In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DONTE LAMONT McDANIEL,

Defendant and Appellant.

CAPITAL CASE

Case No. S171393

Los Angeles County Superior Court Case No. TA074274
The Honorable Robert J. Perry, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On March 26, 2008, the Los Angeles County District Attorney filed a second amended five-count information charging appellant with possession of a firearm by a felon (Pen. Code,[1] § 12021, subd. (a)(1); count 1), murder of Annette Anderson (§ 187, subd. (a); count 2), murder of George Brooks (§ 187, subd. (a); count 3), attempted willful, deliberate, premeditated murder of Debra Johnson (§§ 664/187, subd. (a); count 4), and attempted willful, deliberate, premeditated murder of Janice Williams (§§ 664/187, subd. (a); count 5). As to counts 2 through 5, it was alleged that appellant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), personally and intentionally discharged a firearm, which proximately caused great bodily injury or death (§ 12022.53, subd. (d)), and personally used a firearm (§ 12022.53, subd. (b)), and that a principal personally and intentionally discharged a firearm (§ 12022.53, subds. (c) & (e)(1)), personally and intentionally discharged a firearm, which proximately caused great bodily injury or death (§ 12022.53, subds. (d) & (e)(1)), and personally used a firearm (§ 12022.53, subds. (b) & (e)). It was further alleged as to counts 2 through 5 that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)). A multiple-murder special circumstance was also alleged as to counts 2 and 3 (§ 190.2, subd. (a)(3)). (3CT 568-575.) Appellant pleaded not guilty to all counts (see 3RT 443) and denied the special allegations (3CT 664).

Trial was by jury. (3CT 713.) Following the presentation of evidence at the guilt phase, the jury found appellant guilty as to each of the charged offenses, and found the special circumstance allegations true. The jury

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

found Anderson's and Brooks's murders to be first degree, and that the attempted murders were willful, deliberate, and premeditated. As to counts 2 through 5, the jury found true all of the firearm use enhancement allegations and gang enhancement allegations. (9CT 2238-2243, 2249-2253.)

Appellant's first penalty phase trial ended in a mistrial because the jury was unable to reach a unanimous verdict. (9CT 2289, 2292.) The penalty phase was retried a second time, and the jury fixed the punishment as death. (9CT 2378, 2469-2470, 2474.)

On March 20, 2009, the trial court denied appellant's motions for a new guilt phase trial and to modify the death penalty verdict pursuant to section 190.4, subdivision (e). (10CT 2532-2534, 2576-2578.) As to counts 2 and 3, the trial court sentenced appellant to death and also imposed consecutive terms of 25 years to life for the firearm use enhancements under section 12022.53, subdivision (d). As to counts 4 and 5, the trial court imposed consecutive life terms, plus consecutive terms of 25 years to life for the firearm use enhancements under section 12022.53, subdivision (d). As to counts 2 through 5, appellant was deemed ineligible for parole for 15 years pursuant to the section 186.22 gang enhancement. Finally, as to count 1, the court imposed a consecutive term of two years (the middle term). The remaining enhancements were stayed. Appellant was ordered to pay a restitution fine of $200 pursuant to section 1202.4, subdivision (b), and restitution in the amount of $7,000 to the victim compensation board pursuant to section 1202.4, subdivision (f). (10CT 2549-2551, 2553-2555, 2576-2589.)

This appeal is automatic. (§ 1239, subd. (b).)[2]

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[2] Appellant filed a notice of appeal on March 20, 2009. (10CT 2575.)

STATEMENT OF FACTS

A. Guilt Phase Evidence

1. Prosecution evidence

The Nickerson Gardens shootings

a. Background

Kanisha Garner was George Brooks's sister.[3] (7RT 1488-1489.) In March or April 2006, about a week before Brooks was killed, Brooks told Kanisha that "Billy Pooh" (a.k.a. William Carey) might be looking for him because Brooks had taken some drugs that belonged to Carey. (7RT 1489-1490; 8RT 1627.) Brooks was at Carey's house. Carey was going to give drugs to Brooks. There was a shooting at the house, and Brooks left with the drugs but did not pay for them. Brooks took close to four ounces of drugs. He told Kanisha about the incident the morning after it happened. (7RT 1489-1493.) Kanisha told Brooks that the people he was dealing with were "bad" and that he needed to stay away from them. (7RT 1492.) Brooks told her that he was not going to deal with Carey anymore. (7RT 1495.)

b. Witnesses inside Annette Anderson's apartment

(1) Derrick Dillard and Elois Garner

Derrick Dillard (a.k.a. "Del-Winkie") had known Annette Anderson (a.k.a. "Nobe") his entire life. She was like an "auntie" to him. Anderson lived on 112th Street in the Nickerson Gardens. (5RT 1101-1102, 1134.) George Brooks (a.k.a. "G-Rail") was Dillard's cousin. (5RT 1102.)

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[3] Because Kanisha shares the same last name as Elois Garner, respondent will refer to Kanisha by her first name to avoid any confusion. Kanisha is not related to Elois Garner. (7RT 1489.)

Dillard and Brooks were "hanging out" at Anderson's house on April 5, 2006, the night before Anderson and Brooks were murdered. (5RT 1102-1103.) Dillard and Brooks left Anderson's house and went to "Kai's"[4] house, which was also on 112th Street, about half a block from Anderson's house. (5RT 1104.) Brooks had suggested they go to Harris's house. Brooks and Harris spoke, but Dillard could not hear their conversation. After about 15 minutes, Dillard and Brooks left Harris's house and headed back to Anderson's house. Dillard and Brooks ran into some women outside of Harris's house, including "Cat" (a.k.a. Kathryn Washington), "Angel," and "Dee-Dee." (5RT 1104-1105; 6RT 1270.)

As Dillard and Brooks walked down 112th Street, they ran into appellant. Dillard had known appellant for "a few years" from around the neighborhood. (5RT 1105-1106.) Appellant and Brooks spoke briefly. Appellant asked Brooks where he had been and told Brooks that Carey was looking for him. (5RT 1106-1107.)

Dillard and Brooks proceeded to Anderson's house and arrived there around 2:00 a.m. "Prentice" walked with Dillard and Brooks to the house. Anderson, "Debbie,"[5] and "Janice"[6] were there. Dillard, Brooks, and Prentice went into the bedroom and used cocaine. The bedroom door was closed. (5RT 1102-1103, 1108-1110, 1149.) Anderson called out to Brooks and told him that someone was at the door for him. Brooks left the bedroom and closed the door behind him. (5RT 1111.)

Elois Garner had known Anderson for about 20 years and Brooks for about five or six years. Garner had children with Janice Williams's brother.

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[4] Respondent assumes "Kai" is Kai Harris, appellant's codefendant.

[5] Respondent assumes "Debbie" is Debra Johnson.

[6] Respondent assumes "Janice" is Janice Williams.

(5RT 1153-1155.) On April 6, 2004, Garner was approached by appellant in a walkway near Anderson's apartment. Garner was holding a 16-ounce can of beer. Appellant put a gun to Garner's right temple and told her to knock on Anderson's back door and run. Garner knew appellant from seeing him around the neighborhood. She identified him in court. Appellant was with Harris (a.k.a. "Taco"), whom Garner also knew from seeing him in the neighborhood. (5RT 1154-1161; 6RT 1231.) Appellant and Harris were both wearing black hooded sweatshirts. (5RT 1163.)

Garner complied. She knocked on Anderson's back door and then ran away. Garner did not say anything when she knocked. She ran to a nearby parking lot. About five minutes later, Garner heard two gunshots and then heard two more. She then saw appellant and Harris run out of the back of Anderson's apartment toward the gym. Garner saw Harris's braids sticking out from under his sweatshirt. (5RT 1161-1164, 1183.)

In the meantime, Dillard heard the back door open, and then heard women screaming and multiple gunshots. After the gunshots stopped, Dillard did not hear anything. He hid under the bed. Prentice also hid somewhere. (5RT 1111-1113.)

Dillard left the room after about 10 minutes. Prentice left the house. (5RT 1113, 1115.) Dillard saw blood all over the kitchen. Half of Johnson's face was "opened up." She was holding her face and was in and out of consciousness. The kitchen table was on top of Anderson. Brooks had bullet holes in his back and face. (5RT 1114.) Dillard called 911. (5RT 1113.) Garner returned to Anderson's apartment. She looked inside and saw blood. Anderson was lying on the ground and appeared to have been hurt. (5RT 1166.)

Dillard did not speak to the police that night because the "code" of the street was that the shooting would be handled "on the street." (5RT 1117.) Carey was murdered in October 2004. (5RT 1132.)

Garner was scared and in fear for her life when she was first interviewed by the police on April 15, 2004. She did not tell the police that appellant had put a gun to her head and told her to knock on Anderson's door.[7] (5RT 1171-1172, 1190.) Detective Mark Hahn of the Los Angeles Police Department ("LAPD") showed Garner two photo six-packs on May 26, 2004. She circled appellant's picture in one of the six-packs and wrote, "Donte put the gun to my head and told me to knock on the door." (5RT 1167-1168; 8RT 1598.) Garner circled Harris's picture in the other six-pack. (5RT 1169.)

(2) Janice Williams

Williams had known Anderson for 15 to 20 years, and considered her a sister. Williams had known Brooks her entire life. (6RT 1196-1198.) Williams was at Anderson's apartment on April 6, 2004. Anderson and Brooks were also there.[8] Williams was sitting at the table in the dining room. (6RT 1198-1200.) She was about four feet away from the back door. (6RT 1207-1208.) Williams had not been using any drugs that night, but she had been drinking the previous day. (6RT 1201.)

Williams heard a "quiet" "little whistle," and then heard a knock on the back door. (6RT 1200, 1205). Anderson had gone to the bathroom. (6RT 1200, 1212.) Williams told Anderson that "Lois" was at the door. Anderson asked Williams to let Garner in, but Williams refused because Garner had been in and out of the apartment all night.[9] (6RT 1200, 1206.)

Anderson opened the door, and Williams saw appellant enter the apartment, shooting. Williams knew appellant as "D" and had known him

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[7] Garner did not recall having testified at the preliminary hearing that the police told her she could be charged with murder. (5RT 1174.)

[8] Williams did not think Debra Johnson was there because she thought Johnson was in jail at the time. (6RT 1199.)

[9] Garner had gone out to get more beer. (6RT 1206.)

for about 10 years from the neighborhood. (6RT 1200-1202, 1206-1207.) Williams was shot in the mouth and was "pushed back." She ended up under the table. (6RT 1202.) Williams was "out" after that. The next thing she remembered was seeing firemen and an ambulance. (6RT 1203.)

Dillard was not at the apartment. Williams did not see Dillard enter the apartment with another person that night. (6RT 1218-1219.)

Williams was in the hospital for three to four months. The bullet that wounded her mouth exited through her neck. Her mouth was paralyzed, and she only had half of her tongue. Williams was also shot in her arms and legs. She had a "pipe" put in her leg to enable her to walk. The bone in her arm was in "100 pieces." (6RT 1204-1205.)

(3) Debra Johnson[10]

Around 3:00 a.m. on April 6, 2004, Johnson was at Anderson's house with Anderson, Brooks, and Williams. Johnson was asleep on the living room floor when she awoke to the sound of multiple gunshots coming from the kitchen. Anderson, Brooks, and Williams were in the kitchen. (8RT 1684-1685, 1691, 1718-1719.) Johnson heard at least 20 gunshots. There were so many shots that they "lit up" the kitchen. (8RT 1690, 1692.) Johnson saw appellant enter the apartment through the back door. (8RT 1690, 1693.) She heard the sound of two male voices during the shooting in the kitchen. When the shooting stopped, she did not hear any voices. Neither of the voices were Brooks's. (8RT 1702-1705, 1707.)

Johnson saw appellant exit the kitchen and head toward the hallway where the bedroom and bathroom were located. (8RT 1690, 1692-1693.)

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[10] Because Johnson passed away prior to the instant trial, her testimony from another court proceeding was read to the jury. Appellant and Harris were present at the proceeding. (8RT 1677, 1681.) Johnson was convicted of petty theft with a prior in 2003 and prostitution in 2001. (8RT 1808.)

She looked up and saw appellant standing over her. He was wearing dark clothes and was holding a black handgun. Appellant was less than three feet away from Johnson when he shot her twice. Then he squatted down on his hands and knees and moved toward the front door. Appellant was the only person Johnson saw in the living room. She knew him from the neighborhood and knew his name. (8RT 1685, 1688-1690, 1693-1696, 1705, 1735.) When appellant heard the ambulance and paramedics, he opened the front door and exited the house. (8RT 1690-1691.)

One bullet went through Johnson's right arm, entered the right side of her face, went through her mouth, and exited on the left side of her face. Johnson was also shot in the right side of her chest. She was taken to the hospital. Johnson had already undergone five surgeries and was scheduled to have another one. (8RT 1685-1687, 1695.)

Detectives Hahn and Allen interviewed Johnson in the hospital. At first she did not want to cooperate because she was afraid of what might happen to her. Eventually, she cooperated. She was given written questions and wrote down the answers. Johnson indicated that the "shorter black boy" had shot her and Williams. (8RT 1697-1699, 1713, 1722; Peo. Exh. 60 [written questions and answers].)[11] Johnson testified that appellant was shorter and had darker skin than Harris. (See 8RT 1724-1734.) On April 12, 2004, Johnson identified appellant in a photo six-pack as the person who had shot her. (8RT 1705-1707, 1714; Peo. Exh. 61 [photo six-pack].)

[11] The gang expert, Kenneth Schmidt, testified that appellant was around six feet one inch, or six feet two inches tall. (8RT 1778.)

c. Other witnesses to the shootings

(1) Angel Hill

Hill was involved in a romantic relationship with Harris (a.k.a. "Taco") for a "couple of months," possibly in 2003. She was staying with Dollie Sims from January to April in either 2003 or 2004 and was dating Harris at that time. (6RT 1229-1231.) Sims lived in a house on 112th Street near Compton Avenue. Harris had "Bounty Hunters" tattooed on his back in "very large letters." (6RT 1232.) Harris had a .357 magnum Desert Eagle semiautomatic handgun. (6RT 1273.) Hill knew appellant (a.k.a. "R. Kelly") from the neighborhood and had seen him once before at Sims's house. (6RT 1238, 1246.)

On April 6, 2004, Hill saw appellant and Harris on Sims's porch as appellant entered Sims's house. (6RT 1239.) Appellant was wearing all black that night and had on a long, black leather trench coat. (6RT 1239, 1279-1280.) Brooks and Dillard had come over earlier that night. (6RT 1272.) Hill left Sims's house and went to a nearby parking lot. "Some seconds" later, she heard shots being fired. Hill was in a car with Cat and Dee-Dee. They were going to pick up Dillard. (6RT 1232, 1234-1235.) Hill heard "a lot" of shots, which sounded like they came from more than one kind of gun. (6RT 1235.) Hill drove over to Anderson's house, where she was supposed to pick up Dillard. No one came to the back door when Hill knocked. The door was cracked open. (6RT 1235-1237.)

After that, Hill returned to Sims's house. Appellant and Harris were smoking on the porch. (6RT 1240.) A woman picked up appellant, Harris,

and Hill, and drove them to someone's house (Hill did not know whose house it was).[12] (6RT 1240-1241.)

Hill was interviewed by Detective Hahn on December 16, 2004. She tried to tell him the truth. Hill was aware that the interview was recorded. (6RT 1242-1243.) At trial, Hill initially testified that she did not hear anyone admit to anything on the night of the shooting. (6RT 1242.) She did not recall telling the police that appellant had admitted to the shooting, but testified she could have told that to the police. (6RT 1244.) Hill recalled telling Detective Allen that appellant told Harris that he had disappointed appellant. (6RT 1245.)

Eventually, however, Hill testified that she and the others were at "Tiffany's house"[13] on the night of the shooting and that appellant was bragging about what had happened at Anderson's house. Appellant acted like the shooting was a big joke and did not appear to feel bad about what had happened. (6RT 1248-1253.) Hill did not recall telling the police that appellant talked about how the gun made Brooks's face explode. (6RT 1250.) While watching a news report about the shooting, appellant explained what had happened inside the house. At some point, appellant said to Harris, "You disappointed me, man." (6RT 1251-1253.)

Carey, an "O.G." from the neighborhood, arrived at Hawes's house. (6RT 1254.) Appellant talked to Carey about what was being shown on television. (6RT 1255.) Appellant asked Carey, "Did you see that?" while the story was being reported on the news. Appellant bragged about the shooting. He said "that was your boy," as though appellant had "saved the projects or something." (6RT 1256.)

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[12] Hill could not recall having told the police that they were picked up in a white car. (6RT 1240-1241.)

[13] Respondent assumes "Tiffany" is Tiffany Hawes.

At some point after that, Hill went to the bathroom, where she remained for two or three hours. (6RT 1241, 1256.) Hill eventually left with Harris, and they returned to Sims's house. (6RT 1256.)

Hill and Harris corresponded while he was in jail. He asked her to provide a false alibi for him. Hill told Harris in one of her letters that she would do anything for him. (6RT 1257, 1264-1265.) Hill recalled that Harris told her to say that he never left the house that night. (6RT 1258.) At her first interview with the police on April 13, 2004, Hill told them that Harris never left the house on the night of the shooting. She testified that she was lying when she told the police that. (6RT 1260-1261.) Hill had used several drugs—including PCP, crystal meth, cocaine, marijuana, and liquor—on the night before the shooting. (6RT 1267-1270.)

(2) Myesha Hall

Myesha Hall lived in a second-story apartment in Nickerson Gardens, three doors down from Anderson. Around 3:00 a.m. on April 6, 2004, Hall was standing at her window, talking on the phone and smoking a cigarette when she heard four single gunshots coming from the area of Anderson's apartment. (3RT 632-633, 638-639.) Hall saw a short African-American man wearing a white t-shirt run out of the back door of Anderson's apartment. He ran toward 112th Street, into the projects. (6RT 1337-1339, 1345.) Then Hall heard "a lot" of gunshots that were "like automatic" and "didn't stop." (6RT 1337.) They were louder and lasted longer than the first gunshots. Hall heard more than 10 gunshots. (6RT 1336.) Hall described all of the gunshots as being "automatic" or "semi-automatic." (6RT 1336.) Hall went to the shooting range "every now and then" with her brother and was "sure" that one of the guns firing the shots was an automatic. (6RT 1346.)

Hall saw two tall African-American men wearing dark-colored clothes run out of Anderson's back door. The men were both wearing dark

sweaters and jackets. After the two men ran out of the apartment, Hall did not hear anymore gunshots. (6RT 1338-1339, 1345.) The two men ran through the parking lot, in the direction of the gym. (6RT 1339-1340.)

(3) Dollie Sims

In April 2004, Sims was living near the intersection of 112th Street and Compton Avenue. She used her home as a boarding house. Harris and his girlfriend Angel Hill, Shirley Richardson and her young son, "Larry," and "Arthur" lived in the house. (7RT 1413-1414.) Harris was Sims's cousin. (7RT 1419.)

Sims worked as a nurse at a rehabilitation center. (7RT 1415.) On April 6, 2004, she returned home from work at around 12:30 a.m. Harris, Hill, Richardson, and Richardson's son were home. There were also other people who were "coming by," including Cat. (7RT 1416.) Harris and the others were "in the room closed up, smoking weed, drinking, like they routinely do." (7RT 1416.) Sims prepared something to eat and went to sleep around 1:00 a.m. (7RT 1417-1418.)

Sims woke up when she heard someone banging on the back door, calling out for Harris to open the door. (7RT 1418.) Sims was going to open the door when she saw Harris, who told her not to open the door and to go back to her room. Harris had never talked to Sims like that. She got the feeling that something was wrong based on how Harris had spoken to her. (7RT 1418-1419.)

Sims returned to her room but kept the door ajar. She identified appellant in court as the person who had been banging on the door. (7RT 1420.) Appellant was upset, telling Harris, "Ah, man, we got to go handle this, man," and "This nigga just, you know, messed me over. And he got me twisted." (7RT 1420.)

Appellant said that someone in the projects had been robbing the places where he "hustled," and appellant wanted Harris to go with him to deal with the problem. (7RT 1421.)

Appellant and Harris eventually left the house through the back door. (7RT 1421.) Sims walked to the front of the house and saw that "all the girls who's up there" had also left. Only Richardson's baby remained at the house. (7RT 1422.)

Approximately 15 minutes after everyone had left the house, Sims heard gunshots. Hill, Richardson, and Cat returned to the house. Sims hid in her bedroom so she could eavesdrop. (7RT 1423-1424.) Five minutes later, Harris returned to the house. (7RT 1424-1425.) Appellant came back to the house and talked about buying tickets and all of them leaving the state and going to Atlanta. He said, "I can pay for—get some tickets. We can leave this state. I mean, yeah, who goin' go?" (7RT 1426.)

Sims heard Richardson say, "Oh, my God." Appellant asked whether Richardson was "cool," and Harris responded that she was and that appellant did not have anything to worry about. (7RT 1425-1426, 1429.) Appellant stated, "All right, so we all can go. We can all take this trip and stuff and everything be cool. Just everything, just keep it under the rock, and we keep pushing." Eventually, appellant left the house. (7RT 1429.) Harris told Richardson, Hill, and Cat that when he was running through the alley, he dropped his gun because he was scared, but that he picked it up. (7RT 1429-1430.)

After that, Harris and the others went to his room and closed the door. Sims could not hear anything. (7RT 1430.) She waited for Harris to come out and eventually fell asleep. Sims woke up around 7:30 a.m. Harris was in the house. (7RT 1431-1432.)

Sims identified appellant in a photo six-pack and wrote that she saw him in her house in April "in the late hours." (7RT 1432-1434; Peo. Exhs. 37 [photos], 38 [photo statement forms].)

(4) Shirley Richardson

In 2004, Shirley Richardson lived in Sims's house with her son, Harris, and Harris's girlfriend Angel Hill. The house was near the intersection of 112th Street and Compton Avenue. On the night of the shooting, Richardson was at home with Harris and Hill. All three were getting high off PCP, crystal meth, and cocaine. (6RT 1353-1358.)

At some point, appellant came over.[14] (6RT 1358.) He was wearing "all black," including a black leather jacket. (6RT 1359.) Appellant was carrying a "big" gun that was approximately three feet long and appeared to be a rifle. (6RT 1359-1360.) Appellant wanted Harris to leave with him. He said to Harris "hurry up," and "come on, let's go." (6RT 1359.) Harris had a Desert Eagle handgun on him that night. Richardson had previously seen Harris with the gun. (6RT 1360-1361.)

Harris did not want to leave the house. He eventually left about 20 to 25 minutes after appellant had left. A few minutes after Harris had left the house, Richardson heard "a lot" of gunshots. (6RT 1356, 1362.) It was in the early morning of April 6 when Richardson heard the gunshots. (6RT 1356.)

Appellant and Harris returned to Sims's house. (6RT 1362-1363.) Harris appeared "upset," "like he was scared." (6RT 1363.) On October 6, 2004, Richardson identified appellant and Harris in photo six-packs. (6RT 1364-1367; Peo. Exhs. 25, 27 [photos], 26, 28 [photo statement forms].) With respect to appellant's picture, Richardson wrote, "I know him as R.

[14] Richardson knew appellant as "R. Kelly." She identified him at trial. (6RT 1357.)

Kelly." (6RT 1366-1367; Peo. Exh. 26.) With respect to Harris's picture, Richardson wrote, "I know him as Kai Harris, Taco." (6RT 1367; Peo. Exh. 28.)

(5) Tiffany Hawes

Tiffany Hawes had been appellant's girlfriend since 2004. Although Hawes was not married to appellant, she referred to him as her husband. She had appellant's name tattooed on her back. (7RT 1455-1457.) Appellant was known as "D," and Hawes had also known him to use the name Mitchell Reed. (7RT 1462, 1465.)

Appellant called Hawes the morning of April 6, 2004, and asked her to pick him up in the area of 112th Street and Compton Avenue. She picked him up in a white station wagon, and then picked up Harris and Hill at Harris's house. Hawes drove everyone to her house. (7RT 1457-1460.)

News coverage of a shooting was on the television at Hawes's house. Appellant did not say anything about the news coverage. (7RT 1460-1461.) Hawes knew Carey, but testified he was not her friend. Carey once gave Hawes money to pay her electric bill. She attended his funeral in October or November 2004 to pay her respects. (7RT 1462, 1466.)

When the police searched Hawes's house in December 2004, they found a newspaper article about the Nickerson Gardens murders and an obituary for Carey. Hawes also had transcripts and reports associated with the instant proceedings that appellant had sent her. (7RT 1465-1467.) The police found bus tickets to Atlanta in Mitchell Reed's name in the house.[15] (7RT 1467.)

[15] Hawes "believed" the tickets were "from around Thanksgiving of 2003." (7RT 1469.)

d. The police investigation

(1) First responders at the crime scene

At 3:30 a.m. on April 6, 2004, LAPD Officer Adrian Chin and his partner, Officer Robert Martinez, responded to Anderson's apartment in Nickerson Gardens. Officers Chin and Martinez were the first officers to arrive at the crime scene. (7RT 1470-1471.) Officer Chin observed several African-American females standing in a parking lot that was next to Anderson's unit. (7RT 1471-1472.)

Officers Chin and Martinez entered the apartment through the back door. Officer Chin observed an African-American woman on the floor with gunshot wounds. She did not appear to be conscious or breathing. Officer Chin observed another African-American woman, who was lying on the floor in a pool of blood. Her body was rolling around, and she appeared to be alive. (7RT 1472-1473.) There was furniture (table, chairs) on top of the two women, which the officers had to move in order to enter the apartment. (7RT 1472-1473.) Officer Chin saw an African-American man with numerous gunshot wounds to his upper torso slumped against the refrigerator in the kitchen. He did not appear to be conscious or breathing. Officer Chin observed a third African-American woman, who was in the living room She had a gunshot wound to her mouth, and was moaning and trying to stand up. (7RT 1474.) Officer Chin saw shell casings on the floor of the apartment. (7RT 1475.)

Denise Bertone, an investigator with the coroner's office, arrived at the crime scene around 10:50 a.m. Police officers were there when she arrived. (7RT 1537-1539.) Bertone performed an exam of Brooks's and Anderson's bodies. (7RT 1539.) She found a shell casing inside Anderson's shirt, and a metal wire commonly used with a "crack pipe" on the floor near Anderson's hand. A razor blade was on the kitchen counter.

