimed the trial court had erred by admitting testimony that, while in custody, he had possessed a plastic baggie containing urine. This Court agreed with the defendant’s claim that possession of a baggie of urine was not a crime, and therefore was not “criminal activity” as required under *Phillips* and factor (b). (*Id.* at pp. 1137-1138.) Nonetheless, this Court concluded that any error was harmless beyond a reasonable doubt. (*Id.* at p. 1138.) As this Court observed, the jury in *Moore* had heard evidence of defendant’s participation in “three brutal murders, his conviction for the armed robbery of a jewelry store, his escape from custody by overpowering a deputy, taking his firearm and committing a carjacking with the weapon, and his fighting and possessing other dangerous weapons while in custody.” (*Ibid.*) Thus, this Court concluded, “We have no doubt that the jury would have reached the same verdict had the evidence of his possession of the baggie of urine not been admitted at trial.” (*Ibid.*; see also, e.g., *People v. Page* (2008) 44 Cal.4th 1, 54 [any error in admitting pornographic magazines

during penalty phase of trial for capital murder and commission of a lewd act on a child was harmless].)

Any assumed error in this case was similarly harmless. (See *People v. Moore*, *supra*, 51 Cal.4th at pp. 1137-1138; *People v. Page*, *supra*, 44 Cal.4th at p. 54.) The evidence at issue, the admission of which appellant claims was error of such magnitude that reversal of his death sentence is required, consists of just *five words* written by appellant, i.e., the writing that had been redacted from the guilt phase trial and then admitted at the penalty phase without objection. Given the remaining evidence of appellant's violent criminal activity—the brutal murders of Sanchez and Benson Jones, the attempted murder of Benjamin Jones, the litany of violent convictions and violent conduct while in and out of custody, and appellant's admitted allegiance to a deadly criminal street gang—it is not reasonably possible that absent these *five words*, appellant would have received a life without possibility of parole sentence, rather than a sentence of death. (Cf. *Moore*, *supra*, at pp. 1137-1138.)

Indeed, the sign-related evidence did not damage appellant's character more than the rest of his violent gang writings. And, like all of his gang writings, these words paled in comparison to the impact of appellant's cold-blooded murders, his long history of violence, his utter lack of remorse, and his inability to produce even a shred of evidence in mitigation. (See 2CT 405.) The sign was merely one of many aggravating circumstances listed CALJIC No. 8.87, and the other listed circumstances all involved far more serious conduct. (4CT 912.) The prosecution mentioned the sign-related evidence just once in her opening statement and once in closing argument, and placed little emphasis on it. (See 47RT 5911; 52RT 6411.) Thus, the sign-related evidence was of little importance at the penalty phase, especially in light of the statements and arguments as a whole, and the prosecution's reliance on other aggravating circumstances. (47RT 5907-

5918; 52RT 6488-6525.) Indeed, as the prosecutor argued, the murders alone warranted a death sentence. (52RT 6494-6505.)

Conversely, appellant offered no affirmative mitigating evidence, and his own argument to the jury only hurt his case. Appellant admitted to the jury that he was the gang member "Ant Dog," but asked the jury to consider as a factor in "mitigation" that the victims and their family members "were also gang members" and were "responsible to a gang." (52RT 6542-6543.) Also, the jurors were instructed that before any factor (b) evidence could be considered, they had to be satisfied that the evidence was proven by a reasonable doubt. (4CT 911 [CALJIC No. 2.90 "Reasonable doubt"], 912 [CALJIC No. 8.87 [aggravating circumstances must be proven beyond a reasonable doubt].) If, as appellant argues, there was no evidence of any criminal threat, then the jury would not have used that allegation against him as an aggravating circumstance. Hence, any error in admitting the evidence was harmless. (Cf. *People v. Moore*, *supra*, 51 Cal.4th at pp. 1137-1138.)

B. The Trial Court Acted Within Its Discretion When It Declined To Grant A Mistrial Because Of Erroneously Admitted Factor (b) Evidence

Appellant also contends that the trial court abused its discretion in declining to grant a mistrial following the admission of testimony about four, noncriminal acts by appellant while in custody. He contends that the evidence was prejudicial to the penalty phase verdict, and that even if the harm was curable, the trial court's instructions to the jury to disregard the evidence were not insufficient. (AOB 356-378.) The claim is meritless, and the trial court acted well within its discretion in refusing to declare a mistrial.