(7RT 1545, 1547.) Bertone found a glass vile containing a crystal-like substance and a plastic bag containing a tan, rock-like substance in Brooks's right front pants pocket. (7RT 1547-1548.)

(2) Physical evidence

Annie Eyvazoffouzounian, a criminalist with the LAPD, arrived at the crime scene at Anderson's apartment on April 6, 2004 at 7:40 a.m. (6RT 1293-1295.) A photographer and a number of law enforcement personnel were present when Eyvazoffouzounian arrived. (6RT 1295.)

Eyvazoffouzounian's job was to locate, collect, and preserve evidence and transport it back to the laboratory. (6RT 1296.) She noticed blood in several areas of the apartment. Anderson's and Brooks's bodies were still in the apartment. Anderson's body was lying on its back and Anderson's clothing was partially removed in the chest area. A table that was on its side was near the body. Brooks's body was slouched over in a seated position, leaning up against the washing machine. (6RT 1297-1298, 1308-1309, 1311, 13136; Peo. Exhs. 15, 17, 18, 19 [photos].)

Eyvazoffouzounian observed a number of cartridge cases in the apartment. (6RT 1299.) She found two different types of casings: 10 nine-millimeter cartridge cases, and six Winchester .357 magnum cartridge cases. (6RT 1299-1300.) The .357 magnum cartridge cases were longer than the nine-millimeter cases. (6RT 1319.) Eyvazoffouzounian discovered some of the cartridge cases during her initial walk-through. At least two more cases were discovered after the coroner's investigator moved Anderson's body. (6RT 1302.)

Eyvazoffouzounian observed one nine-millimeter cartridge case on the stomach area of Brooks's body, and two .357 magnum cartridge cases on the neck. (6RT 1309-1310, 1319-1320; Peo. Exh. 16 [photo].) Two nine-millimeter cartridge cases were near one of the hands of Anderson's body. (6RT 1119-1120; Peo. Exh. 16 [photo].) There was a wound in the

middle of the chest of Anderson's body. (6RT 1321-1322; Peo. Exhs. 20, 21 [photos].)

LAPD Officer Freddie Piro was assigned to the gang enforcement detail in 2004. On May 7, 2004, Officer Piro arrested 17-year-old Leon Washington on August Street in Baldwin Hills. Washington was a member of the Black P-Stone gang, and his moniker was "Baby Whack." (6RT 1346-1349-1350, 1352; Peo. Exh. 24 [photo].) The Black P-Stones frequented the Baldwin Hills area, which was about 13 miles from Nickerson Gardens. (6RT 1350.)

Officer Piro recovered a .357 Desert Eagle handgun, serial number 16703, from Washington, along with a magazine. The gun and magazine were booked into evidence. (6RT 1348.) When asked whether the Black P-Stones were related to the Nickerson Gardens Bounty Hunters, Officer Piro opined that Blood gang members "commonly intermingle[d]" with each other, that the Bounty Hunters "closely associate[d]," and that if there was a party, four or five different Blood gang members could be present. Officer Piro reiterated that the Blood gangs were "very close and mingled and [got] along with each other." (6RT 1352.)

At 10:00 p.m. on April 11, 2004, Los Angeles County Deputy Sheriff Marcus Turner and his partner conducted a traffic stop on a blue Toyota near the intersection of 120th Street and Central because the car did not have any license plates. There were two people in the car; appellant was in the front passenger seat. (7RT 1502-1503.)

Deputy Turner engaged the lights on his patrol car, but the blue Toyota did not yield, so he turned on the siren. The car pulled over 30 seconds after that. (7RT 1504-1505.) Appellant opened the passenger side door as soon as the car stopped, and he began to exit. Deputy Turner's partner ordered appellant not to move. Appellant sat back down in the car. (7RT 1505.) The driver of the car was removed. He did not have a driver's

license or identification, so Deputy Turner detained him in the back of the patrol car. (7RT 1506.)

Deputy Turner was removing appellant from the car when he saw a bulge in appellant's front right pants pocket. Deputy Turner recovered a black Ruger nine-millimeter semiautomatic handgun and its magazine, and an additional magazine from appellant's pocket. (7RT 1506-1509; Peo. Exhs. 39A [gun], 39B, 39C [magazines].) There were 20 total rounds of ammunition. The serial number on the gun was 309-87059. (7RT 1507-1508.) Appellant said his name was Mitchell Reed. (7RT 1508.) Deputy Turner booked the gun and magazines into evidence. (7RT 1510.)

Rafael Garcia worked as an examiner in the Firearms Analysis Unit of the LAPD crime lab. (7RT 1550-1551.) He performed an analysis on the casings and bullets in this case, as well as two handguns.[16] One gun was a nine-millimeter Strum Ruger semiautomatic handgun, serial number 909-87059.[17] (7RT 1560-1563; Peo. Exh. 36 [handgun].) The other gun was a .357 magnum semiautomatic Desert Eagle, serial number 16703. (7RT 1565-1567; Peo. Exh. 49 [handgun].) The .357 caliber gun was larger than the nine-millimeter gun, and used a larger round. The .357 ammunition held more gunpowder, so the bullets traveled faster. Garcia opined that the .357 caliber gun was more powerful than the nine-millimeter. (7RT 1567-1568.)

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[16] Another criminalist in the lab, Starr Sachs, was the first person who examined the evidence. Pursuant to lab protocol and to ensure quality assurance, a second criminalist, who worked independently from the first criminalist, was required to examine the evidence. Garcia was the second criminalist to examine and analyze the evidence in this case. (7RT 1553-1553, 1559-1560.) He reached the same conclusions about the evidence as Sachs did. (8RT 1597.)

[17] Garcia was uncertain about the first number. (7RT 1561.)

Garcia determined that 10 cartridge casings recovered from the crime scene had been fired from the nine-millimeter handgun. (7RT 1563.) Garcia also examined projectile evidence recovered from the scene (Peo. Exhs. 42, 43, 33) and concluded that none of them were fired from that gun. (7RT 1564-1565.) The evidence was inconclusive as to whether the bullet fragments recovered by the coroner from Brooks's upper spine (Peo. Exh. 44) were fired from the nine-millimeter gun. (7RT 1569, 1573-1574.) Garcia determined that six cartridge casings recovered from the scene were fired from the Desert Eagle. (7RT 1568.)

(3) The autopsies

Jeffrey Gudstadt, a Deputy Medical Examiner at the Los Angeles County Department of Coroner, performed the autopsy of Anderson. The cause of her death was multiple gunshot wounds. (7RT 1385-1387, 1412.)

Anderson suffered three gunshot wounds. (7RT 1388.) One was an entry wound on the left side of her face, just below her eye. (7RT 1389-1390; Peo. Exh. 30 [photo].) The gunshot wound had small red dots representing powder burns or "stippling" which were the result of firing a gun at intermediate range, anywhere from one-half of an inch to two feet. (7RT 1390-1393.) The bullet passed through the tissue surrounding the left eye, went through the cheek bone, passed through the bone of the base of the skull, and entered the brain. (7RT 1393.) Dr. Gudstadt recovered a medium caliber jacketed bullet from the right occipital scalp. (7RT 1393-1394; Peo. Exh. 31 [bullet fragments].) This gunshot wound by itself was fatal, and was inflicted while Anderson was alive. (7RT 1397, 1403.)

Anderson also suffered a gunshot wound to the middle of her chest. (7RT 1395; Peo. Exh. 32 [photo].) The bullet passed through the skin of the chest, went through the pericardium surrounding the heart, and passed through the heart. The bullet then passed through the diaphragm, the liver, and then out to the right side of Anderson's back. (7RT 1396, 1400; Peo.

Exh. 34 [photo].) Dr. Gudstadt recovered a medium caliber jacketed bullet from the right back. (7RT 1399; Peo. Exh. 33 [bullet fragments].) This gunshot wound by itself was fatal, and was inflicted while Anderson was alive. (7RT 1397-1398, 1403.)

Anderson suffered a third gunshot wound to the back of her left forearm. (7RT 1400-1401; Peo. Exh. 35 [photo].) Dr. Gudstadt recovered a fragment of a jacketed bullet from the forearm (7RT 1403; Peo. Exh. 36 [bullet fragments].) This gunshot wound was not fatal, and was inflicted while Anderson was alive. (7RT 1401, 1403.)

Deputy Medical Examiner Irwin Golden performed the autopsy of Brooks on April 9, 2004. (7RT 1514-1515.) Brooks sustained seven gunshot wounds, all of which were inflicted while he was alive. (7RT 1515-1517, 1519.) The cause of death was multiple gunshot wounds. (7RT 1515.)

One gunshot wound, which was not fatal, was on the left side of Brooks's scalp. The bullet passed beneath the scalp, and exited to the right. (7RT 1516, 1518-1519; Peo. Exh. 41 [photo].) The second gunshot wound, which was fatal, went through Brooks's left forehead, penetrated the skull, and traveled downward into the brain. Dr. Golden recovered the main part of a bullet from Brooks's skull. (7RT 1520-1521, 1526; Peo. Exh. 42 [bullet fragment].) The third gunshot wound went through the bone outside the left eye, passed through the eye and the middle midline, and through the right eyelid. There was stippling in the area between the eyes. (7RT 1522, 1526-1527.)

The fourth gunshot wound, which was also fatal, entered through Brooks's upper left lip, passed through his jaw and skull, and then went through his brain. (7RT 1523-1524, 1527.) Dr. Golden recovered a medium caliber bullet from this wound. (7RT 1523; Peo. Exh. 43 [bullet fragment].) The fifth gunshot wound went through the left side of Brooks's

jaw and lodged in his upper spine. (7RT 1525, 1527; Peo. Exh. 46 [photo].) Dr. Golden recovered bullet fragments from this wound, which was fatal. (7RT 1525-1526; Peo. Exh. 44 [bullet fragments].) The sixth gunshot wound, which was not fatal, went completely through Brooks's right shoulder. (7RT 1528-1530; Peo. Exh. 47 [photo].) The seventh gunshot wound was not fatal. It went through the knuckle of Brooks's left forefinger and passed through the front of his left palm. (7RT 1530-1531; Peo. Exh. 48 [photo].)

e. Further investigation

Detective Hahn was assigned to investigate the murders of Anderson and Brooks. (8RT 1598-1599.) He arrived at the crime scene around 5:15 a.m. Officer Chin was already there, but no investigators from the crime lab had arrived yet. (8RT 1600-1601.) Detective Hahn did not find any guns inside the apartment. He saw remnants of marijuana and a crack pipe, but did not see any "large amounts" of drugs. (8RT 1603-1604.)

Detective Hahn interviewed Williams in the hospital on April 12. He showed her pictures that had been taken from Anderson's apartment. Williams identified Harris in a picture that was found in Anderson's kitchen. (8RT 1610, 1615-1617, 1618; Peo. Exh. 54 [photo].) Williams also identified Harris in a picture depicting Harris kissing Anderson, with his arm around Anderson. (8RT 1617-1618; Peo. Exh. 55 [photo].) Williams identified appellant as the person who had shot her, as did Johnson. (8RT 1618-1619.)

Detective Hahn interviewed Hill four times. On December 21, 2004, he met with her at her attorney's office. She told Detective Hahn that appellant had admitted he was responsible for the shooting. Hill also said that the first thing appellant said to Harris was that Harris had disappointed

him.[18] (8RT 1623-1624.) Hill further stated that appellant was describing what had happened in the house. She felt appellant made it seem like what he had done was a "big joke." (8RT 1624.) Hill told Detective Hahn that appellant was "praising" how his gun worked and what it had done to the victims in the house, and that appellant specifically talked about how the gun made Brooks's face "explode." (8RT 1624-1625.) Appellant also explained where the victims were, and whom he had shot. Appellant was watching a news story about the shooting as he was talking about it. (8RT 1625.)

Hill told Detective Hahn that appellant called one of the "older cats" from the neighborhood. The man came over, and appellant was "praising himself for what happened." While the television was on, appellant asked the man, "Did you see that?" According to Hill, appellant said to the man, "that was your boy," as though appellant had "saved the projects or something." (8RT 1626.)

On April 21, 2004, Dillard met with Detective Hahn . Dillard was shown a photo six-pack. He circled appellant's picture and wrote, "I remember seeing D that night before the shooting." (5RT 1117-1120.)

Detective Hahn served a search warrant on Hawes on December 30, 2004, and interviewed her after the warrant was served. The police found a bus ticket from Atlanta to Los Angeles in the name of Mitchell Reed, as well as a funeral program for Carey, in Hawes's house. (8RT 1626-1628; Peo. Exh. 59A [funeral program].) The police also recovered a portion of a newspaper from April 7, 2004, from on top of the washer/dryer in the kitchen. The paper was folded in half. No other newspapers were found in the house. (8RT 1628-1629, 1634-1635; Peo. Exh. 57 [newspaper article].)

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[18] Appellant said this to Harris while appellant was telling his story about the shooting. (8RT 1625.)

No witnesses were offered leniency or money in exchange for their statements. Johnson was given $3,219 by the district attorney's office to pay for her relocation costs in connection with her participation in the witness protection program. (8RT 1619-1620, 1670.)

f. Gang expert testimony

Detective Kenneth Schmidt testified as a gang expert. He had been a gang detective for approximately six years and with the LAPD for 13 years. (8RT 1740-1741.) Detective Schmidt worked in the Southeast Division from 1998 to 2006. His focus at that time was the Bounty Hunter Bloods. (8RT 1741.) In 2004, the Bounty Hunter Bloods had 550 to 600 members. The gang's primary activities were selling narcotics, street robberies, shootings, and murder. Members of the Bounty Hunter Bloods wore hats with a "B" on them, and the color red because it was a Blood gang. Members also made hand signals forming a "B." (8RT 1744.) The gang's territory was "predominantly in and around the area of Nickerson Gardens." (8RT 1744.)

Ravon Baylor and Cedric Lamont Sanchez were admitted Bounty Hunter gang members. Detective Schmidt investigated a murder and attempted murder committed by Baylor and Lamont on October 17, 2002. (8RT 1744-1745.) Baylor and Lamont were both convicted of these crimes. (8RT 1745, 1747; Peo. Exhs. 62 and 63 [certified minute orders].)

Detective Schmidt had had numerous contacts with appellant. He identified appellant in a picture and at trial. (8RT 1747-1748; Peo. Exh. 64 [photo].) Appellant had "Nickerson" tattooed across his back. Detective Schmidt opined that the tattoo showed appellant's allegiance to the Bounty Hunter Bloods. (8RT 1748-1749; Peo. Exh. 65 [photo].) Appellant had a "B" tattooed on the back of one arm, and an "H" on the back of the other arm, signifying "Bounty Hunter." Above the "B" was "111," which stood for 111th Street. (8RT 1749-1750, 1752; Peo. Exhs. 66 and 67 [photos].)

According to Detective Schmidt, 111th Street was at the north end of Nickerson Gardens. The clique from that area was known as the "Ace Line." (8RT 1749-1750.)

Appellant's moniker, "D-Dogg," was tattooed on his body. The "gg" was crossed out to identify Grape Street, a rival Crip gang. (8RT 1752-1754, 1778; Peo. Exh. 68 [photo].) Appellant had "AL" and "CK" tattoos, which signified "Ace Line" and "Crip Killer," respectively. (8RT 1753; Peo. Exh. 69 [photo].) Appellant also had a "Nake Dog BHIP" tattoo. According to Detective Schmidt, "BHIP" stood for "Bounty Hunter In Peace," and signified that a person had died. (8RT 1754-1755; Peo. Exhs. 70 and 71 [photos].)

Detective Schmidt opined that the Bounty Hunter Bloods were "all within the area in and around Nickerson [Gardens]." The gang had several different cliques. (8RT 1750.) Detective Schmidt named some of the cliques in the Bounty Hunters, including 112th Street ("Deuce Line"), 114th Street ("Four Line"), and 115th Street ("Five Line"). Different parking lots were named for different areas including "Shad Lot," "Folsom Lot," "Nelson Lot," and "Hunter Lot." (8RT 1751.) Detective Schmidt described the relationship between the different cliques, stating, "Other than they are all Bounty Hunters. They all grow up together. They all live together." He opined that not all of the cliques got along at all times. Often times, one clique would make a lot of money selling drugs in a parking lot, and other cliques would want to take over the area, regardless of whether they were a part of the same gang. According to Detective Schmidt, the cliques wanted "the stature of having that lot where they [could] make lots of money." (8RT 1751.)[19]

[19] Detective Schmidt testified on cross-examination that the cliques feuded with each other over "narcotics, robberies, [and] women." (8RT (continued…)

Although the Bloods and Crips were adversarial, Detective Schmidt opined that Blood gangs "generally try to get along." He testified that the Bounty Hunter Bloods and the Black P-Stone Bloods had "a very good rapport" in 2004. (8RT 1755.)

Based on his investigations, Detective Schmidt opined that the Bounty Hunters had no structured hierarchy "other than O.G., old gangsters that have been around longer." Members with more money or who were dealing more narcotics had a higher stature within the gang. (8RT 1750.) Members also elevated their status by "putting in work," i.e., committing robberies or shootings, or moving narcotics or money. (8RT 1756.) Gang members who were weak would be taken advantage of. Members had to be strong because they wanted respect and wanted people to know that they were not afraid. (8RT 1756.)

Detective Schmidt was familiar with Carey (a.k.a. "Billy Pooh"), who was one of the lead narcotic sellers in Nickerson Gardens at the time he was killed. Detective Schmidt had seen appellant and Carey together almost 10 times. (8RT 1756-1758.) Detective Schmidt knew Brooks, Harris, Dillard, and Prentice Mills, and opined that they were all members of the Bounty Hunter Bloods. (8RT 1758-1759.) Detective Schmidt had talked with Anderson "hundreds" of times and opined that she was not involved in any gang activity. (8RT 1760.) Detective Schmidt had no information that Williams or Johnson were members of the Bounty Hunters. (8RT 1760.)

It was common for a Bounty Hunter Blood member to pass off a gun to another gang member whom the Bounty Hunter member could trust after the gun was used in the commission of a crime. When guns were

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(…continued)
1775.) He agreed that Nickerson Gardens was like a "medium size town" where all the cliques lived, and that they were like the "Hatfields" and "McCoys." (8RT 1777.)

recovered, it was sometimes discovered that they had been used in multiple shootings all over the city involving different gangs. A gang member might hold on to a gun if he planned to use it again or if he did not have someone he trusted to whom he could pass it. (8RT 1760-1761.)

Gang members intimidated the witnesses to their crimes. They also used fear to continue their criminal activities. Detective Schmidt opined that gang members often committed crimes during the day so that citizens would see them. This instilled fear in the witnesses and kept them from testifying against gang members. (8RT 1761-1762.) Gang members also liked to boast about their criminal activities because it enhanced their reputation. (8RT 1762-1763.)

Based on a hypothetical mirroring the facts of the shootings in this case, Detective Schmidt opined that the crimes were committed for the benefit of, in association with, or at the direction of the Bounty Hunter Bloods. Detective Schmidt explained that if one gang member stole from a high ranking gang member, the member who was victimized had to get his money or drugs back. If the high ranking member did not get either one back, he would look weak and would lose his stature. (8RT 1762-1763.) Killing witnesses promoted the Bounty Hunter Bloods reputation because citizens would hear about it and think that "these Bounty Hunter Bloods would kill anybody and everybody that goes against them." (8RT 1763.)

2. Defense Evidence

Dr. Ronald Markman was a psychiatrist with a subspecialty in legal psychiatry. (8RT 1789-1790.) He was familiar with the effects of PCP, methamphetamine, cocaine, marijuana, and alcohol. (8RT 1791-1792.)

According to Dr. Markman, PCP is an hallucinogenic drug that is made on the street. It is not a standardized drug made by a drug company. Dr. Markman opined that "from dose to dose to dose it can change." (8RT 1792.) PCP can affect thought processes and memory, and can cause

emotional and perceptual impairment, confusion, and hallucinations. (8RT 1793.)

Methamphetamine is a stimulant. It is equivalent to the adrenalin and epinephrine in the body. Dr. Markman opined that methamphetamine can cause paranoid and delusional thinking as well as visual and auditory hallucinations. (8RT 1794.) Cocaine is also a stimulant and a local anesthetic. If cocaine is taken with methamphetamine, the two drugs are "suddenly additive." (8RT 1795.) In other words, "One unit of cocaine and one unit of methamphetamine is [*sic*] going to give you more than two units of a reaction." (8RT 1795.)

According to Dr. Markman, marijuana was the "mildest" of the four drugs discussed. Dr. Markman opined that marijuana can produce "hallucinogenic symptoms" in some people. (8RT 1795.) He further opined that alcohol can impact memory, judgment, perception, reasoning, and behavior. (8RT 1795.)

Dr. Markman discussed the effects of taking combinations of the drugs together. Marijuana, which has "slowing" or "depressant qualities," could possibly be neutralized by the stimulating effect of methamphetamine or cocaine. Symptoms that are common to the drugs would be accentuated when those drugs are taken together. (8RT 1796.)

Detective Hahn testified that only two shell casings were found in Anderson's living room. Both casings were .357 caliber. (8RT 1803-1806.)

B. Penalty Phase Evidence

1. The prosecution's case-in-chief

a. The underlying offenses

Because the second penalty phase retrial was before a different jury than the one that tried the guilt phase, the prosecution presented evidence

regarding the circumstances of the shootings at Nickerson Gardens during this penalty phase retrial, including reading into evidence the guilt phase testimony of Garner (see 19RT 3536-3578) and Johnson (see 19RT 3578-3614).[20] Instead of repeating the facts of the underlying offenses, respondent incorporates by reference the guilt phase Statement of Facts.

b. Appellant's prior convictions and prior bad acts

Around midnight on April 6, 1995, Javier Guerrero was using a payphone near 112th Street and Central Avenue. His car had broken down, and he was calling his family. Three African-American males approached Guerrero. One male put a gun to Guerrero's head, and another male poked Guerrero in the stomach with a hard object.[21] They demanded money, and searched Guerrero's pockets and clothes. They took Guerrero's watch and threw some papers he had to the ground. (20RT 3763-3766, 3769-3770.)

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[20] At the second penalty phase retrial, the prosecution also presented testimony from the following guilt phase witnesses: Denise Bertone, a coroner investigator who investigated the scene of the Nickerson Gardens shootings and described the injuries sustained by Anderson and Brooks (see 19RT 3615-3627, 3630-3644); Angel Hill, who testified about the events occurring before, during, and after the shootings (19RT 3664-3706); Annie Ouzounian, a criminalist who testified about the casings and bullet fragments recovered from Anderson's apartment (see 19RT 3707-3723); Deputy Sheriff Marcus Turner, who testified about appellant's April 11, 2004 arrest and the nine-millimeter Ruger semiautomatic handgun that he recovered from appellant's pocket (see 19RT 3732-3742); Dr. Jeffrey Gutstadt, who testified about Anderson's autopsy (see 20RT 3743-3762); Rafael Garcia, a criminalist who testified as a firearms expert and described his analysis of the casings found in Anderson's apartment (see 20RT 3882-3898); Dr. Irwin Golden, who testified about Brooks's autopsy (see 21RT 3927-3941); and Detective Hahn, who testified about his investigation of the instant case (see 21RT 3981-4044).

[21] Guerrero told the police that a gun was pointed in his side, but he did not say that one was pointed at his head. (20RT 3780-3781.)

LAPD Officer Marlin Hill and his partner Officer Bojorquez were on patrol in the area that night. They saw Guerrero on the ground, surrounded by three men. The three men noticed the police officers and ran east down 112th Street. The officers pursued one of the suspects—appellant—and detained him. Then they took Guerrero to a field show-up. He identified appellant as one of the men who had robbed him. (20RT 3766-3768, 3773-3776, 3778-3779, 3781.) When asked whether he recognized that person in court, Guerrero responded, "Well, it's been many years, so he might have changed physically. But if it's in the report, then it's got to be him." (20RT 3770.)

Thomas Tolliver was a campus security assistant at Markham Middle School on February 29, 1996. Just before noon, Tolliver saw appellant and two other people walking through campus. They did not appear to belong there. (20RT 3784-3787.)

Tolliver was wearing a yellow security jacket and carrying a radio. He was accompanied by another campus security assistant, who was not wearing a yellow jacket. Tolliver asked appellant and the two other people why they were on campus. Appellant asked Tolliver who he was, and Tolliver identified himself as campus security. Tolliver told appellant and his two companions that they had to leave. (20RT 3785-3787.) Appellant asked Tolliver if he was "strapped," i.e., did Tolliver have a gun. (20RT 3787.) Appellant walked around Tolliver and began closing in on him. (20RT 3787-3788.)

Tolliver told appellant he had to leave and raised the radio to his face. Appellant and his cohorts broke away and headed toward the gate. Appellant said to Tolliver, "I'm going to come back and shoot your mother fucking ass." (20RT 3788.) Appellant's statement made Tolliver fear for his safety. (20RT 3789.)

On December 8, 2001, LAPD Officer Erik Shear and his partner, Officer Canaan Bodell, were working in Nickerson Gardens when they saw appellant outside a unit with a group of people. The officers drove up toward appellant and exited their car. Appellant ran away, and Officer Shear chased him. Officer Shear caught appellant by his jacket. The jacket came off, and Officer Shear saw a large, stainless steel revolver in appellant's waistband. (20RT 3815, 3829-3831.)

Appellant ran into a unit, and Officers Shear and Bodell went to the back of the unit. They shined a light on the second story. Appellant looked out the window, saw the officers, and slammed the window shut. A tenant came out and gave the police consent to search the unit. Appellant exited the unit and was wearing a different shirt than what he had been wearing earlier. The officers arrested him. Officer Shear found a Ruger .357 caliber revolver in the same room where appellant had been looking out the window. The gun was in laundry basket under some clothes. It was loaded with five rounds of hollow point .357 caliber ammunition. (20RT 3831-3832.)

Around 5:30 p.m. on January 18, 2002, LAPD Officer Manuel Moreno and his partner, Officer Coughlin, were working with the violent crime task force. They were on patrol when they saw appellant walking in a walkway between two buildings in Nickerson Gardens, near 112th Street and Parmelee Avenue. (20RT 3796-3798.) Officers Shear and Bodell also saw appellant running between the buildings near 112th Street and Parmelee Avenue. (20RT 3814-3816.)