1. Relevant Proceedings

Appellant had a long history of prohibited conduct while in custody, including assaults on inmates and correctional officers; possession of weapons and weapon making material, and escape attempts. At the penalty phase, the prosecution sought to use all the incidents that amounted to criminal conduct as aggravating circumstances under factor (b). The prosecution also sought to use the following four, noncriminal acts:

(1) propping a cell gate open on March 8, 1992; (2) telling Deputy Orellana on March 25, 1992, that if he were to "open the cell door and step in, we could take care of business," or words to that effect; (3) possession of a handcuff key on January 7, 1993; and (4) removal of handcuffs on January 28, 1993. (See 5814-5818; 47RT 5883-5885, 5889-5897 [prosecutor identifying the incidents she intended to use].) As noted above, however, evidence of unadjudicated criminal activity presented at the penalty phase pursuant to section 190.3, subdivision (b) is limited to evidence of conduct that demonstrates the commission of a crime, specifically, the violation of a penal statute. (*Phillips, supra*, 41 Cal.3d at p. 72; *People v. Boyd, supra*, 38 Cal.3d at p. 778.) The crime must also include a degree of force or violence. (*Boyd, supra*, at pp. 776-777.) Thus, at pretrial hearings on the matter, appellant objected to using several nonviolent acts on the ground that they did not amount to criminal conduct in violation of the Penal Code, or were too prejudicial under Evidence Code section 352. (See 46RT 5808-5809, 5826-5827, 5831, 5865, citing *Phillips, supra*, at p. 65.) The trial court initially ruled that the four noncriminal acts were admissible. (47RT 5881, 5885, 5892-5896.)

Thus, as factor (b) evidence at the penalty phase, prosecution witnesses testified about appellant's extensive history of violent conduct in and out of custody. (See 50RT 6226-6235 [assault with a firearm in 1984]; 49RT 6145-6146 [possession of seven shanks while in custody in 1985],

6149-6155 [assault of an inmate with a spear in 1986], 6169-6171 [possession of instructions for making a pipe bomb and zip gun while in custody in August 1986]; 50RT 6203-6204, 6207-6214, 6263 [attempted possession of explosive device while in custody in December 1986], 6124-6128 [assault of an inmate with a shank in 1988], 6175-6180 [conviction for assault with a firearm in 1989]; 49RT 6100-6108; 50RT 6262 [conviction for possession of a firearm by a felon in 1989]; 48RT 6042-6044 [possession of a shank while in custody in 1991], 6080-6084 [assault of an inmate with a shank in February 1992]; 47RT 6007-6012 [possession of a shank while in custody in March 1992], 5970-5977 [assault of Deputy Disylvio while in custody in July 1993], 5980, 6004-6005 [possession of a shank while in custody in July 1993]; 49RT 6108-6111, 6118 [threat of violence on the "out-of-order" sign].)⁴⁹

Evidence was also presented concerning the four noncriminal incidents at issue on appeal, as follows:

a. Propping Open His Cell Door On March 8, 1992

Sheriff Deputies Carlos Herrera, Miguel Orellana, and Sandra Gannon were on duty at the Men's Central Jail, on March 8, 1992, and were assigned to appellant's module. (48RT 6054, 6073; 49RT 6095-6096.) The module consisted four tiers, and each tier had 26, single-man cells. (48RT 6055-6056.) From a control panel in a security booth, deputies could open and close each cell door, and monitor whether any door was partially opened, fully opened, or fully closed. (48RT 6057-6058; 49RT 6097.)

⁴⁹ This factor (b) evidence is set forth in detail in the Statement of Facts.

Around 6:30 p.m., when the control panel showed that all the cell doors were locked, a trustee inmate ran to the deputies and reported that something had happened. (48RT 6059-6061, 6073; 49RT 6097-6098.) Deputies Herrera and Orellana went to appellant's single-man cell to investigate, while Deputy Gannon checked the control panel. (48RT 6060-6062, 6073; 49RT 6097.) When the deputies arrived, appellant was in his cell but his cell door was unlocked. (48RT 6063, 6073-6074.) Toilet paper had been inserted in the cell track, and had been molded to the shape of the track. This allowed appellant to keep his cell door unlocked, while making the door appear—both visually and to the monitoring panel—that the door was fully closed and locked. (48RT 6063-6064, 6074-6075.) Deputy Herrera had not previously seen an inmate accomplish this without it being noticeable at the control panel. The shape of the paper had to be “almost perfect” to make it work. (48RT 6068-6069.)