It appeared to Officer Shear as though appellant's right leg was injured because he was "kind of running with it straight" and not bending it at the knee. (20RT 3816, 3821.) Appellant was wearing long, black baggy shorts that came to his knee. The pockets were long and went almost the

entire length of the shorts. The right pocket was wider than a normal pocket. (20RT 3816, 3820-3821.)

Officer Moreno pulled over the patrol car, and his partner got out. Appellant looked in the officers' direction and then ran southbound. Officers Moreno and Coughlin pursued appellant. At one point, he tried to enter the rear door of a house. Officer Coughlin ordered appellant to stop. Appellant ran in a different direction. (20RT 3798-3799.) Officer Moreno saw a "pretty good sized" handgun in appellant's left hand. (20RT 3799.)

Appellant continued running, and the officers lost sight of him. Officer Moreno heard a door slam. He and Officer Coughlin entered a nearby unit and found appellant sitting on the kitchen floor. The officers recovered an unloaded TEC 9 semiautomatic assault pistol from underneath the stove top. It was the same gun Officer Moreno had seen in appellant's hand earlier. (20RT 3799-3801, 3817, 3822-3823; Peo. Exh. 75 [photo].) Officer Shear recovered an Uzi assault rifle from under a bed upstairs. A black thread caught on the Uzi was similar to the threads of appellant's shorts. (20RT 3817-3821; Peo. Exhs. 77, 78 & 79 [photos].) Two types of ammunition were found in a kitchen drawer. Sixty-four rounds of ammunition were recovered. (20RT 3823, 3825.)

Ronnie Chapman was in his grandmother's backyard in Nickerson Gardens between 2:00 p.m. and 3:00 p.m. on April 21, 2002. Chapman's cousin, Jeanette Geter, was standing at the window when she saw appellant and his brother approach Chapman.[22] She screamed at Chapman to run. Geter saw appellant open fire on Chapman. (19RT 3645-3648.) Chapman suffered a gunshot wound to his upper stomach area. (20RT 3804.)

[22] Geter saw two people approach Chapman. One of them was a "light skin tall guy." (8RT 3648.)

Officers Moreno and Coughlin saw appellant running through some buildings in Nickerson Gardens right before they received a radio call about the Chapman shooting. Appellant was less than a block away from where the shooting had occurred. He was wearing a royal blue silk shirt. (20RT 3806-3807.)

Geter told the police she was "positive" that appellant was the person who had shot Chapman. (19RT 3650; 20RT 3804-3805.)[23] Geter told the police she had known appellant most of her life from the projects. (20RT 3805.)

On May 11, 2002, LAPD Officers Michael Owens and Scott Burkett were on patrol on the east side of the Southeast Division. Appellant was driving a green Chevy Camaro when he committed a traffic violation. He parked his car near 1622 East 109th Street, exited the car, and walked toward the gate of the house at that address. (20RT 3810, 3812-3813.) Officer Owens detained appellant and called for back up. Officer Moreno arrived to assist. The royal blue silk shirt that appellant was wearing on the day Chapman was shot was found in the back bedroom at the house at that address. (20RT 3807-3808, 3814.)

Around midnight on January 24, 2003, LAPD Sergeant Gerardo Davila and his partner were on patrol in Nickerson Gardens. They received a call that officers needed back up because they were being fired upon in the area of 1444 111th Place. (20RT 3902-3904.)

Sergeant Davila observed appellant approach the police perimeter that had been set up in the area. Appellant sat on the hood of a car parked in front of 1444 111th Place. Sergeant Davila also observed someone on

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[23] Geter testified on cross-examination that she was not sure who did the shooting, but that appellant "had something to do with it. It was him too." But when she was asked, "But just who was shooting, you are not sure who that was, right?," Geter responded, "No, I'm sure." (19RT 3656.)

crutches who was standing on the southwest corner. Sergeant Davila ordered appellant to leave the area. Appellant mumbled something unintelligible. (20RT 3904-3905.) Sergeant Davila asked appellant again to leave. Appellant looked in the sergeant's direction and said, "Fuck that shit." (20RT 3905.)

Sergeant Davila approached appellant, and when he was within about 10 feet of him, the sergeant again asked appellant to leave. Appellant did not respond so Sergeant Davila escorted him off the car and ordered him to leave the area. (20RT 3906-3907.) Appellant looked at Sergeant Davila and said, "Fuck you, bitch. You ain't shit without the badge and gun." Appellant assumed a combative posture with his fists up and walked toward Sergeant Davila, who pushed appellant backward. Appellant threw a "glancing blow" to the top of Sergeant Davila's head. (20RT 3907.) Sergeant Davila hit appellant in the face. Appellant fell to the ground. Two other officers had to assist Sergeant Davila in detaining appellant. (20RT 3907-3910.)

Kathryn Washington was in the vicinity of a shooting involving Akkeli Holley on July 4, 2003. Washington testified she was at her friend's house when the shooting occurred, but that she did not witness it. (19RT 3724-3726; 20RT 3851; 21RT 3982.) The prosecutor played excerpts from Washington's interviews with the police about the Holley murder.[24] (See 20RT 3851-3856; Peo. Exhs. 121, 123, & 125 [DVDs]; Peo. Exhs. 122, 124, & 126 [transcripts].) In the interview, Washington informed the police that she saw Holley get shot. After the interviews were played at trial,

[24] Detective Hahn was interviewing Washington about the Anderson and Brooks murders when Washington informed him that she had witnessed Holley's murder. (See 21RT 3984-3985.)

Washington testified that she personally witnessed what had happened to Holley. (20RT 3857.)

The Holley shooting occurred near 114th Street, in a parking lot that was north of the Nickerson Gardens tenant's office. Holley's car had bullet impacts on the driver's side, and the rear driver's side window was damaged. Holley had been transported to the hospital by the time Detective Hahn arrived at the scene. (21RT 4000-4001; Peo. Exhs. 85 & 86 [photos].) Some items of clothing, four bullet casings, and one live round were found near the passenger's side of the car. (21RT 4002-4004; Peo. Exhs. 87-90 [photos].)

Deputy Medical Examiner Solomon Riley, Jr. performed the autopsy on Holley's body on July 11, 2003. The cause of death was multiple gunshot wounds. Holley sustained three gunshot entry wounds. (20RT 3870-3871.) The first wound occurred at the top of the head and exited through the forehead. It was a fatal wound. (20RT 3873-3875.) The second wound occurred above Holley's left nipple. The bullet lodged in Holley's back, beneath the shoulder blade. It was not a rapidly fatal wound. (20RT 3875-3878.) The third wound occurred on the left side of Holley's chest. The bullet passed through the lungs and the aorta. It was a rapidly fatal wound. (20RT 3878-3879.)

On June 7, 2004, Deputy Sheriff Herson Albizures searched the cell that appellant shared with two other inmates at the Men's Central Jail. Deputy Albizures recovered two shanks from one of the inmate's mattresses. (21RT 3943-3949.) He also recovered a shank from the bunk where appellant kept his personal property. The shank was embedded in the mattress. It was about 11 inches long and was made from a broken broom handle. The shank was sharpened to a point at one end, and had a handle made of cloth on the other end. (21RT 3949-3951, 3965-3966; Peo. Exh. 115 [shank].)

Deputy Sheriff David Jimenez was working at the lockup at the Compton courthouse on June 21, 2006. Appellant was inside a cell, using the phone. Deputy Jimenez asked appellant to get off the phone because he had to move him. Appellant looked at Deputy Jimenez, rolled his eyes, and continued talking on the phone. (20RT 3919-3920.) Deputy Jimenez left and returned a little while later. He again asked appellant to get off the phone. Deputy Jimenez opened the cell door. Appellant got off the phone, and Deputy Jimenez had him step outside of the cell. Appellant was upset and wanted to know why he was being moved. (20RT 3920.)

Deputy Jimenez attempted to grab appellant's right hand (his other hand was handcuffed). Appellant stepped back and assumed a fighting stance. His right hand was balled up in a fist, and it was down to the side. As Deputy Jimenez attempted to use his two-way radio to call for back-up, appellant swung at him, knocking the radio off the deputy's uniform. Deputy Jimenez hit appellant twice in the face. Appellant backed up, and then came at Deputy Jimenez again. Deputy Jimenez sprayed appellant in the face with OC spray. After that, appellant retreated back into the cell and crouched down. (20RT 3921-3922.)

c. Victim impact testimony

(1) Curtis Wilson

Curtis Wilson was Anderson's brother. They grew up in Nickerson Gardens along with their four brothers. Anderson was the oldest child. Wilson did not have a father living with him as he grew up. Wilson's and Anderson's mother still lived in Nickerson Gardens. (21RT 4065-4066, 4076.)

Wilson called Anderson "Nobe." Anderson was the oldest child and was the "backbone" of the family. When Wilson and Anderson were growing up, she was always smiling, making jokes, and having fun.

Anderson was an excellent student who got good grades and was a role model for Wilson. She used to help him with his school work. (21RT 4067-4069.) When Wilson was in his early twenties, he moved away from Nickerson Gardens and got a job. (21RT 4069-4070, 4079.) Wilson would still visit Anderson frequently and would take his children to her house to visit two to three times a week. Anderson remained close with her family and would have family gatherings at her house. (21RT 4070.)

Wilson last saw Anderson on the day before she was murdered. He and his children were at her house, "just hanging out." (21RT 4070-4071.) When Wilson left, Anderson gave him a big hug and a kiss. He said, "See you later, sis." Anderson kissed Wilson's children and said goodbye. She said to Wilson, "See you later . . . big brother." (21RT 4071.)

The next day, Wilson got a call from Anderson's daughter, Neisha Sanford, informing him that Anderson had been shot. Wilson did not know whether she was dead or alive. He was angry and was thinking about revenge. Wilson went to Anderson's house, but the police would not let him inside. Wilson could not think of any reason why anyone would want to shoot Anderson. (21RT 4071-4073.) Wilson did not act on his feelings of revenge because the person who had killed Anderson had already been arrested by the time Wilson found out who it was. (21RT 4074.) Anderson was 52 years old when she died. (21RT 4076.)

The next time Wilson saw Anderson's face was at the viewing of her body. It "tore [him] up" to see her lying in the casket. (21RT 4074.) About a month after Anderson's murder, Wilson and his brothers cleared her personal belongings out of her apartment. It was a "terrible feeling." (21RT 4074-4075.) Anderson's death had a "very bad" effect on Wilson's and Anderson's mother. For the first two months, their mother did not believe that Anderson was dead. After that, their mother's health declined. (21RT 4076.)

After Anderson's death, family gatherings were not as much fun because Anderson was always the life of the party. Wilson could not accept that Anderson was dead for the first two years after she was murdered. He would drive by her house three times a week, hoping to see her sitting on her back porch. (21RT 4076-4077.) Even at the time of trial, Wilson still felt pain over the loss. Wilson's daughter, who was 10 years old when Anderson died, took Anderson's death "really hard." (21RT 4077.)

(2) Delance Evans

Delance Evans was Anderson's grandson and Sanford's son. Delance called Anderson "Little Granny." He would go to her house every day after school and stay there until his mother picked him up after work. Anderson also took care of Delance's little brother Donovan. (21RT 4084-4086.)

Delance would stay up late and watch horror movies with Anderson. She would play "oldie" songs on the radio and would "dance around and crack jokes." (21RT 4086.) It made Delance happy to see her. (21RT 4086-4087.) They would celebrate birthdays and Christmas at Anderson's house. (21RT 4087.)

Delance was 12 or 13 years old when Anderson was murdered. Her death affected him "a lot" because he and Anderson were "very close." It made Delance "sad all the time" not to be able to joke around with Anderson or spend time with her on holidays. (21RT 4087.)

Delance thought about all of the fun things he could no longer do with Anderson, and how he could no longer see her face. Looking at old pictures made him sad. Anderson's advice to Delance was to stay in school, take care of his mother, be good, and stay out of trouble. Delance believed that if Anderson were still alive, she would be proud of him. (21RT 4087-4088.)

(3) Neisha Sanford

Sanford was Anderson's only child. Anderson wanted boys, so Delance and Donovan were like sons to Anderson. Anderson had a "very close" relationship with both boys. They were at her house every day. Delance was Anderson's favorite because he was her first grandchild. They had a special bond. Anderson took pride in Delance's achievements. (21RT 4091-4092, 4099.) Delance talked about Anderson "all the time." (21RT 4093.)

Delance and Donovan were at Anderson's home earlier in the day on April 6, 2004. Sanford picked them up after she got off work. (21RT 4093.) They were sitting in Anderson's kitchen "talking and joking and stuff." (21RT 4094.) Sanford and her sons left Anderson's apartment around 6:00 p.m. Anderson wanted to spend more time with her grandsons because she had cancer. Sanford offered to leave the boys at Anderson's that night, but Anderson told Sanford to take them home and that she would see them tomorrow. (21RT 4094, 4099-4100.) Anderson was in remission, but her illness was "kind of back and forth." She had cut off all of her hair because she was losing it. (21RT 4095.)

Anderson was the "core" of the family. "Everybody" went to her house. Anderson was "fun" to be around, always "joking and laughing and acting silly and stuff." (21RT 4095.) Sanford and Anderson were very close. People thought that they were sisters. (21RT 4096.) Anderson had a good relationship with her own mother. Anderson was her mother's only daughter. (21RT 4097.) Anderson had a "kind heart" and would take people into her home who needed help. (21RT 4096.)

On the day Anderson was murdered, Sanford got a call from her grandmother who told her that there was shooting near Anderson's apartment. Sanford's grandmother wanted Sanford to check on Anderson to make sure she was okay. (21RT 4102.) Sanford drove to Anderson's

apartment. When she arrived, she saw police and yellow tape. The police would not allow Sanford to enter Anderson's apartment. Sanford remained outside for about an hour. During that time, police officers were asking her questions about Anderson and asked for a description. Finally, a female officer told Sanford that one of the bodies in the apartment was Anderson's. Sanford did not believe her. (21RT 4103-4104.)

Later that day, Sanford was able to enter Anderson's apartment. She saw blood on the carpet and her mother's favorite jacket on the couch. (21RT 4105.) Sanford saw blood smears in the kitchen. It looked as though a body had been dragged from the kitchen into the living room. There was blood splattered "all over" the kitchen walls; the floor "basically was just red." (21RT 4106.)

Sanford returned home at around 9:00 a.m. Delance overheard her tell a co-worker on the phone that she would not be in that day because her mother had been murdered. Delance "ran screaming down the hallway." (21RT 4106.) On Easter that year, people left flowers, balloons, and candles at Anderson's apartment to show respect. (21RT 4108.)

Regarding what her life was like since her Anderson's death, Sanford testified: "I don't have a life anymore. My life ended four years ago. Him taking my mother's life, that was the last of my life." (21RT 4108-4109.)

2. Defense evidence

a. Timothy Coomes

Timothy Coomes was a private investigator who was working for appellant. Coomes attempted to interview Tolliver on March 31, 2008, but Tolliver refused to be interviewed. (21RT 4111-4113.) Coomes attempted to interview Geter on March 30, 2008. He left his business card at her house. She called him and told him she would not discuss anything with him. Geter told Coomes that she did not know appellant nor did she know

anything about an incident involving appellant and Chapman. (21RT 4113-4114.)

b. Victor Ross

LAPD Detective Victor Ross was a gang expert who was familiar with the Bounty Hunters. He opined that in 2004, the gang had approximately 800 members, and its territory consisted of the Nickerson Gardens housing development. (21RT 4117-4118.)

According to Detective Ross, a "shot caller" is a leader in a gang who tells the other members what to do. A gang member needs to put in the work, i.e., commit violent crimes, to eventually become a shot caller. (21RT 4118-4119.) Detective Ross testified that "foot soldiers" are the underlings in the gang who are putting in the work. (21RT 4122.)

Detective Ross opined that gang members mistake respect for fear. A gang member who is involved in violent acts elevates his status and makes him feared by the community and within the gang. There can be consequences for disrespecting a gang member. If a person who has been disrespected does not retaliate, he will continue to be disrespected. (21RT 4119-4122.)

Detective Ross opined that in 2004, Carey was a top level leader in the Bounty Hunters, and that Holley was a little higher than Carey. He further opined that Holley had a reputation for being armed. Brooks and Dillard were members of the Bounty Hunters in 2004. Detective Ross testified that Brooks was a mid-level member. He opined that Brooks was feared and respected within the Bounty Hunters, and that Brooks had a reputation for being a violent person. Detective Ross was aware that Carey was murdered in the fall of 2004. (21RT 4122-4124, 4127-4128, 4130.)

Detective Ross opined that if Brooks stole from Carey, it would be considered a "brazen" act. (21RT 4125.) The act would elevate Brooks's status and would put pressure on Carey to retaliate. Detective Ross opined

that if Carey asked a fellow gang member to retaliate against Brooks, and that person refused, the refusal would result in a level of disrespect that was "different" from the level of disrespect that would result from stealing from a gang member. Detective Ross opined that if a gang member refused to retaliate against Brooks, that gang member could be killed. (21RT 4125-4126.)

Detective Ross testified that there was a war between two cliques of the Bounty Hunters in 2004. He further testified that appellant was "in the process of elevating his status in [the Bounty Hunters] quickly." (21RT 4131, 4133.)

c. Joshua Smith

Joshua Smith had been friends with appellant since 1995. At the time he testified, Smith was in custody for aiding and abetting an assault and robbery. (22RT 4143-4144, 4148-4149.) Smith recalled a night when appellant was sitting on a car and he was approached by the police. Smith was on crutches at the time. He was about 10 feet away from appellant. A crime had been committed in the area, and the officer told appellant and Smith to leave. Smith started to walk away. He saw the officer, who was a "big man," say something to appellant, and then the officer swung at appellant. (22RT 4144-4147.) Smith did not see appellant challenge the officer to a fight, nor did he hear appellant yell anything at the officer. Appellant stood up, and the officer grabbed him. Another officer came over to help restrain appellant. (22RT 4146, 4148.)

An officer approached Smith, pulled Smith's cap down over his face, and told Smith not to look in appellant's direction. The officer was trying to block Smith's view, but Smith could see appellant was on the grass, being held down by the police. (22RT 4146.) Smith said it was police brutality and did not want to leave because the officers were beating appellant. (22RT 4147.)

d. Danyelle Jones

Jones grew up in Nickerson Gardens and knew appellant from the neighborhood. She was seven years younger than him. Their families were close. Jones was in custody at the time she testified. (22RT 4154-4156.) Jones and appellant had been corresponding through the mail "a lot." (22RT 4156.)

Jones described appellant as being "caring," "educated," "always eager to learn," "loving," and a "good friend." (22RT 4156.) When Jones was first sent to prison, she wanted to commit suicide and told appellant about how she was feeling. Appellant wrote the people in charge and got Jones help. He also wrote to Jones and "explained the value of life" to her. He convinced Jones not to kill herself. (22RT 4157-4158, 4160.)

Appellant sent cards to Jones's daughter. He told Jones that he loved his own children very much. Jones and appellant talked about world affairs and President Obama. (22RT 4161-4164.) Jones would be "devastated" if appellant were put to death. She loved him as a friend. (22RT 4164.)

e. Dr. Ronald Markman

Ronald Markman was a psychiatrist and drug expert. (22RT 4174-4176.) He testified about the properties and side effects of various drugs including PCP, cocaine, alcohol, marijuana, and methamphetamine. (See 22RT 4176-4183.) Dr. Markman opined that if someone used a combination of all the aforementioned drugs, that person's perception of what was going on around them would be affected. According to Dr. Markman, that combination of drugs "could create nervous system chaos." (22RT 4182.)

f. Kanisha Garner

Kanisha's April 10, 2008, guilt phase testimony was read to the jury. (See 22RT 4192-4202.) Instead of repeating the facts from Garner's

testimony, respondent incorporates by reference the guilt phase Statement of Facts.

g. Kamika Benjamin

Kamika[25] was appellant's older cousin. Her mother and appellant's mother, Geraldine Batiste, were sisters. Kamika grew up with appellant in Nickerson Gardens. (22RT 4206-4208, 4279-4280.) He was a "fun" child, and they often played together. (22RT 4208.)

According to Kamika, appellant was a good father to his three children. He loved his children. He called them and always asked to see them. (22RT 4208.) Appellant sent his children cards on their birthdays and on Christmas, and sent them gifts. (22RT 4209-4210.) Kamika testified that appellant's "number one priority" was to communicate with his children. (22RT 4211.)

Kamika testified about how difficult it was to grow up in Nickerson Gardens. (See 22RT 4212-4213.) Appellant's uncle, Timothy, was a very important person in appellant's life. He was a father figure to appellant. Timothy was a Bounty Hunter Blood. He was murdered by the Hacienda Bloods. Appellant changed after Timothy's murder. Appellant's uncles Ronald and Donald also lived with appellant and his family. Appellant's father never lived with appellant. (22RT 4214-4218.)

h. Jason Benjamin

Jason was Kamika's younger brother. He was closer in age to appellant. Jason grew up with appellant in Nickerson Gardens. Jason's family moved to Long Beach when Jason was 11 or 12 years old. (22RT 4226-4228.)

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[25] Because Kamika and Jason Benjamin share the same last name, respondent will refer to them by their first names to avoid confusion.

Jason testified about what life was like growing up in Nickerson Gardens. He witnessed two shootings. (See 22RT 4228-4230.) Several drug dealers lived in appellant's building, and as a result, the police would frequently raid the building. (22RT 4231.)

Appellant was close with his uncle Timothy, who was like a "dad" to appellant. (22RT 4232-4233.) Timothy's death forced appellant to grow up faster. (22RT 4233.) Appellant was a "good" person with a family that cared about him. (22RT 4235-4236.)

i. Father Gregory Boyle

Father Gregory Boyle was a Jesuit priest and gang expert. He was the founder and executive director of Homeboy Industries, the largest gang intervention program in the country. (22RT 4239-4240.) Father Boyle testified about why kids join gangs and how his organization helps gang members. (See 22RT 4241-4264.) Father Boyle did not know appellant personally, nor had he ever spoken with appellant. (22RT 4249.)

j. Larry McDaniel

Larry McDaniel is appellant's father. McDaniel was not present when appellant was born. McDaniel lived with a woman across the street from appellant. McDaniel never lived with appellant. Appellant lived with his mother at his grandmother's house. (22RT 4265-4267.)

McDaniel was seeing Batiste when she got pregnant with appellant, but he was also involved with another woman. McDaniel had one other child with Batiste—Tyron. McDaniel had six children with the other woman. (22RT 4267, 4269-4270.)

Batiste drank alcohol when she was pregnant with appellant. She would take trips to Las Vegas and drink "a lot." (22RT 4268, 4273.) McDaniel also drank alcohol and started using cocaine when appellant was a toddler. (22RT 4268.)

McDaniel was not around to be a role model for appellant. He moved to Sacramento and did not return until appellant was 11 or 12 years old. McDaniel would call in the evening to check on appellant and Tyron, but they would not be at home. (22RT 4275.) Appellant lived with his uncles Timothy and Don. McDaniel knew they were both members of the Bounty Hunters. Appellant loved Timothy and was hardened after Timothy's death. (22RT 4275-4276.)

McDaniel loved appellant and asked the jury to spare his life. McDaniel testified that if he could have made a difference in appellant's life if he had been there for appellant. (22RT 4278.)

k. Geraldine Batiste

Appellant was born in Inglewood on June 8, 1979. McDaniel was not present for appellant's birth. Batiste drank alcohol when she was pregnant with appellant. She was not aware that it was harmful to her baby. Batiste and McDaniel were friends. She knew that McDaniel had a girlfriend and another family living across the street when she met him. (22RT 4279-4282.) Batiste continued her friendship with McDaniel after appellant was born. She had Tyron a year after appellant was born. (22RT 4283.)

McDaniel once hit Batiste and injured her jaw. Appellant was present when McDaniel hit her. (22RT 4284, 4288.)

Batiste worked evenings. Her brother Timothy would take care of appellant. Timothy sold drugs to make money for Batiste's family. He was a father-figure to appellant. After Timothy was killed, appellant started giving money to the family. Batiste did not know from where appellant was getting the money. (22RT 4288-4291, 4306.) Appellant was "angry" and "hostile" and became involved in gangs after Timothy's death. (22RT 4306.)

Appellant's family moved around a lot when he was young. At one point, they were living in a hotel on skid row. Appellant did not like living

there and asked his mother if they could move away. (22RT 4292-4294.) They eventually moved back to Nickerson Gardens. Batiste testified that life in Nickerson Gardens was "pretty harsh" and that you had to be strong to survive there. She further testified that it was no place to raise children, and that she was constantly in fear for her safety. (22RT 4296, 4298.) When appellant was about 15 years old, he was shot in the ankle and walked with a limp as a result of his injury. (22RT 4298-4300.)

Appellant had problems in school and was diagnosed with a learning disability. Batiste would discipline him by whipping him with a belt. (22RT 4297, 4300.) Batiste opined that appellant was "probably" involved with a gang when he was nine years old. (22RT 4301-4302.)

Appellant had one son and two daughters. His son was born around the time appellant was arrested in the instant case. Appellant was good to his children. (22RT 4302-4303.) Batiste asked the jury to spare appellant's life. She wanted him to be able to see his children grow up. (22RT 4307-4308.)

l. Derrick Dillard

Dillard's April 8, 2008, guilt phase testimony was read to the jury. (See 22RT 4308-4328; 23RT 4477-4508.) Instead of repeating the facts from Dillard's testimony, respondent incorporates by reference the guilt phase Statement of Facts.

m. Tameika Simmons

Simmons had known appellant for seven years. She was the mother of two of his three children. Simmons lived in Mississippi and was married to another man. She still loved appellant. (23RT 4339-4340.)

Simmons described appellant as "caring," a "loving father," and an "understanding person." (23RT 4340.) Appellant sent cards that he made to his children and called them. (23RT 4341.) He had done a lot of "good

things" for Simmons. He was present when their daughter was born and bought things for her. Appellant never mistreated Simmons or his children. (23RT 4342.) Simmons moved to Mississippi to provide her children with a better life. (23RT 4343.)