The deputies testified that the act of propping open the cell door posed a security risk and caused them to be very concerned for the safety of the deputies and the inmates. Propping the door open, in an undetected manner, would allow appellant to come and go from the cell as he pleased. (48RT 6061-6062, 6067-6068, 6075.)

b. Challenging Deputy Orellana On March 25, 1992

Deputy Orellana explained that a “fish line” is a sheet that is torn into a long strand, which is then used to pull contraband from one cell to another. (48RT 6067.) Fish lines are prohibited because they can be used as a weapon or to retrieve weapons from other cells. While patrolling appellant's module on March 25, 1992, Deputy Orellana saw a fish line coming out of appellant's cell. When the deputy went to appellant's cell and found the fish line, appellant was more hostile and aggressive than

usual. Appellant threatened that if the deputy were to “open the cell door and step in, we could take care of business,” or words to that effect. (48RT 6076-6077.)

c. Possession Of A Handcuff Key While In Custody On January 7, 1993

Sheriff's Deputy Tony Taylor was on duty at the Men's Central Jail on January 7, 1993, where appellant was in custody. (48RT 6024.) Upon searching appellant that day, Deputy Taylor found a homemade handcuff key that had been formed from a piece of metal. (48RT 6026.)

d. Removal Of Handcuffs And Waist Chain On January 28, 1993

Sheriff's Deputy Louis Madrid was working at the inmate reception center at the Men's Central Jail on January 28, 1993, when appellant was preparing to go to court. (48RT 6028.) When an inmate who is a Blood or Crip lines up to go to court, he is re-handcuffed with his hands behind his back, and with the backs of his hands together. The inmate's wrists are then chained to his waist. This protocol was in place to make it harder for those inmates—who frequently fought with each other—to unlock their handcuffs with a handcuff key or other object. (48RT 6028-6030.)

Appellant was separated from the line of inmates waiting to go to court; he was handcuffed and placed in a special holding cell with about 10 other inmates. (48RT 6032, 6037.) Deputy Madrid left appellant alone in the cell for about 20 minutes. (48RT 6032-6033.) When the deputy returned, appellant was out of his handcuffs and waist chain. Appellant was the only one in the cell who had removed his restraints. (48RT 6037-6038.) The handcuffs and chain were underneath the toilet in the back of the cell, covered in urine. (48RT 6033.) This concerned the deputy

because appellant could have attacked a deputy or another inmate, and could have tried to escape. (48RT 6038-6039.)

While discussing jury instructions after the presentation of penalty phase evidence, appellant objected that the four noncriminal incidents should be excluded from the factor (b) circumstances listed in CALJIC No. 8.87. (51RT 6371-6372.)⁵⁰ The court reviewed several cases and took the matter under submission. (See 51RT 6371-6374.) The court then ruled that the four noncriminal incidents should not have been admitted as factor (b) evidence, and that the prosecutor could not argue—and the court should not instruct—that the acts could be considered as aggravating circumstances. (52RT 6412-6413, 6416-6417.) The court further ordered the prosecutor to redact a chart that included the acts, and the prosecutor complied. (52RT 6437.) Appellant argued that the incidents were prejudicial, and moved for a mistrial. (52RT 6415-6416.) The court, however, ruled that any error in admitting the evidence was harmless, and denied the motion for mistrial. The court indicated it was willing to strike the evidence and instruct the jury not to consider it. (52RT 6417-6419, 6434-6437 [trial court repeating its ruling and its finding that any error was harmless].)

Appellant asked the court to tell the jury not to consider the evidence, and gave the court a proposed instruction. The trial court modified the first proposed sentence—“The court committed error in allowing certain factors in evidence”—to read, “Evidence of certain acts was received during the penalty trial.” (52RT 6474-6476.) Otherwise, the court gave the requested defense instruction in its original form, as follows:

⁵⁰ Appellant also objected to the inclusion of his possession of dangerous material on August 25, 1986. (51RT 6375.) However, the trial court found that evidence was properly admitted, and appellant raises no claim on appeal concerning that conduct.

Evidence of certain acts was received during the penalty trial. You are instructed not to consider this evidence in your deliberations on whether to impose the sentence of life imprisonment without the possibility of parole or death:

- 1) Possession of a handcuff key on January 7, 1993;
- 2) Removal of handcuffs on January 28, 1993;
- 3) Challenge to Deputy Orellana on March 25, 1992;
- 4) Cell gate being propped open on March 8, 1992.

Do not let these acts enter into your deliberations in any way. The acts that you can consider when deciding what is an aggravating circumstance are set forth in the preceding instructions.

(4CT 913; 52RT 6551-6552.)

2. Because The Admission Of The Four Noncriminal Acts Was Harmless Error, The Trial Court Did Not Abuse Its Discretion In Denying The Motion For Mistrial

A trial court should declare a mistrial only “if the court is apprised of prejudice that it judges incurable by admonition or instruction.” (*People v. Jenkins, supra*, 22 Cal.4th at pp. 985-986, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.) Whether the erroneous admission of evidence warrants granting a mistrial or whether the error can be cured by striking the evidence and admonishing the jury rests in the sound discretion of the trial court. (*People v. McLain* (1988) 46 Cal.3d 97, 113.) This is because the assessment of whether a particular incident is incurably prejudicial is by its nature a speculative matter; thus, a trial court is vested with “considerable discretion” in ruling on mistrial motions. (*Haskett, supra*, at p. 854, citing *Illinois v. Somerville* (1973) 410 U.S. 458, 461-462 [93 S.Ct. 1066, 35 L.Ed.2d 425].) This Court reviews a ruling on a mistrial motion for an abuse of discretion. (*People v. Lewis* (2008) 43 Cal.4th 415, 501,

citing *People v. Davis*, *supra*, 36 Cal.4th at p. 553; *People v. Ayala* (2000) 23 Cal.4th 225, 283.)

Here, the evidence of appellant's four noncriminal acts did not result in prejudice that was incurable by admonition, and therefore the trial court did not abuse its "considerable discretion" in denying the mistrial motion. (See *People v. Moore*, *supra*, 51 Cal.4th at p. 1137-1138 [evidence of inmate's noncriminal possession of contraband was improperly admitted as factor (b) evidence at capital trial, but any error was harmless]; *People v. Page*, *supra*, 44 Cal.4th at p. 54 [any error in admitting pornographic magazines during penalty phase of trial for capital murder and commission of a lewd act on a child was harmless].) By its very nature, the prejudicial impact of appellant's conduct was minimal because, as appellant correctly observes, the four acts at issue were neither violent nor criminal. At most, the testimony informed the jury that appellant had broken prison rules and was not a model prisoner—hardly a revelation given the properly-admitted evidence of his long history of violence in and out of custody. And, as in *Moore*—and like the sign evidence discussed above—the evidence at issue made little difference. Given the remaining evidence of appellant's violent criminal activity—two brutal murders, attempted murder, assault with a firearm, attacks on inmates and deputies, convictions for violent crimes, a long history of violent conduct, and appellant's gang allegiance and lack of remorse—there is no doubt that the jury would have reached the same verdict had the evidence of his four noncriminal acts been excluded at trial. (Cf. *People v. Moore*, *supra*, 51 Cal.4th at p. 1138.)

Further, any potential prejudice was put to rest by the trial court's admonishment to the jury. The trial court specifically instructed the jury not to consider the evidence at all, effectively striking it from the trial, and this Court presumes the jury followed such an instruction. (*People v. Avila*, *supra*, 38 Cal.4th at p. 575; *People v. Boyette* (2002) 29 Cal.4th 381, 436.)

That presumption is bolstered by the prosecutor's closing argument, in which she specifically reminded the jury that pursuant to the court's instruction they could not consider the four incidents in their deliberations. (52RT 6505-6506.)