It would hurt Simmons and her children if appellant were executed because of his redeeming and positive qualities. (23RT 4343-4346.)

n. Dr. Fred Bookstein

Fred Bookstein was a statistician and had a Ph.D. He was involved with fetal alcohol and drug research. (23RT 4353-4354.) Dr. Bookstein provided a history of the study of fetal alcohol syndrome disorder ("FASD"). FASD involves brain damage caused by prenatal exposure to high levels of alcohol. (23RT 4361-4364.) Based on an MRI of appellant's brain, Dr. Bookstein opined that the image showed "one of the typical signs of damage caused by prenatal exposure to alcohol." (23RT 4365, 4367.) He further opined that people with appellant's type of brain damage "typically have problems with moral decisions." (23RT 4421.)

o. Dr. Nancy Cowardin

Nancy Cowardin had a Ph.D. in educational psychology and special education. (23RT 4436.) She defined a learning disability as "a specific learning handicap the schools identify when a child has intellect competence but he can't learn specific material. It can be confined to one subject matter or it could be a learning process such as auditory processing, visual processing, something like this. But it impedes learning." (23RT 4438.)

According to Dr. Cowardin, appellant's school records reflected that he was in special education and had learning disabilities. Teachers identified appellant's learning issues as early as first grade. (23RT 4443.) Dr. Cowardin gave appellant a number of tests to assess whether he had any

learning disabilities. (23RT 4438-4439.) His nonverbal I.Q. was 100, which was average. His verbal I.Q. was 73, and his combined I.Q. was 84. Appellant scored low on reading and spelling, but had strong math skills. (23RT 4447-4448, 4452.) According to Dr. Cowardin, appellant had "good skills in one area and very weak skills in another and that lopsidedness is what accounts for his learning disability." (23RT 4452.) Dr. Cowardin opined that appellant's learning issues at school preceded his behavioral problems. She further opined that appellant had been learning disabled his entire life. (23RT 4455-4456.)

p. Stipulation

The parties stipulated that on July 7, 2006, Kai Harris was convicted of murder of Anderson and Brooks, and attempted murder of Johnson and Williams; that Harris personally used a handgun, the .357 magnum Desert Eagle, in the commission of the murders; that all of the offenses were found to have been for the benefit of a street gang; and that the special circumstance of multiple murder was found to be true. (23RT 4519.)

ARGUMENT

I. APPELLANT WAIVED HIS RIGHT TO A MISTRIAL AND THUS FORFEITED HIS CLAIM THAT THE TRIAL COURT ERRONEOUSLY DENIED HIS *BATSON/WHEELER* MOTION WITH RESPECT TO PROSPECTIVE JUROR NO. 28; REGARDLESS, THE CLAIM IS MERITLESS

Appellant contends the trial court erred when it denied his *Batson/Wheeler*[26] motion with respect to Prospective Juror No. 28, an African-American male. (AOB 42-83.) Appellant forfeited this claim because, after the trial court found the prosecutor had violated

[26] *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258.

Batson/Wheeler when he dismissed Prospective Juror No. 46, appellant chose to reseat Prospective Juror No. 46 rather than have the trial court declare a mistrial even though Prospective Juror No. 28 had already been dismissed. Regardless, the prosecutor's reasons for dismissing Prospective Juror No. 28 were valid, race-neutral, and supported by the record. Because the trial court made a sincere and reasoned effort to evaluate the prosecutor's exercise of the objected-to peremptory challenge, and because the court's determination is supported by substantial evidence, reversal is precluded on this claim.

A. Relevant Proceedings: the Trial Court Accepts Prosecutor's Race-Neutral Reasons for Challenging Prospective Juror No. 28, and Defense Counsel Opts Not to Have a Mistrial

During jury selection, the prosecutor used his first seven peremptory challenges to excuse two White females (Prospective Juror Nos. 5 & 6), two African-American females (Prospective Juror Nos. 7 & 13), one Hispanic male (Prospective Juror No. 19), and two Hispanic females (Prospective Juror Nos. 27 & 35). The prosecutor used his eighth peremptory challenge to excuse Prospective Juror No. 28, an African-American male. At this point, appellant raised a *Batson*/*Wheeler* objection, claiming that the prosecutor was improperly using his peremptory challenges to excuse African Americans. (5RT 1072.) The trial court denied the motion, finding that appellant had not made a prima facie case. The trial court stated that there were "a lot of African Americans on the panel," and that there was "a number of them seated in the box as we speak." (5RT 1072-1073.) The trial court noted that it "would be mindful of it," but reiterated that it did not find a prima facie case. (5RT 1073.)

The prosecutor exercised his next three peremptory challenges to excuse one Hispanic male (Prospective Juror No. 48), one White female (Prospective Juror No. 49), and one African-American female (Prospective

Juror No. 40). The prosecutor used his twelfth peremptory challenge to excuse Prospective Juror No. 46, an African-American male. (5RT 1074-1075, 1084.) Appellant raised his second *Batson*/*Wheeler* objection. The trial court found a prima facie case of race-based excusals and held a hearing with the parties outside the presence of the jury. (5RT 1075.)

The trial court stated it was "concerned" that the prosecutor had used five of its 12 peremptory challenges to remove African Americans. (5RT 1076.) The prosecutor noted that the instant case involved "pretty much all African Americans as witnesses and as victims and as victim impact witnesses." (5RT 1076-1077.) The prosecutor commented, "There is no desire on the part of the People to excuse African Americans based on race. We feel it would not help or hurt the case one way or another." The prosecutor further indicated that he used a "letter grading system that is blind of any racial category" to choose jurors, and that he had used his peremptory challenges "all on jurors that I deem to be F's and D's." The prosecutor pointed out that he had excused a combination of African Americans, Whites, and Hispanics with his first 12 peremptory challenges. (5RT 1077.)

With respect to Prospective Juror No. 28, the prosecutor stated:

> My primary problem with this juror was the fact that he, along with many others, in fact—but he indicated that life without parole is a more severe sentence, which I don't think is a good instinct to have on a death penalty jury. This juror also indicated in his questionnaire that he does not want to serve on the jury because he felt like the trial would be too long.
>
> And I try not to have jurors on death penalty cases that don't want to be here and don't want to take the time in particular to be here.

(5RT 1078-1079.) The prosecutor continued, "a juror that is in a rush is not a juror that I want to have." (5RT 1079.) The prosecutor further stated that he wanted jurors who had "as much formal education as possible," noting

that Prospective Juror No. 28 had only completed school through the twelfth grade. (5RT 1079.)

Defense counsel responded that there were many prospective jurors who had similar issues with their level of education, their feelings that life without the possibility of parole (LWOP) was a more severe punishment than death, and had issues with how long the trial would last. (5RT 1079-1080.) The trial court noted that, in response to a question in the questionnaire about whether he could impose the death penalty if he thought it was the appropriate punishment, Prospective Juror No. 28 responded, "No." (5RT 1080; see 5CT 1216.) Defense counsel replied, "I think he was asked about that by the Court and I believe his response was he made a mistake." (5RT 1080.)[27] The trial court responded, "Yeah, I don't remember that one way or the other. I just have a blank on that." (5RT 1080.)

The prosecutor continued to give his reasons for excusing the four other African-American panelists. (See 5RT 1080-1084.) With respect to Prospective Juror No. 46, the prosecutor stated there were "a few things on his questionnaire that troubled me." (5RT 1081.) Specifically, the prosecutor noted that Prospective Juror No. 46 thought LWOP and death

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[27] Nothing in the record supports defense counsel's remark that Prospective Juror No. 28 responded that he had made a mistake. During voir dire, however, Prospective Juror No. 28 indicated he was a "category four." As explained by the trial court, someone who is a "category four person" is "the person who says, yeah, I know myself. And I'm comfortable. I'm comfortable with myself and I'm comfortable with the fact that I can go either way. I can go for life without parole if I was persuaded. I could go for death if I thought that it was the right decision. [¶] I can follow the Court's instructions. I can weigh and consider the good evidence and the bad evidence. I would want to hear the good. I would want to hear the bad. I would want to look at it all. And I could make the decision." (4RT 863.)

were "essentially the same because life in prison is not a life," that the juror did not believe the death penalty was a deterrent, and that the juror listened to KPFK, a "very very liberal radio station." (5RT 1081-1082.) Defense counsel remarked that Prospective Juror No. 46 was an "intelligent juror, the kind that [the prosecutor] is looking for." (5RT 1082.) The prosecutor agreed that the juror was intelligent, but explained "there is [*sic*] a lot of intelligent people that are opposed to the death penalty." The prosecutor continued:

> The fact of the matter is, that and in conjunction with believing the death penalty doesn't work. And he's actually now reflecting that attitude from that station on his questionnaire. It is not a deterrent. Just for vengeance, doesn't work. And life without the possibility of parole and the death penalty are equal.

(5RT 1082-1083.)

The trial court stated that *Batson/Wheeler* challenges were a "difficult undertaking of probably the most annoying aspect of . . . jury selection as far as this judge is concerned." (5RT 1084.) The trial court further stated:

> I have a great deal of respect for the [prosecutor] in this case, Mr. Dhanidina. And I hold him in high regard. He has tried many cases before me. [¶] I have always found him to be an utmost professional. I have never thought that he was trying to do anything underhanded. [¶] I believe peremptory challenges should have some flexibility in the way the judge looks at them. [¶] *I am accepting of the articulated reasons that have been advanced here*.

(5RT 1084-1085, emphasis added.) Having seemingly found no *Batson/Wheeler* violation, the trial court nonetheless asked defense counsel for clarification of the remedy he was seeking, stating, "I suppose the defense is arguing that we should—that this Court should not allow [Prospective Juror No.] 46 to be excused or are you arguing that this—that [the prosecutor] is making false representations to the Court and that this

panel should be dismissed and we should start all over?" (5RT 1085.) Defense counsel responded that he did not want the entire panel excused, but merely wanted Prospective Juror No. 46 to be reseated. (5RT 1085.)

The trial court granted appellant's motion and struck the peremptory challenge to Prospective Juror No. 46. The trial court explained that the prosecutor's reason for excusing that juror—because the juror listened to radio station KPFK—was not a valid reason. (5RT 1085.) The prosecutor noted that he had excused Prospective Juror No. 46 for numerous reasons, including the juror's views on the death penalty, and that he volunteered for Urban Possibilities, a non-profit organization. (5RT 1085.) The prosecutor added that "throughout the questionnaire there are a number of race-neutral reasons." (5RT 1085-1086.) The prosecutor asked for a brief recess to allow him to discuss the trial court's decision with his supervisor, noting that in his over 10-year career, a *Batson/Wheeler* motion had never been granted against him. (5RT 1086.)

The trial court replied:

> You know, I don't like *Wheeler* law. I am trying to apply it as best I can. [¶] I think that [Prospective Juror No. 46] looked like an acceptable juror. I think we ought to go forward. [¶] I am not going to give you more time to research it. We're going to seat him and let's go on with it. That's going to be the Court's ruling.

(5RT 1086.)

On May 28, 2008, the prosecutor filed a motion requesting that the trial court reconsider its *Batson/Wheeler* ruling with respect to Prospective Juror No. 46. (See 9CT 2302-2313.) In the motion, the prosecutor noted that the trial court initially accepted the "'articulated reasons that have been advanced here,'" which should have shifted the burden back to the defense to prove race-based elimination of jurors. (9CT 2312.) Instead, as the prosecutor argued, the trial court found a *Batson/Wheeler* violation, finding

that Prospective Juror No. 46's choice of radio station was not a valid reason for excusing him and that he "'looked like an acceptable juror.'" The prosecutor further argued that the standard applied by the trial court was one used for for-cause challenges, "when a judge is to determine whether or not actual bias has been shown based on the reasons provided by the striking attorney." (9CT 2312.)

At the July 16, 2008, hearing on the motion, the trial court stated it was "disappointed that we're doing it on the record," but felt they were required to do so because the case was a death penalty case. (16RT 3055.) The trial court asked defense counsel, James Brewer, whether he thought the court had erroneously granted the *Batson/Wheeler* motion. The following discussion transpired:

> Mr. Brewer: Well, your Honor, I am going to leave it up to the Court, between the Court and the prosecutor.
>
> The Court: Well, why now would you do that, Sir? You are an officer of the court. You made your motion in good faith, did you not?
>
> Mr. Brewer: At the time I—yes, at the time I thought the Court was ruling correctly. However, I have talked to [the prosecutor] and I have seen how the jury came out racial-wise and in terms of how many African Americans there were on the jury at the end of it. And I told [the prosecutor] that I would submit it to the Court.
>
> The Court: I think you should choose your words carefully here, because am I to presume in future cases if you make a *Wheeler* motion that you don't really mean it?
>
> Mr. Brewer: No, you shouldn't. [¶] No.
>
> The Court: You made two *Wheeler* motions in this case, did you not?

Mr. Brewer: Yes. And I meant it at the time. I certainly did.

(16RT 3055-3056.)

The trial court stated that the prosecutor's motion had "nothing to do with this trial," but rather had something to do "with the prosecutor's perception of his record as a prosecutor." As such, the trial court indicated its reluctance to rule on the prosecutor's motion. (16RT 3056-3057.) With respect to the prosecutor's reputation and integrity, the trial court commented:

> This Court has a great deal of respect for you. I have had a lot of contact with you over the years. I believe you are a hard working highly ethical prosecutor. I think you are a good trial lawyer. I think you have an excellent demeanor.
>
> At the appropriate time, were you to seek an appointment to the bench I would be pleased to support that appointment even going to the extent of writing a letter to support your appointment.
>
> I think that you are one of the several persons that have come before me that I think would be a good judge but if you push me for a ruling on this, I am going to deny it. Because I do think you are wrong on the law.

(16RT 3057.)

The trial court disagreed with the prosecutor's argument that the Court was "limited to a determination regarding the honesty of the prosecuting attorney in providing race-neutral reasons for dismissal of a juror and not a determination of the validity of those reasons to prove actual bias." (16RT 3057-3058.) The prosecutor argued that an attorney could use a peremptory challenge "for any reason as long as it's not a sham reason to hide some other discriminatory intent." (16RT 3059-3060.)

The trial court responded, "I am saying the reason you advanced for striking what was the 5th Black juror in a pool of 12 potential Black jurors

was inadequate under the law given that you had exercised challenges against four subsequent jurors. That is what I ruled and I stand by my ruling." (16RT 3060.) The trial court stated that it did not think the prosecutor's reasons were valid under the circumstances because there were other jurors who made similar statements as Prospective Juror No. 46. The trial court concluded, "I just felt that in an abundance of caution and since this was a capital case that I had to do what I did. So that is where we are." (16RT 3061.)

B. The Three-Step *Batson* Test

"Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1100, overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) A three-step procedure is used to evaluate allegations of such discrimination:

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination."

(*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129], fn. and citations omitted; *People v. Johnson* (2015) 61 Cal.4th 734, 754.)

Appellant's claim concerns the third stage of the analysis, where "'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale

has some basis in accepted trial strategy.'" (*People v. Lenix* (2008) 44 Cal.4th 602, 613, quoting *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 [123 S.Ct. 1029, 154 L.Ed.2d 931].) "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613.) This Court's review of the trial court's ruling examines "only whether substantial evidence supports its conclusions." (*Ibid*.)

A prosecutor's peremptory challenges are presumed to have been based upon constitutionally permissible grounds. (*People v. Lenix, supra,* 44 Cal.4th at pp. 613-614; *People v. Alvarez* (1996) 14 Cal.4th 155, 193.) Prosecutors may rely on any legitimate basis to excuse a juror as long as it does not deny equal protection. (*People v. Lenix, supra*, 44 Cal.4th at p. 613, citing *Purkett v. Elem* (1995) 514 U.S. 765, 769 [115 S.Ct. 1769, 131 L.Ed.2d 834].) The prosecutor's explanation need not rise to the level that would justify a challenge for cause. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97; *People v. Arias* (1996) 13 Cal.4th 92, 136.) In fact, peremptory challenges "based on 'hunches' and even 'arbitrary' exclusion are permissible" provided they are not based on impermissible group bias. (*People v. Turner* (1994) 8 Cal.4th 137, 164-165, overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th. 536, 555, fn. 5.) "[E]ven a "'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias, supra,* 13 Cal.4th at p. 136.)

The "usual remedy" for a *Batson/Wheeler* violation is to declare a mistrial, dismiss the remaining panel, and start jury selection anew. Alternative remedies, such as seating the improperly excused juror or additional challenges for the moving party, may be provided upon the moving party's consent or waiver of the "usual remedy." (*People v. Mata*

(2013) 57 Cal.4th 178, 181; *People v. Willis* (2002) 27 Cal.4th 811, 821, 823-824.)

C. Appellant Waived the Usual Remedy of a Mistrial and Thus Forfeited His *Batson/Wheeler* Claim with Respect to Prospective Juror No. 28

Preliminarily, respondent notes that, contrary to appellant's assertion (AOB 53-56), appellant waived his right to a mistrial and thus forfeited the instant claim. As shown above, appellant the rejected the trial court's offer to declare a mistrial after the court found that the prosecutor had violated *Batson/Wheeler* when he challenged Prospective Juror No. 46.

As previously discussed, appellant's first *Batson/Wheeler* objection was made in connection with the prosecutor's excusal of Prospective Juror No. 28. (See 5RT 1072.) Without requesting (or receiving) any explanation from the prosecutor for the dismissal, the trial court denied the motion, finding appellant had not made out a prima facie case. (5RT 1072-1073.) It was not until appellant made his second *Batson/Wheeler* objection that the trial court asked the prosecutor to explain his reasons for having used five of his 12 peremptory challenges to remove African Americans from the venire. (See 5RT 1076-1077.) It was at this point that the prosecutor gave his reasons for challenging Prospective Juror No. 28. The prosecutor indicated he had excused Prospective Juror No. 28 because the juror thought LWOP was a more severe punishment than death, he did not want to serve on the jury because the trial would last too long, and he had only completed his education through the twelfth grade. (5RT 1078-1079.) Defense counsel responded that other prospective jurors also met the three criteria that the prosecutor had proffered for excusing Prospective Juror No. 28. (5RT 1079-1080.) Thus, the propriety of Prospective Juror No. 28's excusal was again "on the table" at this point in the proceeding, as

the trial court was in the process of determining whether the prosecutor had violated *Batson* during jury selection.

On the heels of the aforementioned discussion about Prospective Juror No. 28's dismissal, the trial court was "accepting of the articulated reasons" proffered by the prosecutor for the dismissal of four of the five African-American panelists, but the court went on to find that the prosecutor had violated *Batson/Wheeler* when he excused Prospective Juror No. 46. (5RT 1085.) The trial court inquired whether defense counsel wanted the entire panel dismissed or whether he wanted Juror No. 46 to be reseated. (5RT 1085.) Despite having just argued that Prospective Juror No. 28 had been wrongly excused, defense counsel nonetheless rejected the trial court's offer to declare a mistrial and instead requested only that Prospective Juror No. 46 be reseated. (5RT 1085.) Thus, by agreeing to the trial court's alternative remedy of reseating Prospective Juror No. 46, appellant necessarily waived his right to obtain a mistrial based on the allegedly inappropriate dismissal of Prospective Juror Nos. 28 and 46. In other words, appellant is asking this Court to grant the very same remedy, i.e., a new trial, that he specifically rejected below and cannot now assert that the trial court erred in failing to declare a mistrial. (See *People v. Saunders* (1993) 5 Cal.4th 580, 590, fn.6 ["waiver is the intentional relinquishment or abandonment of a known right"]; see also *Cowan v. Superior Court* (1966) 14 Cal.4th 367, 371 [same].)

Moreover, the record demonstrates that defense counsel made a tactical choice *not* to request a mistrial. At the hearing on the prosecutor's motion for reconsideration of the trial court's *Batson/Wheeler* ruling, defense counsel made no argument as to whether he thought the trial court had erred, simply stating that he was "leav[ing] it up to the Court, between the Court and the prosecutor." (16RT 3055.) In response to defense counsel's statement, the trial court asked counsel why he would "do that"

and inquired whether counsel had made the *Batson/Wheeler* motions in good faith. Defense counsel responded that "[a]t the time," he thought the trial court had ruled correctly on the motions. (16RT 3055.) Defense counsel continued, "However, I have talked to [the prosecutor] and I have seen how the jury came out racial-wise and in terms of how many African Americans there were on the jury at the end of it. And I told [the prosecutor] that I would submit it to the Court." (16RT 3055-3056.) Based on the foregoing, it appears that defense counsel was satisfied with the racial make-up of the jury and consequently rejected the trial court's offer to declare a mistrial, even though the court had found a *Batson/Wheeler* violation.

People v. Burgener (1986) 41 Cal.3d 505, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, is instructive. In *Burgener*, a capital case, the trial court learned from the foreperson that a juror was possibly intoxicated during a substantial part of the deliberations. (*People v. Burgener*, *supra*, 41 Cal.3d at p. 516.) The trial court suggested either questioning the juror in chambers or substituting an alternate juror. (*Id*. at p. 517.) Defense counsel rejected both suggestions. Opposing an inquiry, defense counsel suggested the juror's rambling speech might be typical of her usual behavior, not symptomatic of intoxication, and warned an inquiry could single her out and "'destroy the jury.'" (*Ibid*.)

The *Burgener* court found that the trial court had erred by not conducting a further inquiry to establish whether good cause existed for the juror's discharge. (*People v. Burgener*, *supra*, 41 Cal.3d at pp. 520-521.) This Court held, however, that the defendant could not challenge his conviction based on the error because his defense counsel had objected to any further inquiry. (*Id*. at p. 521.) The Court inferred from the record that counsel's true motivation was a tactical one, i.e., that he believed the

continued participation of the purportedly intoxicated juror might result in a verdict favorable to defendant. (*Ibid*.) This Court held:

> Regardless of counsel's motives, . . . defendant cannot be permitted to prevent an inquiry into the condition of a possibly intoxicated juror on the basis that such an inquiry would "destroy the jury" and subsequently challenge the verdict of that very jury on grounds that the court's failure to conduct an inquiry prejudiced his interests.

(*Ibid*; see also *People v. Holloway* (2004) 33 Cal.4th 96, 123-124 and cases cited therein [failure to seek juror's excusal forfeits the issue]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1047 [same].)

Similar to the defendant in *Burgener*, appellant was given two choices after the trial court found that the prosecutor had violated *Batson/Wheeler*—to declare a mistrial or to reseat Prospective Juror No. 46. Having just learned of the prosecutor's reasons for dismissing Prospective Juror No. 28 and after arguing the reasons were not valid, defense counsel nonetheless chose to reseat Prospective Juror No. 46 and to have appellant be tried by a jury that did not include Prospective Juror No. 28. This was a seemingly tactical decision that resulted in a racially balanced jury of which defense counsel approved. Appellant should not now be allowed to request a remedy that he already rejected at trial.

D. Even Assuming Both That Appellant Did Not Waive His Right to a Mistrial and That the Instant Claim Is Not Forfeited, the Prosecutor Had Valid, Race-Neutral Reasons for Excusing Prospective Juror No. 28

1. The trial court's ruling is entitled to deference

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions." (*People v. Lenix, supra,* 44 Cal.4th at p. 613 [trial court's ruling to be viewed with """"great restraint""""].) The identical standard applies to a comparative juror analysis. (*People v. Johnson*, *supra*, 61

Cal.4th at p. 755, citing *People v. Lenix*, *supra*, 44 Cal.4th at p. 627.) This Court has observed that trial judges are in the best position to assess the credibility of prosecutors and evaluate their reasons for exercising peremptory challenges. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1197; *People v. Turner, supra,* 8 Cal.4th at p. 168.) "So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" (*People v. Lenix, supra,* 44 Cal.4th at p. 614, citing *People v. Burgener, supra*, 29 Cal.4th at p. 824; see also *People v. Jackson, supra,* 13 Cal.4th at p. 1197; *People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Fuentes* (1991) 54 Cal.3d 707, 720-721 ["great deference" afforded to trial court].) In the absence of "exceptional circumstances," an appellate court will defer to the trial judge. (*People v. Lenix, supra,* 44 Cal.4th at p. 614.)

In this case, relief is precluded under this deferential standard because the record shows that the trial court made a "sincere and reasoned effort" to evaluate the prosecutor's exercise of the objected-to peremptory challenge and because the trial court's determination was supported by substantial evidence. As will be explained, the record supports the prosecutor's stated reasons for challenging Prospective Juror No. 28, and there is no "exceptional circumstance" that would support rejection of the trial court's conclusion that those reasons were sincere.

Although a deferential standard is normally used to review a trial court's ruling on a *Batson/Wheeler* motion, appellant urges this Court to apply a stricter standard here. Specifically, he argues that the trial court failed to take into consideration its finding of discrimination with respect to Prospective Juror No. 46 when it ruled on his motion regarding Prospective Juror No. 28. (AOB 56-60.) Appellant asserts that "the trial court's finding of discrimination—combined with its failure to explicitly take that finding into account in assessment of the excusal of other jurors—requires that this

Court alter its ordinarily deferential assessment of appellant's *Batson/Wheeler* error." (AOB 58.)

Once the trial court denies a *Batson/Wheeler* motion, however, it need not reconsider that ruling even though it grants a later motion, unless the defendant asks the court to do so when he makes the later motion. In *People v. Avila* (2006) 38 Cal.4th 491, this Court held that "when a trial court determines that the defendant has made a prima facie showing that a particular prospective juror has been challenged because of such bias, it need not ask the prosecutor to justify his challenges to other prospective jurors of the same group for which the *Batson/Wheeler* motion has been denied." (*Id*. at p. 549.) Instead, "if a trial court finds a prima facie showing of group bias at a later point in voir dire, the court need only ask the prosecutor to explain 'each suspect excusal.' [Citation.] Each suspect excusal includes the excusals to which the defendant is objecting and which the court has not yet reviewed." (*Id*. at p. 551; see also *People v. Hamilton* (2009) 45 Cal.4th 863, 900, fn. 10 ["[d]efendant did not ask the court to reconsider whether the excusal of [a prospective juror] was made with discriminatory intent, and the court was not required to do so sua sponte"]; *United States v. Stewart* (11th Cir. 1995) 65 F.3d 918, 925-926 ["the prima facie case determination is the self-contained, first step in a one-direction process, which is not affected by events or determinations that occur thereafter"].)

Here, appellant did not ask the trial court to reconsider its prior ruling on the prosecutor's dismissal of Prospective Juror No. 28 in light of its finding of discriminatory intent with respect to Prospective Juror No. 46, nor was the trial court required to do so. As a result, appellant cannot now argue that this Court should treat the trial court's findings skeptically because the trial court allegedly failed to do something that appellant was obligated to, but did not, request.

In any event, appellant ignores that the trial court necessarily reexamined the prosecutor's peremptory challenge against Prospective Juror No. 28 after appellant raised his second *Batson/Wheeler* motion. As shown above, the trial court initially denied the *Batson/Wheeler* motion as to Prospective Juror No. 28 due to appellant's failure to make a prima facie showing. (5RT 1072-1073.) Following the prosecutor's challenge against Prospective Juror No. 46, the trial court expressed "concern" about the dismissal of five African-American jurors, including Prospective Juror No. 28, found a prima facie case of discrimination, and ordered the prosecutor to articulate his reasons for the peremptory challenges. (5RT 1075-1076.)

After listening to these reasons, the trial court accepted them as to four of the five subject jurors and found a violation as to Prospective Juror No. 46. (5RT 1084-1085.) Thus, the trial court clearly reconsidered or reexamined its previous ruling about Prospective Juror No. 28, which did not go beyond the first *Batson* step, when it asked the prosecutor to give reasons for his challenging this juror, thereby going to the second *Batson* step as to this prospective juror. Moreover, as part of the third *Batson* step, the trial court accepted the prosecutor's reasons as to Prospective Juror No. 28 even though the court simultaneously found the prosecutor's reasons for dismissing Prospective Juror No. 46 invalid. Thus, contrary to appellant's position, it is evident that the trial court did take into consideration its ruling regarding Prospective Juror No. 46 when it accepted the prosecutor's reasons for challenging Prospective Juror No. 28. Accordingly, this Court should apply a deferential standard in reviewing the trial court's ultimate ruling as to Prospective Juror No. 28.

To the extent appellant relies on the trial court's ruling about Prospective Juror No. 46, it appears from the record that, in finding a *Batson/Wheeler* violation with respect to this juror, the trial court applied the wrong standard. As the prosecutor noted in his motion for

reconsideration and at the hearing on the motion (see 9CT 2304, 2308-2313; 16RT 3057-3061), the trial court appeared to have applied the stricter "for cause" standard in assessing whether Prospective Juror No. 46's excusal was pretextual. A juror may be challenged for cause for implied or actual bias. (Code Civ. Proc., § 225, subd. (b)(1); *People v. Black* (2014) 58 Cal.4th 912, 916.) Implied bias is "when the existence of the facts as ascertained, in judgment of law disqualifies the juror." (Code Civ. Proc., § 225, subd. (b)(1)(B); see also *People v. Black*, *supra*, 58 Cal.4th at p. 916.) ""'Actual bias" [is] the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." [Citations.]'" (*People v. Ayala* (2000) 24 Cal.4th 243, 271-272; see also Code Civ. Proc., § 225, subd. (b)(1)(C).)

The trial court remarked that the fact that Prospective Juror No. 46 listened to KPFK, described by the prosecutor as a "very very liberal political radio station" (5RT 1082), was not a valid reason for excusing him. (5RT 1085.) The trial court further commented, "I think [Prospective Juror No. 46] looked like an acceptable juror." (5RT 1086.) The prosecutor's exercise of a peremptory challenge, however, can be based on *any reason*, including arbitrary or idiosyncratic reasons, so long as it is not a reason that denies equal protection. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613.) It need not rise to the level that would justify a challenge for cause. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97; *People v. Arias*, *supra*, 13 Cal.4th at p. 136.) In order to "accept a prosecutor's stated nonracial reasons, the court need not agree with them." (*Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 359.) Because the trial court's ruling was apparently made under the stricter for cause standard, it has no relevance in determining whether the prosecutor's excusal of Prospective Juror No. 28 was pretextual or whether the trial court's ruling about this juror is entitled

to deference. At most, this ruling shows that the trial court subjected the prosecutor's articulated reasons to a stricter standard than is required by *Batson* and its progeny.

Equally unavailing is appellant's argument that the trial court's ruling is not entitled to deference because he "urged" the trial court to perform a comparative analysis, but the court never "explicitly" did so. (AOB 63.) At best, defense counsel made a brief comment that there were other jurors who shared the same characteristics that the prosecutor found troublesome in Prospective Juror No. 28. Defense counsel, however, did not identify any specific jurors to compare to Prospective Juror No. 28. (See *People v. Lenix*, *supra*, 44 Cal.4th at p. 624.) This can hardly be labeled a request that the court conduct a comparative analysis. Indeed, in *People v. Johnson* (2003) 30 Cal.4th 1302, 1309, overruled on other grounds in *Johnson v. California*, *supra*, 545 U.S. 162, this Court found that when the defendant failed to provide any detailed comparison analysis to the trial court, the court could not be expected to do so itself. Thus, contrary to appellant's assertions, this Court should review the trial court's denial of the *Batson/Wheeler* motion deferentially, examining only whether substantial evidence supports the court's conclusions. (*People v. Lenix, supra,* 44 Cal.4th at p. 613.)

2. Substantial evidence supports the trial court's denial of appellant's *Batson/Wheeler* motion with respect to Prospective Juror No. 28

As previously discussed, after defense counsel made a second *Batson/Wheeler* motion, the prosecutor explained that he had excused Prospective Juror No. 28 because this juror thought that LWOP was a more severe sentence than death, the juror indicated he did not want to serve on a lengthy trial, and he had only completed his education through twelfth

grade (and the prosecutor wanted jurors with the highest level of education possible). (5RT 1079.) The record supports these assertions.

Prospective Juror No. 28 was a retired 73-year-old African-American male. He had worked as an electrician for "Bowen" Aircraft for 39 years. He indicated he had one grown child.[28] Prospective Juror No. 28 responded that his education level was "12 years," and that he had served in the military. He was not currently attending school and had not earned any degrees. (5CT 1209-1210.) Prospective Juror No. 28 had served on a criminal jury, but he did not indicate whether the jury reached a verdict. Neither he nor anyone close to him had ever worked in law enforcement. (5CT 1210-1211.) His nephew had been arrested and charged with a crime. Prospective Juror No. 28 indicated he was a religious person but responded that his religious beliefs would not affect his ability to serve as a juror. (5CT 1212.) He thought LWOP was a more severe punishment than death, but he did not explain his answer. (5CT 1214.) In response to a question regarding whether he would like to serve on the jury in this case, Prospective Juror No. 28 responded "no" because it would take "to[o] long." (5CT 1216.)

Although Prospective Juror No. 28 indicated in his questionnaire that he would not be able to vote for the death penalty even if he believed it was the appropriate punishment (5CT 1216), on voir dire, he stated that he was in "category four" (4RT 878). The trial court commented, "You don't want to serve because this case is going to be too long. [¶] I appreciate you being here." (4RT 878.) Prospective Juror No. 28's only other oral response during voir dire occurred when the prosecutor inquired of the

[28] Prospective Juror No. 28 did not directly respond to the question regarding his marital status, but did answer the question regarding a spouse's or significant other's level of education. (5CT 1209.)

entire panel whether they could give the same weight to testimony that is read into the record as they would to live testimony. Prospective Juror No. 28 indicated that he could. (5RT 1057.)

None of the reasons proffered by the prosecutor for excusing Prospective Juror No. 28 ran afoul of *Batson/Wheeler*. In fact, all of the reasons advanced by the prosecutor have been found to be race-neutral. For example, this Court has found that a prospective juror's doubt that the death penalty was as severe a sentence as LWOP can be a race-neutral reason to exercise a peremptory challenge. (*People v. Montes* (2014) 58 Cal.4th 809, 856; see also *People v. Johnson*, *supra*, 61 Cal.4th at p. 758 [a prospective juror's doubts about the death penalty can be a legitimate, race-neutral reason for a prosecutor to exercise a peremptory challenge], citing *People v. Smith* (2005) 35 Cal.4th 334, 347-348.) A prospective juror's reluctance to serve on a jury has also been found to be a valid race-neutral ground for excusing a juror. (*People v. Cash* (2002) 28 Cal.4th 703, 725; *People v. Garceau* (1993) 6 Cal.4th 140, 172, disapproved on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118; *People v. Walker* (1998) 64 Cal.App.4th 1062, 1070.) And it is also permissible for a prosecutor to strike a prospective juror based on the juror's limited educational background. (*Batson*, *supra*, 476 U.S. at p. 89, fn. 12 [prospective jurors may be evaluated based upon their education]; *People v. Reynoso* (2003) 31 Cal.4th 903, 924 [prosecutor's subjective opinion that a customer service representative lacked educational experience to effectively serve as a juror may properly form the basis of a peremptory challenge].)

As shown above, the prosecutor's reasons for excusing Prospective Juror No. 28 were neither contradicted by the record nor inherently improbable. (*People v. Reynoso*, *supra*, 31 Cal.4th at pp. 925-926.) In turn, substantial evidence supports the trial court's finding on the credibility of the prosecutor's explanation for dismissing Prospective Juror No. 28.

Accordingly, appellant has failed to sustain his burden of showing "purposeful racial discrimination" in the prosecutor's exercise of the peremptory challenge against Prospective Juror No. 28. (*Johnson v. California*, *supra*, 545 U.S. at p. 168.)

Nevertheless, appellant argues that in addition to the trial court's finding of discriminatory intent with respect to Prospective Juror No. 46, other "significant evidence" supports a finding of discrimination with respect to Prospective Juror No. 28. (AOB 66.) First, appellant contends that the prosecutor's failure to "meaningfully" question Prospective Juror No. 28 demonstrates that his three justifications for excusing the juror were pretextual. (AOB 66-72.) Second, appellant argues that the prosecutor's "inexplicably extremely negative" rating of Prospective Juror No. 28 is further evidence of discrimination. (AOB 72-73.) Finally, appellant contends that a comparative analysis demonstrates that the prosecutor's dismissal of Prospective Juror No. 28 was race-based. (AOB 73-83.) Respondent addresses these issues below.

a. The prosecutor's decision not to extensively question Prospective Juror No. 28 does not evidence a discriminatory intent

Noting that the prosecutor asked Prospective Juror No. 28 only one question—which was unrelated to his three reasons for excusing the juror—appellant argues that the prosecutor's lack of questioning demonstrates that his reasons were pretextual. (AOB 67.) Although "*Miller-El* [*v. Dretke* (2005) 545 U.S. 231, 246 [125 S.Ct. 2317, 162 L.Ed.2d 196]] states that failure to engage in any meaningful voir dire examination on a subject a party asserts it is concerned about is evidence suggesting that the stated concern is pretextual," this factor is not dispositive and the trial court's ruling will nevertheless be upheld if supported by substantial evidence. (*People v. Huggins* (2006) 38 Cal.4th 175, 234-235; see also *People v.*

Lewis (2008) 43 Cal.4th 415, 476 [noting that while "a party's failure to engage in meaningful voir dire on a topic the party says is important can suggest the stated reason is pretextual," the factor is not dispositive, and concluding "the prosecutor's failure to question [a stricken juror] on voir dire does not undermine the trial court's conclusion that the prosecutor's stated reasons for striking her were not pretextual"].)

Whether the prosecutor extensively questioned Prospective Juror No. 28 "is of limited significance in a case such as this one, in which the prosecutor reviewed the jurors' questionnaire answers and was able to observe their responses and demeanor, first, during extensive individual questioning by the court and later, during group voir dire." (*People v. Clark* (2011) 52 Cal.4th 856, 906-907; *People v. Taylor* (2010) 48 Cal.4th 575, 615-616.) Here, all prospective jurors completed a questionnaire prior to voir dire. Defense counsel remarked on the usefulness of such questionnaires, stating, "if you have a questionnaire, you are going to get far more information from the jurors than orally because people don't like to respond orally in front of a group . . . ." (3RT 269.) Indeed, a questionnaire effectively obviates the need for extensive questioning. (See *People v. Bell* (2007) 40 Cal.4th 582, 598-599 [noting the trial court's remark that when every prospective juror has answered an extensive questionnaire, the examination could "never be [] perfunctory"].)

Moreover, during the initial phase of voir dire, the trial court extensively questioned members of the venire regarding their attitudes about the death penalty. (See 4RT 864-903.) Defense counsel and the prosecutor then posed follow-up questions based on the panelists' responses. (See 4RT 905-941-953, 956-973.) The trial court asked the venire additional follow-up questions after both parties had completed their questioning. (See 4RT 973-978.) This gave the prosecutor the opportunity to observe the panelists' responses and demeanor.

And after a number of jurors were excused for cause, defense counsel and the prosecutor asked the remaining members of the venire general follow-up questions. (See 4RT 995-1025; 5RT 1029-1064.) During this round of questioning, the prosecutor mainly focused on weightier issues such as whether the panelists thought police officers would lie on the witness stand (5RT 1040-1041), how the panelists would judge a witness's credibility (5RT 1041), the panelists' attitudes about gangs (5RT 1041-1044), whether anything would impede the panelists' ability to sit as jurors on the case and be fair (5RT 1047-1049), whether the panelists would judge testimony that is read into the record the same as live testimony (5RT 1054-1058), whether the socioeconomic status or criminal history of a victim would affect the panelists' judgment (5RT 1058-1061), whether a victim's use of drugs would affect the panelists' judgment (5RT 1059-1060), and finally, whether any of the panelists' personal or religious beliefs would prevent them from sitting in judgment on the case (5RT 1061-1064).

Appellant notes that the prosecutor addressed the members of the venire about their thoughts on whether LWOP was a more severe penalty than death. (AOB 68.) He further notes that earlier, the trial court had admonished the panelists that death was the more severe penalty, and that when the prosecutor raised the issue, he asked the panelists who still believed LWOP was the more severe punishment to raise their hands. (AOB 68.) The prosecutor stated that there were "considerably fewer" people than had earlier answered that they thought LWOP was more severe. (4RT 942.) The prosecutor then questioned three prospective jurors on this issue. (See 4RT 942-943.)

Appellant argues that "[c]onspicuously absent from this questioning was Prospective Juror No. 28," and that the prosecutor's failure to question Prospective Juror No. 28 after the trial court had admonished the panel "was simply pretext to discriminate." (AOB 68.) What appellant fails to

recognize, however, is that, with limited time for questioning, the prosecutor could not ask *every* prospective juror who raised his or her hand in response to his question. Additionally, the prosecutor here may well have concluded that Prospective Juror No. 28's negative characteristics outweighed his positive responses and that it was unnecessary to voir dire him on this point.

Relying on *Snyder v. Louisiana* (2008) 552 U.S. 472, 477 [128 S.Ct. 1203, 170 L.Ed.2d 175], appellant argues that the prosecutor's failure to question Prospective Juror No. 28 about his desire not to serve on the jury because the trial would be lengthy also demonstrates pretext. (AOB 69-70.) His reliance on *Snyder* is misplaced. In *Snyder*, the United States Supreme Court reviewed a prosecutor's stated reasons for using a peremptory challenge to excuse a prospective African-American juror. The first was the prospective juror's demeanor, and the second was a worry that, because the prospective juror had stated a concern about missing classes if he served on the jury, he would, in order "'to go home quickly, come back with guilty of a lesser verdict [than first degree murder] so there wouldn't be a penalty phase.'" (*Snyder*, *supra*, 552 U.S. at p. 478.) The Court found the second stated reason to be pretextual and, hence, discriminatory "even under the highly deferential standard of review" that was applicable because it was not supported by the record. (*Id*. at p. 479.)

Unlike the prosecutor in *Snyder*, the prosecutor here did not premise his dismissal on the notion that if Prospective Juror No. 28 were rushed, he would come back with a verdict other than first degree murder in order to avoid a penalty phase. Noting that there would be "many witnesses, deliberation on the guilty phase, many witnesses on penalty" and "possibly deliberation on that phase," the prosecutor simply remarked that he did not want to have "jurors on death penalty cases that don't want to be here and don't want to take the time in particular to be here," and that "a juror in a

rush is not a juror I want to have." (5RT 1079.) Thus, the prosecutor was not worried the juror would vote not guilty to avoid a penalty phase. He just wanted jurors who had a more positive attitude about serving on this case. This is a far cry from the reason proffered by the prosecutor that the *Snyder* court found demonstrated discriminatory intent. Needless to say, unlike the instant case, the time commitment reason proffered in *Snyder* was not supported by the record.

Finally, appellant points to the prosecutor's failure to question Prospective Juror No. 28 about his level of education as evidence that the juror's excusal was based on race. (AOB 70-72.) Appellant notes that the prosecutor did not question any of the prospective jurors about their level of education "despite the fact that many jurors listed the extremely ambiguous answer of 'some' high school or college." (AOB 71.) Respondent disagrees that some answers were "extremely ambiguous." "Some college" unambiguously implies that a person attended college but did not graduate. (See AOB 71.) Keeping in mind that the prosecutor had a limited amount of time to question the panel, it is not surprising that he chose not to question any prospective jurors about their relatively unequivocal responses regarding their level of education.[29]

In sum, although the prosecutor did not question Prospective Juror No. 28 regarding his belief that LWOP was a more severe punishment than death, his level of education, and his statement that he did not want to serve on the jury because the trial would last too long, any lack of questioning was not indicative of a pretextual motive for excusing this juror, especially in light of the fact that the prospective jurors completed lengthy

[29] Respondent will address appellant's comparative analysis of the jurors' responses about their level of education (AOB 70-72) in more detail in Argument I.D.3.b.

questionnaires prior to voir dire, and the prosecutor had ample time to observe the responses and the demeanor of the panelists. (*People v. Clark*, *supra*, 52 Cal.4th at pp. 906-907; *People v. Taylor*, *supra*, 48 Cal.4th at pp. 615-616.)

b. The prosecutor's negative rating of Prospective Juror No. 28 did not evidence a discriminatory intent

Next, appellant argues that the prosecutor's "inexplicably extremely negative" rating of Prospective Juror No. 28 is additional evidence of discrimination. (AOB 72-73.) As will be discussed below in Argument I.D.3, a comparative analysis demonstrates no discriminatory intent.

3. Comparative juror analysis evidence does not demonstrate that the prosecutor acted with discriminatory intent

Finally, appellant argues that comparative juror analysis shows that Prospective Juror No. 28's challenge was race-based. (AOB 73-81.)[30] Of the twelve seated jurors, four were African American, three were Hispanic, three were White, and two were Asian. (See 4CT 729, 741, 753, 765, 777, 789, 801, 813, 825, 837, 849, 861.) Thus, not only was three-quarters of the jury made up of minorities, but there were more African-American

[30] Respondent notes that appellant uses prospective jurors who were not seated in his comparative analysis. As the high court has explained, however, a comparative analysis is conducted by comparing those prospective jurors of a particular race stricken by a peremptory challenge to those jurors of a different race who were "permitted to serve." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241; see also *Kesser v. Cambra*, *supra*, 465 F.3d at p. 356.) In order for comparative analysis to have any relevance whatsoever, the individuals being compared to the stricken jurors must have been "accepted" by the prosecutor to serve in the jury. Where a prosecutor has no ultimate opportunity to strike a particular prospective juror, the characteristics of that prospective juror are irrelevant to the comparative analysis inquiry.

members than *any* other race, including Whites. As will be discussed in more depth below, comparative juror analysis does not assist appellant's *Batson*/*Wheeler* claim, especially in light of the racially-diverse jury panel accepted by the prosecutor.

"[E]vidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*People v. Lenix, supra,* 44 Cal.4th at p. 622; see also *People v. Cruz* (2008) 44 Cal.4th 636, 658.) Even then, when no comparative analysis was made in the trial court, appellate review is necessarily circumscribed. (*Lenix*, *supra*, 44 Cal.4th at pp. 622, 624.) "The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment." (*Id*. at p. 624.) "However, '[w]hen asked to engage in comparative juror analysis for the first time on appeal, a reviewing court need not, indeed, must not turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors.'" (*People v. Chism* (2014) 58 Cal.4th 1266, 1391, quoting *People v. Jones* (2011) 51 Cal.4th 346, 365-366.) "This is so because a party legitimately may challenge one prospective juror but not another to whom the same particular concern applies." (*People v. Chism*, *supra*, 58 Cal.4th at p. 1391.)

Although comparative analysis is one form of relevant circumstantial evidence, it is "'not necessarily dispositive [] on the issue of intentional discrimination.'" (*People v. Cruz, supra*, 44 Cal.4th at p. 658, quoting *People v. Lenix, supra,* 44 Cal.4th at p. 622.) The reviewing court must still be mindful of the inherent limitations of conducting comparative juror analysis "on a cold appellate record." (*People v. Lenix, supra,* 44 Cal.4th at p. 622, citing *Snyder v. Louisiana*, *supra*, 552 U.S. at p. 483.) Although a

written transcript may reflect that two or more prospective jurors gave similar answers to the same question, "it cannot convey the different ways in which those answers were given." (*Id*. at p. 623.) Likewise, while two panelists might give a similar answer on a given point, "the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 624; see also *People v. Chism*, *supra*, 58 Cal.4th at p. 1319.)

Preliminarily, respondent notes that throughout his argument on this issue, appellant asserts the prosecutor's "main concern" in dismissing Prospective Juror No. 28 was the juror's response that LWOP was a more severe punishment than death. Appellant further argues that because this "main concern" fails comparative juror analysis under *Snyder v. Louisiana*, *supra*, 552 U.S. at page 485, "that is the end of the matter" and no further comparative analysis on other reasons proffered by the prosecutor is necessary. (AOB 43, 73-76.) Appellant, however, mischaracterizes the facts and the holding in *Snyder*.

In the previously-discussed *Snyder* case, the United States Supreme Court reversed a murder conviction and death sentence because the Court found the prosecutor had exercised a racially motivated peremptory challenge. (*Snyder v. Louisiana*, *supra*, 552 U.S. 472.) The prosecutor used five of his 12 peremptory challenges to eliminate *all* African-American jurors from the panel of 36 prospective jurors. (*Id*. at p. 476.) The prosecutor gave two reasons for excusing one African-American prospective juror, Mr. Brooks, a college senior who was fulfilling his student teaching obligation: (1) the prosecutor's "main reason" was Brooks's nervousness throughout voir dire, and (2) his "main concern" was

that Brooks's time constraints might cause him to vote for a lesser charge to avoid a penalty phase. (*Id*. at p. 478.)

In a third-stage review of the prosecutor's reasons for challenging Brooks, the Court held the trial court's failure to state whether it shared the prosecutor's perception about Brooks's demeanor made it impossible to review Brooks's nervousness as a proposed justification. (*Id*. at p. 479.) As to the alleged time-constraint justification, the Court found it failed because Brooks's dean had informed the trial court it would not be problematic if Brooks missed up to a week of student-teaching, and Brooks did not subsequently express any further concern about serving on the jury. (*Id.* at pp. 481-483.) Notably, the Court acknowledged the prosecutor had described *both* of his proffered explanations as "main concern[s]." (*Id.* at p. 485.) The Court analyzed only the prosecutor's second reason because, with respect to the prosecutor's first reason, the record "[did] not show that the trial judge actually made a determination regarding Mr. Brooks' demeanor" (*id*. at p. 479). Thus, the Court's decision not to analyze the first proffered reason was not, as appellant contends, because the "main" justification failed comparative analysis. Hence, *Snyder* (or any other precedent) does not support appellant's suggestion that no further comparative analysis is necessary when the "main reason" for exercising a peremptory challenge fails such analysis.

a. LWOP more severe than death

Contrary to appellant's position (AOB 74-76), comparative juror analysis fails to show that the prosecutor's reliance on Prospective Juror No. 28's response that LWOP was more severe than death was pretextual. As previously discussed, during voir dire the prosecutor asked how many members of the venire still thought LWOP was more severe than death. After a show of hands, the prosecutor remarked, "Considerably fewer than I know filled out the questionnaires." (4RT 942.) With the exception of

Prospective Juror Nos. 7, 49, and 51, the record does not indicate which jurors raised their hands in response to the prosecutor's question. The prosecutor questioned Prospective Juror Nos. 7, 49, and 51, each of whom indicated that he or she still believed LWOP was the more severe punishment. (See 4RT 942-943.) Later, the prosecutor struck Prospective Juror No. 7, an African-American female, and Prospective Juror No. 49, a White female.

Of the seated jurors, only two (Juror Nos. 4 and 8) responded on the questionnaire that LWOP was more severe than death. (See 4CT 770, 818.) Six seated jurors (Juror Nos. 6, 7, 9, 10, 11, 12) indicated that death was the more severe punishment (4CT 794, 806, 830, 842, 854, 866); two jurors (Juror Nos. 1 and 3) responded that the punishments were the same (4CT 734, 758); Juror No. 2 answered that he had "[n]o opinion without context" (4CT 746); and Juror No. 5 stated he did not know (4CT 782). Thus, just based on their questionnaire responses, less than 20 percent of the seated jurors thought LWOP was the more severe punishment, while *at least* 50 percent indicated that death was more severe. Of the six jurors seated as alternates, two jurors thought death was the more severe punishment (Alt. Juror Nos. 3 & 6) (4CT 902, 938), three thought LWOP was more severe (Alt. Juror Nos. 2, 4, 5) (4CT 890, 914, 926), and one stated that she felt they were both "severe" (Alt. Juror No. 1) (4CT 878).

As previously noted, during voir dire, the prosecutor asked how many people on the panel still thought LWOP was more severe than death. He remarked that fewer people had raised their hands in response to his question than had earlier indicated on their questionnaires that LWOP was more severe; but with the exception of Prospective Juror Nos. 7, 49, and 51, no specific jurors were identified as having raised their hands. (See 4RT 942.) Thus, the appellate record is silent as to whether Juror Nos. 4 and 8 raised their hands during voir dire and thus affirmed their written responses.

Because this Court must find error based on the four corners of the appellate record, and because appellant has the burden on appeal to show error, this Court should not assume or speculate that Juror Nos. 4 and 8 raised their hands and that this assumed fact supported appellant's claim. (*People v. Waidla* (2000) 22 Cal.4th 690, 743; see also *In re Carpenter* (1995) 9 Cal.4th 634, 646.)

In any event, as the comparative analysis below reveals, and even assuming arguendo that Juror Nos. 4 and 8 did not change their opinions during voir dire, the prosecutor's reason for exercising a peremptory challenge to remove Prospective Juror No. 28 based on his views on the severity of LWOP was not pretextual.

(1) Juror No. 4

Juror No. 4 was a 30-year-old Hispanic male who worked as an office services coordinator at Waters Kraus. He had worked there for four months. He was married and had two young children. He had attended "some college courses," but did not have any degrees. He had served on a criminal jury that reached a verdict, and had also been on a hung jury where he was in the majority. No one close to him had ever been the victim of a crime. (See 4CT 765-766.) Juror No. 4's uncle was employed as a sheriff. Neither Juror No. 4 nor anyone close to him had ever been arrested or charged with a crime. Juror No. 4 was not a religious person, and religion was "not really important" in his life. (4CT 767-768.) Juror No. 4 indicated in his questionnaire that he thought LWOP was a more severe punishment than death. (4CT 770.) During voir dire, however, when the trial court admonished Juror No. 4 that he could not consider that, he responded, "Yeah." (4RT 877.) Juror No. 4 stated in his questionnaire that he wanted to serve on the jury because he though it would be an "interesting" case and that he wanted to hear "all the factors and come to a conclusion on the case." (4CT 772.)