Appellant argues the admonishment was ineffective to cure any harm, because the instruction referred only to appellant's "acts," rather than the entirety of the witnesses' testimony. (AOB 372-375.) Appellant's claim fails, as there is no indication the jury did not understand the scope of the instruction. Under ordinary circumstances such as these, a court may correct an error in admitting improper evidence by ordering it stricken and admonishing the jury to disregard it, and as noted, the jury is presumed to obey the instruction. (See *People v. Avila*, *supra*, 38 Cal.4th at p. 575; *People v. Hardy* (1948) 33 Cal.2d 52, 61-62; *People v. Prather* (1901) 134 Cal. 436, 439.) Only if the erroneous evidence "goes to the main issue, and where the proof of defendant's guilt is not clear and convincing" will the error in admitting the evidence not be curable by striking it and instructing the jury to disregard it. (*Hardy*, *supra*, at p. 61.) In this case, the single evidentiary error at issue—involving nonviolent, noncriminal conduct—did not present an extraordinary circumstance. Appellant's guilt was clear and convincing; the properly admitted factor (b) evidence and victim impact evidence was overwhelming; and testimony about appellant's four instances of noncriminal conduct did not go to the main issue, i.e., whether appellant should be punished by death or life without the possibility of parole.

In sum, the trial court reasonably concluded that the admission of the evidence was harmless and could be adequately addressed by the court's limiting instruction. Under the totality of circumstances, it can be said beyond a reasonable doubt that the penalty phase verdict was not affected by the jury's consideration of any inadmissible evidence. As such, the trial

court acted well within its discretion when it denied appellant's motion for a mistrial, and that decision may not be disturbed.

C. Appellant's Cumulative Error Claim Fails

Appellant contends that reversal is required in light of the combined penalty phase evidentiary errors set forth above. (AOB 375.) Because there were no errors to accumulate or any errors were harmless, appellant's claim must fail.

In assessing claims of cumulative error at a penalty phase of a capital trial, the test is whether there is a "reasonable possibility" that a sentence of life without possibility of parole would have been returned absent the alleged errors. (*People v. Hamilton, supra*, 45 Cal.4th at p. 912; *People v. Jackson, supra*, 13 Cal.4th at p. 1232.) California's reasonable possibility standard for assessing penalty phase error is the same in substance and effect as the beyond a reasonable doubt standard of *Chapman v. California, supra*, 386 U.S. 18. (*People v. Ochoa, supra*, 19 Cal.4th at p. 479.)

As shown above, there were no errors to accumulate at the penalty phase, with the exception of the improperly admitted evidence of four instances of noncriminal conduct by appellant, which the court instructed the jury to disregard. As shown above, the trial court reasonably determined that this sole evidentiary error was harmless. Moreover, if there were errors concerning the sign-related evidence, they too were plainly harmless under any standard, even if viewed cumulatively with the four noncriminal acts. Even if the alleged errors occurred as suggested, appellant was entitled to a fair penalty phase trial, not a perfect one. (*People v. Mincey* (1992) 2 Cal.4th 408, 454.) Appellant received a fair penalty phase trial, and therefore this Court should reject the claim of cumulative error.

XIII. APPELLANT'S ROUTINE CHALLENGES TO CALIFORNIA'S DEATH PENALTY SCHEME HAVE BEEN REPEATEDLY REJECTED BY THIS COURT, AS APPELLANT CONCEDES, AND THUS THESE CLAIMS AFFORD NO BASIS FOR RELIEF

Appellant's opening brief includes the usual laundry list of sub-claims concerning the validity of California's death penalty scheme. (AOB 379-396.) Appellant admits that each sub-claim has previously been rejected by this Court, but raises them in a summary fashion, pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240, 303-305. (See AOB 379 [appellant "briefly presents" the challenges "[i]n light of this Court's directive in *Schmeck*".]) Because he offers no persuasive reasons for this Court to reconsider its prior rulings, these claims should be denied.

In recent cases, this Court has confirmed its rejection of all fourteen challenges raised by appellant: (a) section 190.3, factor (a), which permits the jury to consider the circumstances of the crime in deciding whether to impose the death penalty, does not license the arbitrary and capricious imposition of the death penalty (AOB 379-381; see *People v. Nelson* (2011) 51 Cal.4th 198, 225); (b) there is no error in failing to give proof-beyond-a-reasonable-doubt instructions regarding the existence of aggravating factors, aggravating factors outweighing mitigating ones, and the determination that death was the appropriate penalty (AOB 381-384; see *Nelson, supra*, at pp. 225-226); (c) the jury may properly consider unadjudicated criminal activity at the penalty phase and need not make a unanimous finding on each instance of such activity (AOB 385-387; see *Nelson, supra*, at pp. 225-226); (d) phrase "so substantial" in the final sentence of CALJIC No. 8.88 does not render the standard concluding instruction impermissibly vague and ambiguous (AOB 388; see *People v. Page, supra*, 44 Cal.4th at pp. 55-56); (e) CALJIC No. 8.88 properly describes the weighing process for determining whether death is an appropriate penalty (AOB 388-389; see *Page, supra*, at pp. 49-50);