Juror No. 4 can be distinguished from Prospective Juror No. 28 in a number of ways. First, Juror No. 4 had a higher level of education than Prospective Juror No. 28 because Juror No. 4 had attended some college courses (4CT 765), while Prospective Juror No. 28 had only 12 years of education (5CT 1209). Second, although Juror No. 4 initially indicated that he believed LWOP was more severe than death (4CT 770), during voir dire he was rehabilitated by the trial court (see 8RT 877). Third, unlike Prospective Juror No. 28, Juror No. 4 expressed a desire to serve on the jury. (See 4CT 772.) Fourth, Juror No. 4 indicated he was not a religious person and that religion was "not really important" his life. (4CT 768.) On the other hand, Prospective Juror No. 28 indicated that he was a religious person. (5CT 1212.) The prosecutor may have reasonably found that it was more prudent to have jurors who were not religious in order to avoid any religious or moral issues with imposing the death penalty.

Fifth, Prospective Juror No. 28's nephew had been arrested or charged with a crime (5CT 1212), but neither Juror No. 4 nor anyone close to him had ever been arrested or charged with a crime (4CT 768). Negative encounters with the criminal justice system, experienced either by the prospective juror personally or by a relative or close friend, can make the juror unsympathetic to the prosecution and thus properly subject to peremptory challenge. (See *People v. Gray* (2005) 37 Cal.4th 168, 192 ["someone close" to juror arrested and sent to jail for auto theft]; *People v. Panah* (2005) 35 Cal.4th 395, 441-442 [arrest of juror or relative]; *People v. Farnam* (2002) 28 Cal.4th 107, 138 [nephew incarcerated].) Thus, the prosecutor may have reasonably believed that Prospective Juror No. 4 would be more favorable to the prosecution than Prospective Juror No. 28. Finally, Juror No. 4 had an uncle who was employed as a sheriff (4CT 767), whereas Prospective Juror No. 28 indicated he did not know anyone in law enforcement (5CT 1211). The prosecutor could have reasonably

chosen not to strike Juror No. 4, at least in part, because of his ties to law enforcement. (See *People v. Chism*, *supra*, 58 Cal.4th at p. 1321; *People v. Gray*, *supra*, 37 Cal.4th at pp. 190-191.)

For the foregoing reasons, Juror No. 4 was not similar enough to Prospective Juror No. 28 to warrant any finding of racial discrimination. In fact, this juror was distinguishable from Prospective Juror No. 28 as to the other two reasons articulated by the prosecutor for the peremptory challenge.

(2) Juror No. 8

Juror No. 8 was a 50-year-old African-American male who was a utility worker. He had been working at the Los Angeles Department of Water and Power for 20 years. He was married and had no children. Juror No. 8 had a twelfth grade education and had attended "trade school." (4CT 813.) He had served in the military as an "E-4." Juror No. 8 had served on a criminal jury that reached a verdict, and his brother worked in a jail. (4CT 814-815.) Neither Juror No. 8 nor anyone close to him had ever been arrested or charged with a crime. Juror No. 8 indicated that he was not a religious person and that religion was "not very" important in his life. (4CT 816.) He indicated that he did not want to serve on the jury because of possible conflicting appointments. (4CT 820.) During voir dire, however, Juror No. 8 explained that he had a friend who had recently passed away, and he was "worried" about going to the service. When asked whether he was still concerned about it, Juror No. 8 answered that he was not. (4RT 950-951.)

Juror No. 8 can be distinguished from Prospective Juror No. 28 for many of the same reasons as Juror No. 4. Having attended school through the twelfth grade and trade school, Juror No. 8 had more formal education than Prospective Juror No. 28. Juror No. 8's brother worked in a jail, but Prospective Juror No. 28 did not know anyone in law enforcement. (See

4CT 815; 5CT 1211.) Unlike Prospective Juror No. 28, Juror No. 8 was not a religious person, and religion was "not very" important in his life. (4CT 816.) Although Juror No. 8 had indicated he did not want to serve on the jury because he may have conflicting appointments (4CT 820), on voir dire he clarified that he was no longer concerned about any such issues (see 4RT 950-951). Prospective Juror No. 28, on the other hand, indicated he did not want to serve on the jury. (5CT 1216.) For all these reasons, the prosecutor may have found Juror No. 8 to be a better qualified juror than Prospective Juror No. 28. Certainly, race was not the distinguishing factor between the two jurors, as they were both African American.

(3) Alt. Juror No. 2

Alternate Juror No. 2 was a married 48-year-old White male. He had three children ranging in age from 8 to 18 years old. Alternate Juror No. 2 worked as a café manager for the Los Angeles Unified School District. He had an AA degree in hotel and restaurant management. (4CT 885.) Neither Alternate Juror No. 2 nor anyone close to him had any law enforcement contacts, nor had he or anyone close to him ever been arrested or charged with a crime. (4CT 887-888.) Alternate Juror No. 2 described himself as a religious person and stated that religion was "very" important in his life. (4CT 888.) He wanted to serve on the jury because "[i]t's important and my civil [*sic*] duty." (4CT 892.)

In comparison to Prospective Juror No. 28, Alternate Juror No. 2 was a more desirable juror for the prosecution. Alternate Juror No. 2 had attained a higher level of education (AA degree) than Prospective Juror No. 28 (4CT 885), and unlike Prospective Juror No. 28, Alternate Juror No. 2 stated that he wanted to serve on the jury and that he felt it was an important civic duty (4CT 892). Notably, these were two of the factors that the prosecutor stated he was looking for in prospective jurors. Moreover, Alternate Juror No. 2 did not have a family member who had been arrested

or charged with a crime (4CT 888), whereas Prospective Juror No. 28 had a nephew who had been arrested or charged with a crime. Accordingly, the prosecutor may have reasonably believed that Alternate Juror No. 2 was a more favorable juror for the prosecution than Prospective Juror No. 28.

(4) Alt. Juror No. 4

Alternate Juror No. 4 was a married 53-year-old Hispanic woman. She worked as a judicial assistant for a civil judge in the Los Angeles County Superior Court for 34 years. Alternate Juror No. 4 graduated from high school and attended one year of junior college. (4CT 909, 911.) Neither she nor anyone close to her had any contact with law enforcement. (4CT 911.) Alternate Juror No. 4 had a friend who had been convicted of spousal rape. She had not seen the friend in over 15 years. Alternate Juror No. 4 indicated she was a religious person and that religion was "somewhat important" in her life. (4CT 912.) Alternate Juror No. 4 stated that she wanted to serve on the jury because she wanted to do her "duty" and "it is a right." (4CT 916.)

Alternate Juror No. 4 was a more desirable juror than Prospective Juror No. 28 because, similar to Alternate Juror No. 2, she satisfied two of the qualifications that the prosecution was seeking in jurors. That is to say, she had attended some college (4CT 909), and she wanted to serve on the jury, noting it was her "duty" and it was a right (4CT 916). In addition, Alternate Juror No. 4 had worked for a civil judge for more than 30 years. Thus, the prosecutor may have reasonably believed that Alternate Juror No. 4's work experience and familiarity with the court system would be an asset.

(5) Alt. Juror No. 5

Alternate Juror No. 5 was a 32-year-old Hispanic female. She worked for the Los Angeles County Sheriff's Department as a fingerprint

identification specialist. Alternate Juror No. 5 had three children ranging in age from 8 to 13 years old. She had attended "some college." (4CT 921.) Alternate Juror No. 5 had a brother who was serving time in prison for stealing cars. She was not a religious person. (4CT 924.) Alternate Juror No. 5 wanted to serve on the jury because she was a "fair person." (4CT 928.)

Just like the previous two alternate jurors, Alternate Juror No. 5 had two of the qualities that the prosecutor was looking for in a juror—a higher level of education (4CT 921), and a desire to serve on the jury (4CT 928). Notably, Alternate Juror No. 5 had strong ties to law enforcement, given her occupation as a fingerprint specialist for the Los Angeles County Sheriff's Department. (4CT 921, 923.) Prospective Juror No. 28 lacked all of these qualities. In addition, he indicated he was a religious person (5CT 1212), whereas Alternate Juror No. 5 indicated she was not religious (4CT 924). For all of these reasons, the prosecutor could have reasonably determined that Alternate Juror No. 5 was a more desirable juror than Prospective Juror No. 28.

b. Level of education

A comparative analysis of the seated jurors' level of education to that of Prospective Juror No. 28 also fails to show that the prosecutor's reason for excusing Prospective Juror No. 28 was pretextual. Of the seated jurors, Juror Nos. 3, 5, 7, and 10 were the only jurors who had attained the same (or lower) level of education as Prospective Juror No. 28. (See 4CT 753, 777, 801, 837.)[31] Juror Nos. 1, 2, and 9 all had master's degrees (4CT 729,

[31] Seated Juror No. 3 was originally Prospective Juror No. 46. (See 4CT 752.) Because the prosecutor exercised a peremptory challenge to excuse this juror, respondent will not include him in the comparative analysis.

741, 825), Juror No. 11 was working on her MBA (4CT 849), and Juror No. 6 had a bachelor's degree (4CT 789). Juror No. 4 had attended "some college courses" (4CT 765), Juror No. 8 had completed school through the twelfth grade and had attended a trade school (4CT 813), and Juror No. 12 had "14" years of education, including a legal secretary certificate (4CT 861).[32]

With respect to the Alternate Juror Nos. 2, 3, 4, and 5, appellant argues that they had "marginally more advanced education than Prospective Juror No. 28." (AOB 78-79.) The prosecutor indicated he was looking for jurors who had "as much formal education as possible." (5RT 1079.) All of the aforementioned alternate jurors had, at a minimum, "some" college (Alt. Juror Nos. 3 and 5) (4CT 897, 921), and at most, an AA degree (Alt. Juror No. 2) (4CT 885). Thus, contrary to appellant's characterization, these alternate jurors had attained a higher level of education than Prospective Juror No. 28.

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[32] Appellant notes that the prosecutor did not state that one of the reasons he excused Prospective Juror No. 46 was because of his level of education (high school). Appellant argues the fact that the prosecutor "listed this factor for one juror, but not another, suggests his avowed concern about education was not a true selection criterion." (AOB 77.) Appellant fails to note, however, that the prosecutor was clearly most concerned about the fact that Prospective Juror No. 46 listened to a "very very liberal" radio station, that the juror thought the death penalty and LWOP were equal, and that the juror thought the death penalty was not a deterrent. (5RT 1081-1083.) These weighty reasons, in and of themselves, were justification enough to challenge the juror. That is to say, Prospective Juror No. 46's level of education was not as critical a factor for dismissing the juror as were the more troublesome reasons articulated by the prosecutor. In any event, after the trial court found a *Batson* violation, the prosecutor remarked that "throughout [Prospective Juror No. 46's] questionnaire *there are a number of race-neutral reasons*." (5RT 1085-1086, emphasis added.) Thus, the prosecutor also may have dismissed Prospective Juror No. 46 because he had only attained a high school-level education.

(1) Juror No. 5

Juror No. 5 was a 30-year-old Hispanic male. He worked as a manager at CVS.[33] He was married, and his spouse worked at the court.[34] Juror No. 5 had two young children. (4CT 777.) He had obtained an 11th grade level education. Juror No. 5 had a family member who had been arrested or charged with a crime. He indicated he was not a religious person, and that he "sometimes" attended church. (4CT 780.) In response to a question of how important religion was in his life, Juror No. 5 responded, "Yes." (4RT 780.)

In his questionnaire, Juror No. 5 answered "don't know" to most of the death penalty questions. (See 4CT 782-783.) The prosecutor asked him why he had answered in that manner, and Juror No. 5 responded that he had never sat on a jury "of this case of this matter here." (4RT 964.) The prosecutor asked Juror No. 5 whether he would still give the same answers, after having heard some of the discussions about the death penalty and the trial court's instructions, and Juror No. 5 responded, "No." (4RT 964.) However, Juror No. 5 never stated LWOP was a more severe punishment than death.

Juror No. 5 indicated in his questionnaire that he did not want to serve on the jury for financial reasons and stated during voir dire that he thought his financial issues would impact how he viewed the evidence in the case. (4CT 784; 4RT 964.) The prosecutor asked Juror No. 5, "If the Court tells you [that] you have to make a decision based only on the evidence in this case and not based upon anything that is going on in your personal life,

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[33] In response to a question about how long he had been employed at his current job, Juror No. 5 responded "12." (4CT 777.)

[34] Juror No. 5 later indicated that no one close to him worked in the court system. He circled the word "clerk" however, but crossed it out. (4CT 779.)

would you be able to do that?" Juror No. 5 answered, "I guess I have to." (4RT 964.) The prosecutor followed-up, "You have to?" and Juror No. 5 responded, "It is the law." (4RT 965.) The prosecutor asked, "Would you be able to?" and Juror No. 5 replied, "Yes." (4RT 965.)

While Juror No. 5 and Prospective Juror No. 28 had relatively similar levels of education (11th and 12th grade, respectively), Juror No. 5 appeared more willing to serve on the jury than Prospective Juror No. 28. Juror No. 5 initially indicated he did not want to serve on the jury due to his work and financial obligations. The prosecutor, however, rehabilitated Juror No. 5 during voir dire. (see 4RT 964-965.) In addition, Juror No. 5 did not consider LWOP a more severe punishment than death. Thus, Juror No. 5 was a more desirable juror for the prosecution than Prospective Juror No. 28.

Moreover, this Court has recognized

> that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge; that the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box; and that the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the peremptory challenge and the number of challenges remaining with the other side."

(*People v. Chism*, *supra*, 58 Cal.4th at p. 1318, quoting *People v. Johnson*, *supra*, 47 Cal.3d at p. 1220, internal quotation marks omitted.) "Near the end of the voir dire process a lawyer will naturally be more cautious about 'spending' his increasingly precious peremptory challenges." (*People v. Johnson*(1989) 47 Cal.3d 1194, 1220.)

Here, Juror No. 5 was seated after the prosecutor had exercised his tenth peremptory challenge. (See 5RT 1074.) Thus, even if Juror No. 5 arguably shared similar characteristics to Prospective Juror No. 28 (who

was the eighth peremptory challenge), the prosecutor may have been "cautious" about using his "increasingly precious peremptory challenges" to excuse Juror No. 5 at this stage in voir dire. (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1220.) As this Court noted, "It should be apparent, therefore, that the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar." (*Id.* at p. 1221.)

(2) Juror No. 7

Juror No. 7 was a single, 49-year-old African-American male with no children. He had worked as an intermediate laundry worker for 24 years. He had completed "some" high school and indicated he was attending a community adult school and "trying to receive [his] diploma." (4CT 801.) Juror No. 7 had served as a Private First Class in the military. (4CT 802.) He had no ties to law enforcement or the court system, and neither he nor anyone close to him had ever been arrested or charged with a crime. (4CT 803-804.) Juror No. 7 believed that death was a more severe punishment than life in prison. (4CT 806.) Juror No. 7 indicated he did not want to serve on the jury, but stated, "If picked I would do the best in understanding the facts." (4CT 808.)

Even though Juror No. 7 had not achieved the same level of education as Prospective Juror No. 28, Juror No. 7 still was a more desirable juror for the prosecution than Prospective Juror No. 28 for a number of reasons. First, neither Juror No. 7 nor anyone close to him had ever been arrested or charged with a crime. (4CT 804.) On the other hand, Prospective Juror No. 28's nephew had been arrested or charged with a crime. (5CT 1212.) Second, Juror No. 7 believed that death was a more severe punishment than LWOP (4CT 806), whereas Prospective Juror No. 28 believed that LWOP was worse than death (5CT 1214). Finally, Prospective Juror No. 28

clearly did not want to serve on the jury. (5CT 1216). In contrast, although Juror No. 7 responded that he did not want to serve on the jury, his explanation for that response suggested that he was willing to serve. (4CT 808.) Accordingly, the prosecutor could have reasonably determined that Juror No. 7 was a more desirable juror than Prospective Juror No. 28. Regardless, race was not the distinguishing factor as both jurors were African American.

(3) Juror No. 10

Juror No. 10 was a 75-year-old African-American male who had worked as a traffic officer for the City of Los Angeles for 21 years. He was currently single (but had been married twice) and had three children ranging in age from 16 to 47 years old. One of his children worked as a security guard. Juror No. 10 indicated he had "12 years" of education. (4CT 837.) He had served as a Morse code operator in the military and achieved the rank of Corporal. (4CT 838.)

Juror No. 10 indicated that neither he nor anyone close to him had been employed by a law enforcement agency or worked in the court system. (4CT 839.) Juror No. 10's son had been arrested for or charged with physical abuse. Juror No. 10 indicated he was not a religious person, but also indicated that religion was "extremely" important in his life. (4CT 840.) Juror No. 10 believed that death was a more severe punishment than LWOP. (4CT 842.) Juror No. 10 expressed interest in serving on the jury because he "kn[e]w [he] could be fair to both sides." (4CT 844.)

Juror No. 10 and Prospective Juror No. 28 had the same level of education and had both served in the military. Several factors, however, may have reasonably led the prosecutor to find that Juror No. 10 was better suited to serve on the jury. Notably, as a traffic officer, Juror No. 10 had served in a law enforcement capacity (despite his response that he was not employed by law enforcement). He indicated his job responsibilities

included traffic control and recovering stolen vehicles. And one of Juror No. 10's children worked as a security guard. (4CT 837.) Thus, the prosecutor could reasonably believe that Juror No. 10 would favor the prosecution. Moreover, in contrast to Prospective Juror No. 28, Juror No. 10 believed death was more severe than LWOP. And unlike Prospective Juror No. 28, Juror No. 10 indicated that he wanted to serve on the jury. Accordingly, Juror No. 10 appeared to be a more favorable juror for the prosecution than Prospective Juror No. 28. That notwithstanding, because both jurors were African American, race was not the distinguishing factor.

c. Willingness to serve on jury

Finally, a comparative analysis of the seated jurors' willingness to serve on the jury reveals no racial bias on the part of the prosecutor for excusing Prospective Juror No. 28. As previously discussed, Prospective Juror No. 28 indicated he did not want to serve on the jury because the trial would last too long. (5CT 1216.) Seven of the seated jurors—Juror Nos. 2, 3, 4, 6, 10, 11, and 12—expressly indicated that they wanted to serve on the jury. (4CT 748, 760, 772, 796, 844, 856, 868.) Juror No. 8 initially responded he did not want to serve because of potentially conflicting appointments (4CT 820), but on voir dire he confirmed that he no longer had any conflict (4RT 950-951). Juror No. 1 indicated a willingness to serve if she could leave at 3:00 p.m. on Wednesdays and Fridays to pick up her son from school. (4CT 736.)[35] Of the remaining three jurors, Juror

[35] Juror No. 1 raised this concern during the hardship portion of voir dire. (3RT 474-475.) The trial court informed her that they would end every day at 4:00 p.m. and asked whether that would "work" for her. She responded, "Maybe." The trial court ordered her to fill out a questionnaire and to include the information about needing to pick up her son. The trial court stated, "You say you are willing to work with us and we are willing to work with you a little bit." (3RT 475.)

Nos. 5 and 9 indicated they did not want to serve based on job, family, and/or financial obligations. (See 4CT 784, 832.) As noted earlier, however, the prosecutor rehabilitated Juror No. 5 with respect to this issue. (See 4RT 964-965.) Finally, as previously discussed, although Juror No. 7 responded that he did not want to serve on the jury, his follow-up response to the question indicated otherwise. (4CT 808.)

Regardless, a comparison of Juror Nos. 1, 5, 7, and 9 to Prospective Juror No. 28 demonstrates that the four seated jurors were more desirable than Prospective Juror No. 28. Juror No. 1 had a much higher level of education (master's degree) than Prospective Juror No. 28 (4CT 729.) Unlike Prospective Juror No. 28, Juror No. 1 did not have a family member who had been arrested or charged with a crime (4CT 732), and she was not a religious person (4CT 732). Juror No. 1 also appeared more interested in serving on the jury than did Prospective Juror No. 28.

With respect to Juror Nos. 5 and 7, respondent has previously discussed the reasons why they may have been more qualified or favorable jurors for the prosecution than Prospective Juror No. 28. (See Args. I.D.3.b.(2) and I.D.3.b.(3), *ante*.)

Finally, the prosecutor could have reasonably believed Juror No. 9 was a better candidate to serve on the jury than Prospective Juror No. 28 because Juror No. 9 had a higher level of education (MS in Public Administration) (4CT 825) and also had a number of qualities—which Prospective Juror No. 28 lacked—that suggested he would look favorably on the prosecution's case. For example, Juror No. 9 worked as a deputy city manager for the City of Simi Valley and his spouse worked as a public information director for the Los Angeles Police Commission (4CT 825), he and his wife worked with police officers "on a daily basis" (4CT 827), neither he nor anyone close to him had ever been arrested or charged with a crime (4CT 828), and he was not religious (4CT 828). Certainly, these

race-neutral factors distinguished Juror No. 9 from Prospective Juror No. 28 and made him a more desirable juror for the prosecution.

4. Conclusion

As previously discussed, four of the seated jurors were African American, three were Hispanic, three were White, and two were Asian. (See 4CT 729, 741, 753, 765, 777, 789, 801, 813, 825, 837, 849, 861.) Thus, not only was three-quarters of the jury made up of minorities, but there were more African-American jurors than any other race. "'While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.'" (*People v. Ward* (2005) 36 Cal.4th 186, 203, quoting *People v. Turner*, *supra*, 8 Cal.4th at p. 168; see also *People v. Johnson*, *supra*, 61 Cal.4th at p. 760 ["Although not conclusive, the fact that the jury included a member of the group allegedly discriminated against 'is an indication of good faith in exercising peremptories.'"].]

As noted by the prosecutor below, it is also relevant that the victims and a majority of the witnesses in this case were the same race as appellant. (See 5RT 1076-1077.) Thus, the instant case "is not like the usual *Wheeler* case, where those being excused from the jury are of the same race as the defendant, a race different from that of the victim." (*People v. Ortega* (1984) 156 Cal.App.3d 63, 70-71, citing *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 262-263, *People v. Johnson* (1978) 22 Cal.3d 296, 297, and *People v. Allen* (1979) 23 Cal.3d 286, 293-294.) When the victims and/or prosecution witnesses are members of the cognizable group, this circumstance cuts against a finding of group bias because there is less motive for the prosecutor to discriminate against prospective jurors who are members of the same group. (*Hernandez v. New York* (1991) 500 U.S. 352, 369-370 [111 S.Ct. 1859, 114 L.Ed.2d 395]; *People v. Cleveland* (2004) 32

Cal.4th 704, 734; *People v. Reynoso*, *supra*, 31 Cal.4th at p. 926, fn. 7; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315.)

In sum, the prosecutor's reasons for excusing Prospective Juror No. 28 were neither contradicted by the record nor inherently improbable. (*People v. Reynoso*, *supra*, 31 Cal.4th at pp. 925-926.) For the same reasons, the trial court's finding on the credibility of the prosecutor's explanations was supported by substantial evidence and should be adopted by this Court. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 233.) The jury's racial composition and the fact that the victims and many of the witnesses were the same race as appellant further refutes appellant's claim that the prosecutor employed an impermissible group bias in challenging Prospective Juror No. 28. Accordingly, this Court should reject appellant's *Batson/Wheeler* claim.[36]

[36] Appellant filed a motion for judicial notice concurrently with his opening brief on August 6, 2015. In the motion, appellant requested that this Court take judicial notice that the prosecutor in this case was also the prosecutor in codefendant Kai Harris's case, and that the trial court in the Harris case found the prosecutor had violated *Batson*. (Motion 1-7.) On August 28, 2015, respondent filed an opposition to the motion, which is currently pending before this Court. As explained in the opposition, the evidence of the proceedings in the Harris case, as they relate to the instant alleged *Batson* violation, is irrelevant. An appellate court "reviews whether the trial court's decision [*on a Batson motion*] was correct *at the time it was made and not in light of subsequent events*." (*People v. Williams* (2006) 40 Cal.4th 287, 310, 311, emphasis added.) Thus, any rulings made in the Harris trial have no impact on the trial court's rulings in this instant case. Logistically, the trial court here could not have taken any rulings from the Harris case into consideration because that trial occurred *after* the trial in the instant case.

II. APPELLANT FORFEITED HIS CLAIM THAT THE TRIAL COURT ERRONEOUSLY DENIED HIS SUPPRESSION MOTION; REGARDLESS, THE CLAIM IS MERITLESS

Appellant claims the trial court erred in denying his motion to suppress. He specifically contends the arresting officer had no basis for ordering him to remain in the car after he attempted to exit it because there was no evidence he was engaged in any criminal activity. (AOB 84-111.) Appellant forfeited this claim because he did not raise it below as part of his suppression motion. Nonetheless, the record establishes that the officer's order that appellant return to the car did not violate appellant's Fourth Amendment rights because it was based on concerns for officer safety and on a reasonable suspicion that appellant may have been involved in criminal activity. In any event, any error in denying the suppression motion was harmless. Accordingly, this claim should be rejected.

A. The Trial Court Denies Appellant's Suppression Motion

Appellant filed his motion to suppress on October 22, 2007. In the motion, he argued that the police lacked probable cause to detain, search, and arrest him, and he sought to suppress the Ruger semiautomatic handgun and magazine loaded with 20 live rounds that the police had recovered from him. (See 2CT 397-410.) The motion did not specifically argue, as appellant does now, that the officers violated his Fourth Amendment rights when they ordered him to get back into the car. Notably, appellant did not cite in the motion to any of the pertinent cases that he now relies on in the opening brief, including *People v. Gonzalez* (1992) 7 Cal.App.4th 381, *People v. Castellon* (1999) 76 Cal.App.4th 1369, and *People v. Vibanco* (2007) 151 Cal.App.4th 1. (See 2CT 397-403.)

On November 30, 2007, the prosecutor filed an opposition to the suppression motion. The prosecutor argued that the traffic stop was lawful

and that the subsequent search of appellant was legally justified for officer safety. (2CT 414.)