(f) CALJIC No. 8.88 adequately conveys that life in prison without the possibility of parole is the appropriate punishment if the burden of proof for a verdict of death is not met (AOB 389-390; see *Page, supra*, at p. 57); (g) death penalty instructions do not violate the federal Constitution by failing to provide the jury with instructions on unanimity and the standard of proof for finding mitigating circumstances (AOB 390-391; see *People v. Stitely, supra*, 35 Cal.4th at p. 573; *People v. Welch* (1999) 20 Cal.4th 701, 767); (h) trial court is not required to instruct a penalty jury on a “presumption of life” (AOB 391-392; see *People v. Gamache* (2010) 48 Cal.4th 347, 407); (i) a jury is not required to make written findings at the penalty phase (AOB 392-393; see *Nelson, supra*, at pp. 225-226); (j) use in the sentencing factors of the words “extreme” (§ 190.3, factor (d)) and “substantial” (§ 190.3, factor (g)) does not act as a barrier to consider mitigating evidence in violation of the federal Constitution (AOB 393; see *People v. Avila, supra*, 38 Cal.4th at pp. 614-615; *Gamache, supra*, at p. 406); (k) trial court need not instruct which of the section 190.3 factors could be only aggravating, only mitigating, or either aggravating or mitigating circumstances (AOB 393-394; see *People v. Homick* (2012) 55 Cal.4th 816, 890); (l) intercase proportionality review is not constitutionally compelled (AOB 394-395; see *Nelson, supra*, at p. 227, citing *Pulley v. Harris* (1984) 465 U.S. 37, 42, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29]); (m) California’s death penalty law does not deny capital defendants equal protection by providing certain procedural protections to noncapital defendants but not to capital defendant (AOB 395-396; see *Nelson, supra*, at p. 227); and (n) California’s death penalty law does not violate the Eighth Amendment, international law or norms, or “evolving standards of decency” (AOB 395-396; see *People v. Howard* (2010) 51 Cal.4th 15, 39).

Appellant’s repeatedly rejected challenges provide no basis for reversal of his judgment.

XIV. THERE WAS NO CUMULATIVE ERROR

Appellant's final contention is that there was cumulative error. (AOB 397-399.) Respondent disagrees because there either was no error, and to the extent there was error, appellant failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 458; *People v. Catlin*, *supra*, 26 Cal.4th at p. 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box*, *supra*, 23 Cal.4th at p. 1214.) The record shows appellant received a fair trial, and his claim of cumulative error should be rejected.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence of death should be affirmed its entirety.

Dated: February 15, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 87,993 words.

Dated: February 15, 2013

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read 'SEM', with a large loop at the start and a long horizontal stroke extending to the right.

STEVEN E. MERCER
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: ***People v. Anthony Bankston (CAPITAL CASE)***
No.: **S044739 (Super. Ct. No. VA007955)**

I declare:

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

On February 19, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Michael J. Hersek, State Public Defender
State Public Defender's Office
1111 Broadway, 10th Floor
Oakland, CA 94607

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

The Honorable Jackie Lacey, District Attorney
Los Angeles County District Attorney's Office
210 West Temple Street
Los Angeles, CA 90012

Maria Arvizo-Knight
Death Penalty Appeals Clerk
Los Angeles County Superior Court
210 West Temple Street, Room M-3
Los Angeles, CA 90012

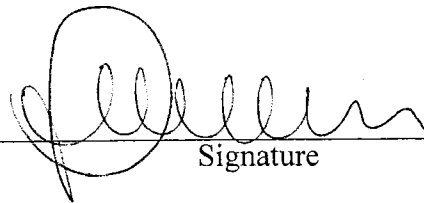
John A. Clarke, Clerk of the Court
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012

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

On February 19, 2013, I caused thirteen (13) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102 by OnTrac Messenger Service.

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 February 19, 2013, at Los Angeles, California.

Frances Conroy
Declarant


Signature