The hearing on the motion was held on January 17, 2008. Deputy Marcus Turner testified that he and his partner, Deputy Eric Sorenson, were working patrol out of the Century Sheriff's Station on April 11, 2004, around 10:00 p.m. They were in the area of 120th Street and Central Avenue when they saw a Blue Toyota without a rear license plate. There was a passenger inside the Toyota, and his head was moving back and forth as though he was having a conversation with the driver. Deputy Turner activated the lights on the patrol car. (3RT 237-238, 241, 254.) The Toyota did not immediately pull over. It was not until Deputy Turner activated the siren that the Toyota finally stopped. (3RT 241.)

After the car had pulled over, the passenger door opened, and appellant stepped out and "made a motion and tried to run out of the vehicle." (3RT 238.) Deputy Turner explained that appellant "jumped out as if he was going to start running." (3RT 243.) Deputy Sorenson told appellant to get back into the car, and appellant complied. (3RT 238, 244-245.) Deputies Turner and Sorenson then approached the Toyota, and Deputy Turner ordered the driver to get out. The driver appeared "nervous." Deputy Turner detained the driver because he did not have a driver's license. (3RT 239, 245.)

As Deputy Turner was removing appellant from the car, he noticed a bulge in appellant's right pants pocket. Inside the pocket was a loaded Ruger semiautomatic handgun with a loaded magazine, and a separate loaded magazine. (20RT 3735-3737.) Deputy Turner took the gun from appellant, handed it to Deputy Sorenson, and then handcuffed appellant. (3RT 242-243.)

Defense counsel argued:

> Your Honor, this was a fishing expedition from the very beginning. He had no right to reach in and pull [appellant] out of the car. Many times I have been in the car that has been stopped for a traffic violation when I was in the passenger seat and gotten out of the car.
>
> His testimony about he was attempting to run is contradicted by his own testimony that he just stood there, that he never took a step.
>
> This whole situation seems concocted to me and I would ask the Court not to find credibility on the part of the officer and grant the motion.

(3RT 259-260.) Defense counsel never argued that appellant was improperly detained when the deputies ordered him to return to the Toyota.

The prosecutor responded, "[L]ooking at the testimony on [] whole, the reason, according to what the deputy said, the reason why [appellant] never got any further than the door well, because he was ordered not to move and get back in the car." (3RT 260.) The prosecutor continued, "He initially got out of the car without anyone asking him to do so. That left the officer with the impression that he was attempting to flee. That is why he was ordered to return to the inside of the compartment of the car." (3RT 260.) The prosecutor further argued that the stop and search were based on appropriate probable cause. (3RT 260.)

The trial court denied the motion, finding that Deputy Turner's testimony was credible and that the deputy "had every right to do what he did under the circumstances." (3RT 261.)

B. Appellant Forfeited the Instant Claim

Appellant never argued in his suppression motion or at the hearing on the motion that the deputies violated his Fourth Amendment rights when they ordered him to return to the car. Indeed, as previously noted, appellant did not rely on any of the cases cited in his opening brief—*Gonzalez*,

Castellon, or *Vibanco*—to argue that he was illegally detained. Under these circumstances, appellant has forfeited the claim. (See *People v. Williams* (1999) 20 Cal.4th 119, 136 [a defendant moving to suppress evidence due to warrantless search, after prosecution presents some justification for search or seizure, must give prosecution sufficient notice of claimed inadequacy of justification to preserve that claim on appeal]; see also *People v. Redd* (2010) 48 Cal.4th 691, 717; *People v. Auer* (1991) 1 Cal.App.4th 1664, 1670 ["Since the People were not placed on notice of the necessity to present evidence refuting the theory [of an illegal search] defendant seeks to raise here, that theory may not be raised for the first time on appeal."].)

Despite his failure to raise the instant claim below, appellant argues that at the hearing on the suppression motion, the prosecution failed to produce any evidence that demonstrated the deputies ordered him back into the car out of concern for their safety. Thus, he argues, any argument by the People regarding officer safety is forfeited on appeal. (AOB 92-93.) Appellant ignores, however, that his failure to raise the issue below deprived the prosecution of the opportunity to present additional evidence that would have supported the detention. As previously discussed, appellant never argued in his motion or at the hearing that, pursuant to *Gonzalez*, he was illegally detained when he was ordered back into the car. The prosecutor certainly could not have been expected to defend against an unknown theory of illegal detention or seizure. (See *People v. Williams*, *supra*, 20 Cal.4th at p. 136; see also *People v. Redd*, *supra*, 48 Cal.4th at p. 717; *People v. Auer*, *supra*, 1 Cal.App.4th at p. 1670.) Thus, while appellant points to a lack of testimony from Deputy Turner about how the encounter presented an "inherent threat" (AOB 94-95), any lack of such evidence is the result of appellant's failure to raise the issue below.

Regardless, contrary to appellant's position (AOB 92-93), respondent did not forfeit the argument because the prosecutor argued in his written opposition that appellant's search was legally justified for officer safety. (See 4CT 414.) Additionally, the record shows that, given the specific circumstances of the traffic stop, the deputies necessarily had concerns about their safety when appellant attempted to leave the scene.

Even if appellant has not forfeited the instant claim, it is meritless because, as will be discussed below, the deputies did not illegally seize or detain him when they ordered him to stay in the car during the traffic stop. Accordingly, the trial court properly denied appellant's motion to suppress.

C. The Fourth Amendment and the Standard of Review for Suppression Rulings

The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures—including brief investigatory stops—by law enforcement personnel. (U.S. Const., 4th Amend.; *People v. Souza* (1994) 9 Cal.4th 224, 229.) A detention, however, will not violate the Fourth Amendment "when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza*, *supra*, 9 Cal.4th at p. 231; see also *Terry v. Ohio* (1968) 392 U.S. 1, 21-22 [88 S.Ct. 1868, 20 L.Ed.2d 889]; *In re Tony C.* (1978) 21 Cal.3d 888, 893.) When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment, and any passenger is seized as well. (*Brendlin v. California* (2007) 551 U.S. 249, 251 [127 S.Ct. 2400, 168 L.Ed.2d 132].) "An officer making a traffic stop may immediately take the reasonable steps he or she deems necessary to secure the officer's safety, including ordering a passenger to remain in or to get out of the vehicle, without

violating the Fourth Amendment." (*People v. Castellon*, *supra*, 76 Cal.App.4th at p. 1376, fn. 2.)

> A defendant may move to suppress evidence on the ground that [t]he search or seizure without a warrant was unreasonable. (§ 1538.5, subd. (a)(1)(A).) A warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. The standard of appellate review of a trial court's ruling on a motion to suppress is well established. [A reviewing court] defers to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, [a reviewing court] exercise[s] [its] independent judgment.

(*People v. Redd*, *supra*, 48 Cal.4th at p. 719, internal quotation marks, citations, and fn. omitted.)

A reviewing court "view[s] the evidence in a light most favorable to the order denying the motion to suppress, and [a]ny conflicts in the evidence are resolved in favor of the superior court ruling. Moreover, the reviewing court must accept the trial court's resolution of disputed facts and its assessment of credibility." (*People v. Tully* (2012) 54 Cal.4th 952, 979, internal quotation marks and citations omitted.) "[I]t is settled that the trial court's [suppression] ruling must be upheld if there is any basis in the record to sustain it." (*People v. Marquez* (1992) 1 Cal.4th 553, 578.)

D. Precedent from the High Court and Lower Courts Allows a Police Officer to Order a Passenger to Return or Remain in the Car during a Traffic Stop

It is well established that following a lawful traffic stop, a police officer may, as a matter of course, order the driver out of the vehicle pending completion of the stop without violating the protections of the Fourth Amendment. (*Pennsylvania v. Mimms* (1997) 434 U.S. 106, 111 [98 S.Ct. 330, 54 L.Ed.2d 331].) In *Maryland v. Wilson* (1997) 519 U.S. 408, 410-415 [117 S.Ct. 882, 137 L.Ed.2d 41], the United States Supreme

Court extended this per se rule of *Mimms* to the passengers of legally stopped vehicles. In *Wilson*, a patrol officer who was alone stopped a car with no license tags. He observed the passengers in the car looking back at him several times and ducking below sight and reappearing. (*Id.* at p. 410.) After the car pulled over, the defendant, a passenger in the car, was sweating and "appeared extremely nervous." The officer ordered him out of the car. When the defendant exited, a quantity of cocaine fell to the ground. (*Id*. at p. 411.) The trial court granted the defendant's motion to suppress the evidence after finding the officer's order to the passenger constituted an unreasonable seizure under the Fourth Amendment, and the court of appeal agreed. (*Id.* at p. 411.)

Balancing the public interest with a citizen's right to personal liberty, the high court reversed. (*Wilson*, *supra*, 519 U.S. at pp. 413-415.) With respect to the public interest, the Court noted that "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger" and that "traffic stops may be dangerous encounters." (*Id*. at p. 413.) The Court explained that "the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer." (*Ibid.*, fn. omitted.)

Regarding the personal liberty side of the balance, the *Wilson* court recognized that "the case for the passengers is in one sense stronger than that for the driver." (*Wilson*, *supra*, 519 U.S. at pp. 413.) The Court explained, however, that "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle." The Court continued:

> It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

(*Id*. at p. 414.) Emphasizing that "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car" (*ibid.*), the *Wilson* court concluded that the same considerations of safety that are present when drivers are ordered to get out of a stopped vehicle outweigh the minimal intrusion on any passenger who is ordered out of a car that has been legally stopped for a traffic infraction (*id*. at pp. 413-415).

Three California cases and one Ninth Circuit case have directly addressed the question of when it may be justified for a police officer to temporarily detain a passenger involved in a traffic stop by ordering him or her to remain in or return to a vehicle. (See *People v. Vibanco*, *supra*, 151 Cal.App.4th 1; *People v. Castellon*, *supra*, 76 Cal.App.4th 1369; *People v. Gonzalez*, *supra*, 7 Cal.App.4th 381; *United States v. Williams* (9th Cir. 2005) 419 F.3d 1029.) In *Gonzalez*, which was decided five years before the Supreme Court decided *Wilson*, two police officers observed a car quickly change lanes without signaling. After the officers stopped the car, the defendant, a passenger, started to get out, and an officer ordered him to get back into the car. (*People v. Gonzalez*, *supra*, 7 Cal.App.4th at p. 383.) The officer testified that he had no reason to suspect that the defendant was involved in any illegal activity, but that he ordered him to get back into the vehicle "'for the safety of both my partner and I.'" (*Ibid*.) The officer observed that the defendant appeared to be under the influence of heroin and arrested him. (*Ibid*.)

The defendant successfully argued on appeal that he was unlawfully detained when the officer ordered him back into the car. (*People v. Gonzalez*, *supra*, 7 Cal.App.4th at p. 386.) The Court of Appeal justified its holding stating, "Inchoate concerns for officer safety may justify certain minimal intrusions. However, a reasonable, articulable suspicion of criminal activity is needed to justify a detention. [Citations.] Being a

passenger in a car stopped for a quick, unsignaled lane change is not sufficiently suspicious behavior to meet this standard." (*Ibid*.)

In *Castellon*, *supra*, 76 Cal.App.4th 1369, the defendant was a passenger in a car that was stopped for displaying expired license tags. (*Id*. at p. 1371.) The officer was alone, and the defendant started to get out of the car. The officer recognized him to be a member of a gang with whom he had been in contact since 1990. (*Id*. at p. 1372.) The officer told the defendant not to get out of the car. The defendant consented to a search, which disclosed dollar bills that tested positive for heroin residue. (*Ibid.*) The trial court denied the defendant's suppression motion. (*Id*. at pp. 1372-1373.)

On appeal, the defendant in *Castellon* argued that the detention, which occurred when the officer ordered him to remain in the car, was unlawful because there was no evidence any crime had been committed or that the defendant was connected to any criminal activity. (*Id*. at 1373.) Relying on *Wilson*, the Court of Appeal rejected the argument, noting that "whether the passenger is ordered to stay in the car or got out of the vehicle is a distinction without a difference." (*Id.* at pp. 1374-1375, citing *Wilson*, *supra*, 519 U.S. at p. 414.) The *Castellon* court continued,

> Further, the inconvenience and intrusion are certainly *less* when the passenger is simply ordered to remain seated in the car than when he or she is ordered out of the vehicle. If the minimal additional intrusion on the personal liberty of the passenger ordered out of the vehicle cannot trump the safety of the officer, then surely the slight inconvenience of ordering the passenger to remain seated can be justified by an officer's concerns.

(*People v. Castellon*, *supra*, 76 Cal.App.4th at p. 1375, emphasis in original.)

The *Castellon* court also commented on the court's ruling in *Gonzalez*: "We have some difficulty with the idea that the fear expressed by the officers in *Gonzalez* was 'inchoate.' It seems to us that police

officers who make a traffic stop and are confronted with the . . . circumstance of a passenger getting out of the car have every reason to fear for their safety. We see no need for any further development of such fear." (*People v. Castellon*, *supra*, 76 Cal.App.4th at p. 1376, fn. omitted.)

In *Williams*, an Oakland police officer stopped a car for a Vehicle Code violation. The defendant, who was sitting in the front passenger seat of the car, opened the passenger door and got out before the officer could approach the driver. The officer immediately ordered the defendant to get back into the car, and the defendant complied. After the driver told the officer that she did not have a license or identification, the officer asked her to step out of the vehicle and handcuffed her. While the officer was escorting the driver to the patrol car, the defendant threw a gun out of the passenger window. (*Williams*, *supra*, 419 F.3d at p. 1031.)

The defendant was later charged in federal court with being a felon in possession of a firearm. The district court denied the defendant's motion to suppress the recovered gun as evidence. (*Williams*, *supra*, 419 F.3d at p. 1031.) Relying on *Wilson*, the Ninth Circuit Court of Appeals affirmed, holding that the Fourth Amendment permits a police officer to order a passenger who has exited a car during a lawful traffic stop to reenter the vehicle. (*Id*. at pp. 1031-1034.)

Finally, in *Vibanco*, two officers in an unmarked car initiated a traffic stop of a Cadillac, which had a cracked windshield and no front license plate. (*People v. Vibanco*, *supra*, 151 Cal.App.4th at p. 5.) Four occupants were in the car. As the officers approached, the defendant opened the right rear passenger door and began to exit the car. Both officers ordered him to get back inside. (*Id.* at pp. 5-6.) At this point, one of the officers saw a woman seated in the backseat behind the driver reach into her waistband. (*Id*. at p. 5.) The officer ordered her to stop what she was doing and to show her hands, and she complied. One of the officers then directed all of

the occupants to exit the car and sit on the curb "'[i]n order to stabilize the situation' because there were 'too many things going on at one time'" and because he was afraid the officers were losing control of the traffic stop. (*Id*. at p. 6.) The defendant supplied one of the officers with a false identification. The defendant fled as the officer began to handcuff him. After the defendant was apprehended, the officers found an American Express card with the name scratched off in his pants pocket. (*Ibid*.)

The trial court granted the defendant's suppression motion, concluding there was "'no probable cause to stop the defendant from exiting the car and continuing on his journey.'" (*People v. Vibanco*, *supra*, 151 Cal.App.4th at p. 7.) The Court of Appeal disagreed. It found the officers were justified in stopping the car to investigate the Vehicle Code violations, and accepted the People's concession that the passengers were seized when they were first ordered to remain in the car and then when they were later ordered to exit the car. (*Id.* at pp. 8-9.) The court went on to address whether, under the circumstances, the defendant's detention was justified. Relying in part on *Wilson*, *Castellon*, and *Williams*, the *Vibanco* court found the defendant's detention lawful, noting that because there were four people inside the car, "the officers' attention could be distracted by the different movements of the various occupants of the car." (*Id*. at p. 11.) As a result, the court found that, "as a matter of course," the officers could reasonably require defendant to stay with the other people in car—either inside or outside—until the traffic stop had been completed. (*Ibid*.)

Relying on *Wilson* and *Williams*, the *Vibanco* court concluded that it was "sensibly consistent" with the public interest in protecting officers to give them the authority to control the movement of passengers during a traffic stop. The court noted that if one or more passengers were allowed to freely move about, the officers' attention would be split among the individuals. This, in turn, would enable the driver or a passenger to take

advantage of a distracted officer. Thus, the *Vibanco* court held that under the Fourth Amendment, an officer can reasonably order a passenger to reenter a car that the passenger has exited because the concern for officer safety and the officer's need to control the individuals involved in a traffic stop outweighed "the marginal intrusion on the passenger's liberty interest." (*People v. Vibanco*, *supra*, 151 Cal.App.4th at p. 12.)

The *Vibanco* court also distinguished the case from *Gonzalez*, explaining that "current law supports the conclusion that police officers conducting a car stop may, for purposes of officer safety, order the occupants either to get out of the car or to stay in the car." (*People v. Vibanco*, *supra*, 151 Cal.App.4th at pp. 12-13.) The court noted there were four people in the Cadillac when it was pulled over, one person was reaching into her waistband, another person was getting out of the car, and a third person remained in the front seat. The court further noted that, as was emphasized in *Wilson*, "'danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car.'" (*Id.* at p. 13, citing *Wilson*, *supra*, 519 U.S. at pp. 414-415.) The *Vibanco* court concluded that, under the circumstances, the officers were justified in trying to keep sight of all the passengers for officer safety reasons. (*People v. Vibanco*, *supra*, 151 Cal.App.4th at p. 13.)

A number of federal circuit and state courts have addressed this issue post-*Wilson* and have similarly held that it is appropriate for an officer to order a passenger back into a vehicle during a routine traffic stop. (See *United States v. Sanders* (8th Cir. 2007) 510 F.3d 788, 791-792 [holding that officer's seizure of vehicle's passenger, by ordering him after he left vehicle during traffic stop to reenter it, was reasonable under Fourth Amendment]; *United States v. Clark* (11th Cir. 2003) 337 F.3d 1282, 1288 [holding that officer did not violate Fourth Amendment when he ordered passenger to reenter car as means of protecting officer's safety]; *Rogala v.*

District of Columbia (D.C. Cir. 1998) 161 F.3d 44, 53 [concluding "it was reasonable for [the officer] to order [the defendant] to stay in the car in order to maintain control of the situation and that [the officer] therefore did not violate [the defendant's] Fourth Amendment rights"]; *United States v. Moorefield* (3d Cir. 1997) 111 F.3d 10, 11 [holding that officers may constitutionally order passengers of car to remain in vehicle]; *People v. Gonzalez* (Ill. 1998) 704 N.E.2d 375, 382-383 [stating "it is reasonable for a police officer to immediately instruct a passenger to remain at the car, when that passenger, of his own volition, exits the lawfully stopped vehicle at the outset of the stop"]; *People v. Forbes* (N.Y.App.Div. 2001) 283 A.D.2d 92, 95 [holding "it is within the discretion of the police officers on the scene to decide whether it is safer to have the driver and passengers exit the vehicle or whether it is safer to maintain the status quo by requiring the driver and passengers to remain in the vehicle until the traffic stop is over"]; see also *United States v. Holt* (10th Cir. 2001) 264 F.3d 1215, 1223 [stating in dictum that "during a routine traffic stop, an officer may . . . order the passengers to remain in the vehicle"].)[37]

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[37] *Williams* sets forth a summary of the state courts that have held the opposite, i.e., that it is a violation of the Fourth Amendment to order a passenger to return to the car during a traffic stop:

> *But see*, *e.g.*, *People v. Dixon*, 21 P.3d 440, 445-46 (Colo.Ct.App. 2000) (passenger was unreasonably seized when ordered back into a vehicle that he voluntarily exited). Other state courts have held that an officer may not detain passengers who voluntarily attempt to exit the automobile unless it is supported by reasonable suspicion of dangerousness or criminal activity. *Dennis v. State*, 345 Md. 649, 693 A.2d 1150, 1152, *cert. denied*, *Maryland v. Dennis*, 522 U.S. 928, 118 S.Ct. 329, 139 L.Ed.2d 255 (1997) (passenger who attempts to walk away from traffic stop cannot be detained absent reasonable suspicion of dangerousness or criminal activity); *Wilson v. State*, 734

(continued…)

Respondent respectfully asks this Court to adopt the reasoning and holding of *Wilson* and its progeny for the reasons aptly explained by the *Vibanco* court and thereby find that an officer has the authority to order a passenger to return to or to remain in the car during a valid traffic stop. (See *People v. Saunders* (2006) 38 Cal.4th 1129, 1134-1135 [acknowledging the per se rule in *Wilson* and noting a passenger's seizure or detention must be upheld as long as the underlying traffic stop was lawful].)

E. Appellant's Detention Was Lawful Because the Record Shows It Was Based on Concerns for Officer Safety

Contrary to appellant's position (AOB 93-95), the record here undeniably supports the conclusion that his detention was based on officer safety concerns. Preliminarily, respondent notes that in *Wilson*, *Vibanco*, and *Williams*, none of the officers expressly testified that he had ordered a passenger to return to a lawfully stopped car out of concern for his safety. Nonetheless, all three of these courts allowed officers as a matter of course to order passengers to exit, reenter, or remain in a vehicle during a traffic stop. In fact, *Wilson* set forth a per se rule that was adopted by *Vibanco* and *Williams*.

In *Wilson*, the officer ordered the defendant, a passenger, out of the car only after he observed that the defendant was sweating and appeared "extremely nervous." (*Wilson*, *supra*, 519 U.S. at pp. 410-411.) Nothing in the record suggested that the officer specifically ordered the defendant out

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(…continued)

> So.2d 1107, 1112 (Fla.Ct.App. 1999), *review denied*, 749 So. 2d 504 (Fla. 1999), *cert. denied*, 529 U.S. 1124, 120 S.Ct. 1996, 146 L.Ed.2d 820 (2000) (same); *Walls v. State*, 714 N.E.2d 1266, 1267-68 (Ind.Ct.App. 1999) (same).

(*Williams*, *supra*, 419 F.3d at pp. 1032, fn. 2.)

of the car out of concern for his safety. Instead, in setting forth a per se rule (*id*. at p. 413, fn. 1), the *Wilson* court considered the public interest involved in ordering a passenger out of the car during a traffic stop, remarking that "the same weighty interest in officer safety is present regardless of whether to occupant of the stopped car is a driver or passenger" (*id.* at pp. 411-412). The court recognized how giving officers the authority to control the movements of the individuals involved in a traffic stop was helpful in curtailing the risk of danger to the officers. (*Id.* at pp. 413-414.) The *Wilson* court explained that even where "'no special danger to the police is suggested by the evidence in the record,'" some situations are so dangerous that "the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." (*Id.* at p. 415, quoting *Michigan v. Summers* (1981) 452 U.S. 692, 702-703 [101 S.Ct. 2587, 69 L.Ed.2d 340].)

According to the testimony of the two officers who were involved in the traffic stop in *Vibanco*, one of them ordered the defendant to get back in the car as he began to get out. But neither officer testified that this was done out of concern for their safety. (*People v. Vibanco*, *supra*, 151 Cal.App.4th at pp. 5-6.) It was not until *after* the defendant was ordered to return to the car and one of the officers saw a female passenger reach for her waistband that the officers ordered all of the occupants to exit the car so they could stabilize the situation and maintain control of the traffic stop. (*Ibid*.) The *Vibanco* court ultimately extended the per se rule set forth in *Wilson* to the circumstances of the case. (*Id*. at p. 11-12.)

Finally, in *Williams*, after a car was stopped for a traffic violation (but before the officer could contact the driver), the passenger opened the car door and got out. The officer "immediately" ordered the passenger to get back into the car, and the passenger complied. No evidence in the record, however, indicated that the officer ordered the passenger to reenter the car

out of concern for his safety. (*Williams*, *supra*, 419 F.3d at p. 1031.) In upholding the detention, the *Williams* court emphasized the import the *Wilson* court had given to the public interest in maintaining officer safety during traffic stops. (*Id.* at p. 1032, citing *Wilson*, *supra*, 519 U.S. at p. 413.) The *Williams* court noted that the public concern for officer safety in that case was "as weighty as it was in *Wilson*." (*Williams*, *supra*, 419 F.3d at p. 1033.)

In the instant case, the record supports the conclusion that the deputies, after lawfully stopping the Toyota, were justified in ordering appellant back in the car for officer safety reasons. Under circumstances similar to those in the instant case, *Castellon*, *Vibanco*, and *Williams* all held that, as a matter of course, a police officer can order a passenger who has voluntarily exited a lawfully-stopped car to get back into the car without violating the passenger's Fourth Amendment rights. As in those aforementioned cases, the deputies here lawfully initiated a traffic stop on a car that had clearly violated the Vehicle Code. There were two occupants inside the Toyota, appellant and the driver. Before the Toyota pulled over, Deputy Turner could see the passenger, who appeared to be talking to the driver. (3RT 254.) Thus, the deputies were aware that there was more than one person inside the car before they made contact with the occupants. As the *Wilson* court emphasized, simply because there was more than one person in the car, the deputies were likely to be in greater danger of being harmed. (See *Wilson*, *supra*, 519 U.S. at p. 413.)

Similar to the defendants in *Castellon*, *Vibanco*, and *Williams*, appellant voluntarily exited the Toyota. Deputy Turner did not need to specifically testify that appellant was ordered back into the car for safety concerns, because *Wilson* set forth a per se rule allowing similarly-situated officers to control passengers during valid traffic stops as a matter of course. Nevertheless, the circumstances of the traffic stop herein justified

Deputy Turner's unspoken concern about officer safety. As the *Vibanco* court noted, had the deputies permitted appellant to leave, a violent encounter could have possibly originated from two places: either inside the car and/or from appellant's location outside the car. (*People v. Vibanco*, *supra*, 151 Cal.App.4th at p. 11.) Indeed, the semiautomatic handgun that was recovered from appellant had one round in the chamber and a loaded magazine. (20RT 3733-3737.) Because appellant was armed, the traffic stop could have quickly become the type of violent encounter that the *Vibanco* court envisioned had the deputies not taken control of the situation and ordered appellant to return to the car.

Other evidence in the record supports the conclusion that the detention was based on concern for officer safety. The traffic stop occurred in the late evening around 10:00 p.m., in the area of 120th Street and Central Avenue, not far from the high-crime Nickerson Gardens.[38]

Deputy Turner testified that, right after the Toyota pulled over, appellant "made a motion and tried to run out of the vehicle" (3RT 238), and that appellant "jumped out as if he was going to start running" (3RT 243). Appellant contends this testimony shows the deputy was only concerned with appellant leaving the scene and not with his safety. (AOB 94-95.) Appellant interprets this testimony too narrowly, as the two

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[38] The prosecution's gang expert testified that the Bounty Hunter Bloods' territory was "predominantly in and around the area of Nickerson Gardens." (8RT 1744.) He further testified that the Ace Line, a clique of the Bounty Hunters, was located on 111th Street between Central Avenue and Compton Avenue. (8RT 1750.) According to Officer Hill, who testified about the robbery involving appellant and victim Javier Guerrero, the area of 112th Street and Central Avenue was "right on the outside of [Nickerson Gardens], on the outskirts, and that the people who live in the area "consider it part of [Nickerson Gardens]." (20RT 3782.) The area of the traffic stop, 120th Street and Central Avenue, was therefore not far from the Nickerson Gardens.

concerns were not mutually exclusive. For example, had appellant been permitted to walk away, the deputies' attention would have been divided between appellant and the driver of the Toyota, a situation the *Vibanco* and *Williams* courts found to be dangerous. (*People v. Vibanco*, *supra*, 151 Cal.App.4th at p. 12; *Williams*, *supra*, 419 F.3d at p. 1034.) As the *Vibanco* court stressed, "Allowing a passenger, or passengers, to wander freely about . . . presents a dangerous situation . . . ." (*People v. Vibanco*, *supra*, 151 Cal.App.4th at p. 12.) "Ordering the occupants back into the vehicle does no more than establish the status quo at the time of the stop. To hold otherwise could well lead to the unnecessary death of an officer, gunned down by those walking away who suddenly turn and fire or who circle behind the officer, either assaulting or killing him while he is talking to the driver." (*State v. Webster* (Ariz.Ct.App. 1991) 824 P.2d 768, 770.) Thus, Deputy Turner's testimony was not inconsistent with a finding that he ordered appellant back into the car out of concern for officer safety.

In sum, the record shows that the lawful traffic stop occurred late at night in a precarious location, that at least two people were inside the Toyota, and that appellant attempted to exit the car. Under these circumstances, the deputies lawfully ordered appellant to get back into the car to ensure their safety and to maintain control over the encounter. (See , e.g., *People v. Vibanco*, *supra*, 151 Cal.App.4th at pp. 8-13; *Williams*, *supra*, 419 F.3d at pp. 1030-1031.)

F. Appellant's Detention Was Lawful Because the Deputies Had Reason to Suspect That Criminal Activity was Afoot

Not only was appellant's detention lawful because of concerns for officer safety, but it was also permissible because Deputies Turner and Sorenson had reasonable suspicion to believe appellant was engaged in criminal conduct.

"A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Suff* (2014) 58 Cal.4th 1013, 1053-1054, internal quotation marks and citation omitted.) "[P]ossible innocent explanations for an officer's observations do not preclude the conclusion that it was reasonable for the officer to suspect that criminal activity was afoot." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 148 (*Letner*).) "Indeed, the principal function of [police] investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal" (*Ibid*., internal quotation marks and citations omitted; see also *United States v. Arvizu* (2002) 534 U.S. 266, 274-275 [122 S.Ct. 744, 151 L.Ed.2d 740] [reviewing courts should not apply a "divide-and-conquer" analysis in determining if an officer's conduct was reasonable, because factors which by themselves were "quite inconsistent" with innocent activity, may collectively amount to reasonable suspicion].)

This inclusive approach allows officers to draw on their own individual experiences and specialized training to make inferences from and deductions about the information available to them that might otherwise elude an untrained person. (*Arvizu*, *supra*, 534 U.S. at p. 273.) "[C]ourts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and [reviewing courts] cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124-125 [120 S.Ct. 673, 145 L.Ed.2d 570]; *Letner*, *supra*, 50 Cal.4th at p. 146.)

As noted by both this Court and the United States Supreme Court, by allowing officers to act based upon conduct that is "'ambiguous and susceptible of an innocent explanation,'" courts have accepted the risk that officers may stop innocent people. (*Letner*, *supra*, 50 Cal.4th 99, 146-147, quoting *Illinois v. Wardlow*, *supra*, 528 U.S. at p. 125.) Indeed, the reasonable suspicion standard is "not particularly demanding," and is considerably less than proof of wrongdoing by a preponderance of the evidence. (*Letner*, *supra*, 50 Cal.4th at p. 146, citing *United States v. Sokolow* (1989) 49 U.S. 1, 7 [109 S.Ct. 1581, 104 L.Ed.2d 1].) The evidence relied on by an officer to justify a detention "'must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'" (*People v. Souza*, *supra*, 9 Cal.4th at p. 240, quoting *United States v. Cortez* (1981) 449 U.S. 411, 418 [101 S.Ct. 690, 66 L.Ed.2d 621].)

There are a number of factors which can reasonably lead an officer to suspect that an individual is involved in criminal activity. Fleeing from an officer is one such factor. As this Court noted in *People v. Souza*, *supra*, 9 Cal.4th at page 234, "even though a person's flight from approaching police officers may stem from an innocent desire to avoid police contact, flight from police is a proper consideration—and indeed can be a key factor—in determining whether in a particular case the police have sufficient cause to detain." (*Id*. at p. 235; see also *Illinois v. Wardlow*, *supra*, 528 U.S. at p 124 ["Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."].) When an officer approaches an individual, that person has the right to ignore the officer and go about his business, and his refusal to cooperate does not establish the requisite justification needed for a detention or seizure. (*Illinois v. Wardlow*, *supra*, 528 U.S. at p. 125.) Unprovoked flight, however, is "simply not a mere

refusal to cooperate." (*Ibid.*) "Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning." (*Ibid.*) "Time, locality, lighting conditions, and an area's reputation for criminal activity all give meaning to a particular act of flight, and may or may not suggest to a trained officer that the fleeing person is involved in criminal activity." (*People v. Souza*, *supra*, 9 Cal.4th at p. 239.)

Another relevant factor in the reasonable suspicion analysis is the time of night. (*People v. Souza*, *supra*, 9 Cal.4th at p. 241.) As this Court noted in *Souza*, more than 70 percent of motor vehicle thefts take place between 6:00 p.m. and 6:00 a.m., and frequently occur just outside of the victims' homes. (*Ibid*.; see also *People v. Huggins*, *supra*, 38 Cal.4th at p. 242 [noting the defendant was "loitering in a high-crime residential area at night" in reasonable suspicion analysis].)

Finally, an area's reputation for criminal activity is an appropriate consideration in assessing the permissibility of an investigative detention under the Fourth Amendment. (*People v. Souza*, *supra*, 9 Cal.4th at pp. 240-241, citing *People v. Holloway* (1985) 176 Cal.App.3d 150, 155 ["we must allow those we hire to maintain our peace as well as to apprehend criminals after the fact, to give appropriate consideration to their surroundings and to draw rational inferences therefrom, unless we are prepared to insist that they cease to exercise their senses and their reasoning abilities the moment they venture forth on patrol"].)

Here, all three factors—unprovoked flight, time of night, and locality—supported a reasonable suspicion that appellant was engaged in unlawful conduct. The traffic stop occurred around 10:00 p.m. in an area that was in close proximity to the high-crime area of Nickerson Gardens (and the Bounty Hunter Bloods's territory). After the car pulled over,

appellant, who was unprovoked, attempted to flee. (See 3RT 238, 243.) The deputies did not know why appellant was fleeing; it was their job to find out why. (*People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1544.) Indeed, Deputies Turner and Sorenson "would have been derelict in [their] duties had [they] not attempted to detain appellant." (*Ibid*.) To suggest that the deputies should have allowed appellant to leave the scene of the traffic stop would be absurd. Appellant's flight and the surrounding circumstances formed a particularized and objective basis for suspecting criminal behavior. (*See Arvizu*, *supra*, 534 U.S. at p. 273.) Accordingly, appellant was lawfully detained based on the deputies' reasonable suspicion that he was engaged in unlawful conduct. Based on the foregoing, the trial court properly denied appellant's suppression motion.

G. The Semiautomatic Handgun and Loaded Magazine in Appellant's Pocket Were Admissible under the Inevitable Discovery Doctrine

Even if this Court were to find appellant was unlawfully detained, the loaded Ruger semiautomatic handgun and loaded magazine in his pocket were admissible under the inevitable discovery doctrine, which provides that illegally seized evidence may be admitted where it would have been discovered by the police through lawful means. (*People v. Robles* (2000) 23 Cal.4th 789, 800.) "The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct." (*Nix v. Williams* (1984) 467 U.S. 431, 443, fn. 4 [104 S.Ct. 2501, 81 L.Ed.2d 377]; *People v. Robles*, *supra*, 23 Cal.4th at p. 800) The burden rests on the government to establish by a preponderance of the evidence that the contested evidence would have inevitably been lawfully discovered. (*People v. Robles*, *supra*, 23 Cal.4th at pp. 800-801; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1040.) Even where the inevitable discovery doctrine was not presented to the trial court, it may be applied on

appeal if the factual basis for the theory is fully set forth in the record. (*People v. Robles*, *supra*, 23 Cal.4th at p. 801, fn. 7.)

The record in the instant case supports an application of the inevitable discovery doctrine. Deputy Turner testified that as he was removing appellant from the car, he saw a "bulge" in appellant's right front pants pocket that appeared to be a semiautomatic weapon. (7RT 1506-1507.) The gun, a semiautomatic Ruger nine millimeter, was loaded with a full magazine, and there was another magazine in appellant's pocket. (7RT 1507.) So, even if appellant had continued to walk away from the car, Deputy Turner certainly would have seen the distinctive bulge in appellant's pants pocket, not to mention that the bulge must have been rather large because there was a fully loaded gun and an extra magazine in appellant's pocket.

At the time the traffic stop occurred in 2008, former section 12031 made it a crime to carry a loaded firearm in a vehicle or a public place. (*People v. Elliott* (2012) 53 Cal.4th 535, 587.)[39] And section 833.5 specifically allows peace officers to detain and search a person upon reasonable cause to believe that the person has a firearm. (See also *People v. Greer* (1980) 110 Cal.App.3d 235, 238 [carrying a loaded firearm in a vehicle on a public street is a misdemeanor and suspects are subject to search].) In the instant case, the deputies could have justifiably detained and searched appellant based on the handgun-shaped bulge in his pocket. Hence, based on a preponderance of evidence, it was inevitable that Deputy Turner (or his partner) would have found the loaded semiautomatic handgun and extra magazine in appellant's pants pocket.

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[39] Section 12031 was repealed effective January 1, 2012, and section 25850, which likewise prohibits carrying a loaded firearm in public, became operative. (*People v. Elliott*, *supra*, 53 Cal.4th at p. 587, fn. 7.)

H. Any Error Was Harmless

Finally, appellant argues the trial court's denial of his suppression motion was not harmless error. (AOB 104-111.) Respondent disagrees. Even assuming arguendo that the trial court erred in denying appellant's suppression motion, any error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].) (See *People v. Moore* (2011) 51 Cal.4th 1104, 1129; *People v. Neal* (2003) 31 Cal.4th 63, 86.)[40]

Preliminarily, appellant asserts that the admission of a weapon that was involved in a charged offense "is a classic example of prejudicial evidence resulting from an unlawful search." (AOB 105.) Appellant relies only on a search and seizure treatise and Justice Harlan's concurring opinion in *Bumper v. North Carolina* (1968) 391 U.S. 543 [88 S.Ct. 1788, 20 L.Ed.2d 797] to support this contention. (See AOB 105-106.) Notably, appellant does not specifically address how such precepts apply in the instant case.

Notwithstanding the fact that this Court is not bound by either one of these authorities, respondent notes that in *People v. Tewksbury* (1976) 15 Cal.3d 953, this Court found the evidence of the defendant's guilt was so overwhelming that, even if the trial court erred in admitting evidence of a gun believed to be used in the charged murder, the error was harmless beyond a reasonable doubt. (*Id.* at pp. 969-972.) In finding the error harmless, the *Tewksbury* court explained that the gun, which was similar to the gun that may have been used by the defendant or an accomplice, and

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[40] Respondent notes that the following harmless error analysis applies only to the two murder (counts 2 & 3) and two attempted murder counts (counts 4 & 5). Appellant was convicted in count 1 of possession of a firearm by a felon. The challenged evidence is the only evidence supporting that charge.

was found six days after the murder, was "of little significance in the overall evidence." (*Id.* at p. 972.)

Similarly, even if the challenged evidence in the instant case had not been admitted at trial, other evidence of appellant's guilt was so overwhelming that the alleged error was harmless beyond a reasonable doubt. To begin with, both of the surviving victims, Johnson and Williams, identified appellant in court and in photo six-packs as the person who had shot them. (See 6RT 1201-1202, 1206-1207; 8RT 1618-1619, 1705-1707, 1714.)[41] Johnson gave detailed testimony about how appellant walked from the kitchen to the hallway, returned to the living room, and then shot her twice. Johnson described how appellant squatted down on the floor and moved toward the front door on his hands and knees after he had shot her. (8RT 1685, 1688-1690, 1693-1696, 1705, 1735.) Williams testified that she saw appellant enter the apartment shooting. (6RT 1201-1202.)

Moreover, Garner testified that appellant pointed a gun at her head and ordered her to knock on Anderson's door. Garner ran away after she complied with appellant's order. About five minutes later, she heard gunshots and then saw appellant and Harris run out Anderson's back door toward the gym. (5RT 1154-1164, 1183; 6RT 1231.) Garner testified that both men were wearing black hooded sweatshirts. (5RT 1163.) Around a month after the shooting, Garner identified appellant in a photo six-pack and stated that he had put a gun to her head and told her to knock on Anderson's door. (5RT 1167-1168; 8RT 1598.)

Additionally, Dillard saw appellant on the night before the early morning shooting occurred, and he heard appellant tell Brooks that Carey

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[41] Johnson testified that the "shorter black boy" had shot her and Williams, and later testified that appellant was shorter and had darker skin than Harris. (See 8RT 1700-1701, 1724-1734.)

was looking for him. (5RT 1106.) Dillard also identified appellant in a photo six-pack and indicated that he saw him the night before the shooting. (5RT 1117-1120.)

Hill's testimony was particularly damaging. She was with appellant at Hawes's house after the shooting. Hill testified that appellant was watching news coverage of the shooting with Carey and bragging about what had happened. (See 6RT 1248-1253.)[42] He asked Carey, "Did you see that?" and said "that's your boy." (6RT 1256.) Appellant acted as though the shooting was a joke and showed no remorse. (6RT 1249; 8RT 1624.) Notably, Hill's testimony about how appellant watched the news coverage of the shooting and bragged about it to Carey was corroborated by Detective Hahn. (See 8RT 1623-1626.)

Equally compelling was Sims's testimony. She testified that prior to the shooting, appellant was banging on her door, calling out for Harris. (7RT 1420.) Appellant was upset and indicated that someone had been robbing the places where he "hustled" and that he and Harris had to go "handle" the problem. (7RT 1420-1421.) Sims identified appellant in a photo six-pack and indicated that he was at her house in April "in the late hours." (7RT 1432-1434.) Not only did this evidence put appellant near the scene of the shooting at the time when it occurred, but it was also very strong evidence of motive.[43] Around 15 minutes after appellant and Harris

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[42] At trial, Hill could not recall having told the police that appellant had admitted to the shooting but testified it was possible she could have told the police as such. (6RT 1244.) According to Detective Hahn, Hill told him that appellant had admitted he was responsible for the shooting. (8RT 1623-1624.)

[43] Kanisha's testimony about what Brooks had told her about a week before he was murdered was also compelling evidence of motive. Respondent addresses appellant's argument challenging that evidence in Argument III, *post*.

left her house, Sims heard gunshots. When appellant returned to Sims's house, he talked about buying tickets and going to Atlanta. (7RT 1423-1426.) Appellant said, "We can all take this trip and stuff and everything be cool. Just everything, just keep it under the rock, and we keep pushing." (7RT 1429.)

The physical evidence was also significant. For example, the police found a newspaper article from April 7, 2004, about the shooting, a program from Carey's funeral, and transcripts and reports associated with the instant case (which appellant had sent her) at Hawes's house. The police also found a bus ticket to Atlanta in Mitchell Reed's name in the house. (8RT 1626-1629, 1634-1635.) This was all strong circumstantial evidence of appellant's guilt.

Although appellant attempts to discredit the testimony of Johnson, Williams, and Garner, much of their testimony was corroborated by each others' and other witnesses' testimony. For example, Williams corroborated Garner's testimony that she knocked on Anderson's door and then ran away. (See 6RT 1200, 1206.) Garner, Johnson, Hill, Hall, and Richardson all described appellant's clothes as being dark-colored. (See 6RT 1239, 1279-1280, 1339, 1359; 8RT 1735.) And like Garner, Hall saw two African-American men in dark clothing run out of Anderson's house and head toward the gym after she heard gunshots. (See 6RT 1338-1340.)

Moreover, the strength of the challenged evidence was minimal at best. The gun was not recovered from appellant immediately after the shootings. Rather, similar to the gun at issue in *Tewksbury*, it was recovered on April 11, almost a week after the shootings had occurred. The gang expert testified that it was a "common practice" for members of the Bounty Hunters to pass off a gun to a trusted member of the gang after the gun had been used to commit a crime. The gang expert explained that a gang member would want to get rid of the weapon in case he was identified

as a suspect in a crime and the police executed a search warrant at his residence. (8RT 1760-1761.) The importance of the gun is also questionable because, as appellant points out in his brief (AOB 107), defense counsel argued that the shell casings found in the living room (where Johnson was shot) matched the gun used by Harris, not the one used by appellant. (See 9RT 1908-1909.)

In sum, the challenged gun evidence was of little significance, especially in light of the compelling evidence connecting appellant to the shootings at Anderson's apartment. The considerable evidence of appellant's guilt established beyond a reasonable doubt that any error in admitting the gun evidence did not contribute to the verdicts obtained, and was therefore harmless.

For the reasons already articulated above, this Court should similarly reject appellant's argument that the admission of the challenged evidence was not harmless with respect to the penalty phase. (AOB 108-111.) Given the overwhelming evidence of appellant's culpability of the underlying offenses, and the mountain of evidence of appellant's prior convictions and bad acts, it is clear beyond a reasonable doubt that the challenged gun evidence did not prejudice appellant in the penalty phase.

III. THE TRIAL COURT PROPERLY ADMITTED BROOKS'S STATEMENT TO HIS SISTER

Appellant contends the trial court improperly admitted a statement that Brooks made to his sister Kanisha just prior to his murder. Although appellant concedes that part of the statement was admissible as a statement against penal interest pursuant to Evidence Code section 1230, he argues that the latter portion of the statement should have been excluded because it was a collateral statement that lacked any of the hallmarks of trustworthiness. Appellant further argues that the erroneous admission of

the statement violated his rights under the federal and state Constitutions to a fair and reliable capital sentencing hearing and due process. (AOB 112-128.) Appellant forfeited the instant claim because he did not object to the admission of the statement on the state evidentiary grounds that he now asserts. Regardless, the claim is meritless because Brooks's statement to Kanisha was properly admitted as a statement against penal and social interest.

A. The Trial Court Grants the Prosecution's Motion to Admit Brooks's Statement to His Sister

On March 27, 2008, the prosecutor filed an in limine motion to admit Brooks's statement pursuant to Evidence Code section 1230. A transcript of Kanisha's testimony from Kai Harris's trial was included with the motion. (3CT 581-594.) The prosecutor noted in his motion that at Harris's trial, Kanisha testified as follows: that about a week before Brooks was shot, he told her that he had gotten into trouble with "Billy Pooh" (a.k.a. William Carey), a drug dealer; that Brooks had been recently released from prison and needed money; that Carey had offered to give Brooks some drugs to sell as a means of making money; and that a shootout had occurred at Carey's house, and Brooks took some drugs that Carey had left in the house. (3CT 582, 588-589.) The prosecutor further noted in the motion that Kanisha testified that she had told Brooks not to deal with Carey "'because of [appellant's] status in the projects.'" (3CT 582, 588.)

Also in the prosecutor's motion was information about Dillard's testimony from the Harris trial. Dillard had testified that on the evening before Brooks was murdered, he and Brooks were walking in the area of 111th Street and Compton Avenue when they saw appellant. Appellant and Brooks had a conversation, and according to Dillard, appellant told Brooks that Carey was looking for him. (3CT 582-583.)

The prosecutor argued in the motion that Brooks's statement to Kanisha was admissible because it was a statement against penal and social interest under Evidence Code section 1230. The prosecutor asserted that Brooks's statement that he had stolen drugs from Carey was a confession of a serious crime. (3CT 584.) The prosecutor further argued that the statement was also against Brook's social interest:

> Taking advantage of Billy Pooh's generosity, and abusing his trust by stealing his entire drug supply, put George Brooks at risk, not only with Billy Pooh, but also with his confidante Donte McDaniel, and perhaps the Bounty Hunters gang as a whole. . . . Admitting such criminal action to anyone would put George Brooks at great risk of social harm.

(3CT 585.) Finally, the prosecutor argued that Brooks's statement to Kanisha was "the very foundation of proof of motive." (3CT 585.) Appellant did not file an opposition.

At the Evidence Code section 402 hearing on the motion, defense counsel made a brief argument. He merely objected to the admission of Brooks's statement under the federal Constitution, confrontation clause, due process, equal protection, the Eighth Amendment, and *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]. (3RT 482.) The trial court then questioned whether Brooks's statement was testimonial, and defense counsel remarked, "It's probably not testimonial." (3RT 483.) The trial court ruled that Brooks's statement was admissible. Defense counsel responded, "Judge, there are two aspects to the statement—I'll withdraw that." (3RT 483.)

B. Kanisha's Trial Testimony Regarding Brooks's Statement

At trial, Kanisha testified that a few weeks before Brooks was killed, he told her that Carey "might be looking for him for some drugs that he ended up having of his." (7RT 1489.) Kanisha further testified that Brooks had told her that Carey had given him the drugs and he was supposed to pay Carey back for them, but a shooting occurred during the transaction and Brooks left with the drugs. (7RT 1489-1490.) Brooks told Kanisha that he had not paid Carey any money for the drugs. Brooks had taken close to four ounces of drugs. (7RT 1490-1491.)

Kanisha told Brooks "this was a bad thing to have done." (7RT 1492.) She testified on cross-examination, however, that Brooks did not intentionally take the drugs. (7RT 1492.) Kanisha testified that Carey had given the drugs to Brooks, and Brooks was to reimburse Carey with the proceeds he received from selling them. Kanisha further testified that "[i]t wasn't he took anything." (7RT 1493.) Defense counsel inquired, "And when you warned [Brooks] about the potential consequence of having apparently taken these drugs, what was his response?" (7RT 1494.) Kanisha answered, "That he wasn't going to deal with him no more. He didn't know the ins and outs of those guys and how they got down until I told them [*sic*] because he was new out of jail. He didn't know what was new going out on the street." (7RT 1495.)

C. Appellant Forfeited the Instant Claim Because He Failed to Object to the Admission of the Statement on State Evidentiary Grounds

Appellant has forfeited his claim that Brooks's statement to his sister was inadmissible hearsay under state law because he failed to object on that ground below. (*People v. Williams* (1997) 16 Cal.4th 635, 661-662; Evid. Code, § 353; see also *People v. Marks* (2003) 31 Cal.4th 197, 228 ["A

general objection to the admission or exclusion of evidence, or one based on a different ground from that advanced at trial, does not preserve the claim for appeal."]; *People v. Price* (1991) 1 Cal.4th 324, 440 ["The lack of a specific objection on the ground now urged precludes consideration on appeal of the defendant's claim that the evidence was improperly admitted."].) A defendant must object in a way that alerts the trial court to the nature of the anticipated evidence and the basis on which the defendant seeks to exclude that evidence, and to allow the People an opportunity to show its admissibility. (*People v. Marks*, *supra*, 31 Cal.4th at p. 228; *People v. Holt* (1997) 15 Cal.4th 619, 666-667.)

Here, appellant objected to the statement based *solely* on federal constitutional grounds. (See 3RT 482.) Appellant did not file a written opposition to the prosecutor's motion, and at the evidentiary hearing, the only issue he raised was whether Brooks's statement was testimonial. (3RT 483.)

Moreover, appellant forfeited the claim for failing to object at the time of Kanisha's trial testimony. An objection to an in limine ruling admitting evidence is usually insufficient to preserve the objection for appeal if the objection is not repeated when the evidence is offered. (*People v. Morris* (1991) 53 Cal.3d 152, 190, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; see also *People v. Holloway*, *supra*, 33 Cal.4th at p. 133 ["A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself."].) Kanisha's trial testimony differed from the prosecutor's offer of proof at the evidentiary hearing. At trial, she testified that Brooks did not steal the drugs from Carey; rather, Carey gave Brooks the drugs but Brooks needed to pay Carey for them. (See 7RT

1492-1493.) As a result, appellant should have once again objected to preserve the issue for appeal. (*People v. Morris*, *supra*, 53 Cal.3d at pp. 189-190 [Because "[a]ctual testimony sometimes defies pretrial predictions of what a witness will say on the stand," "an objection at the time the evidence is offered serves to focus the issue and to protect the record."].) Appellant elected not to object, however, presumably because Kanisha's trial testimony was more beneficial to him than was the evidence offered at the pretrial evidentiary hearing.

In sum, at the evidentiary hearing, appellant did not specifically object that the evidence was inadmissible based on state evidentiary law. Appellant also failed to object when Kanisha testified about Brooks's statement at trial. Because appellant objected to the admission of Brooks's statement solely on federal constitutional grounds, and he did not object (on any grounds) after Kanisha testified at trial, he forfeited that contention for purposes of appeal.

D. Regardless, the Claim Is Meritless Because Brooks's Statement Was Properly Admitted as a Declaration Against Interest Under Evidence Code Section 1230

Even if this Court finds that appellant did not forfeit the instant claim, it should be rejected because Brooks's statement was properly admitted as a statement against penal and social interests under Evidence Code 1230.

1. Declarations against penal and social interests are admissible

As a general rule, hearsay evidence is inadmissible. (Evid. Code, § 1200, subd. (b).) An exception exists, however, with respect to declarations against interest:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability, . . . or created such a risk of making him an

> object of hatred, ridicule or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

(Evid. Code, § 1230.)

A hearsay statement is admissible as a declaration against penal interest if the proponent of the evidence can show that (1) "'the declarant is unavailable,'" (2) "'the declaration was against the declarant's penal interest when made,'" and (3) "'the declaration was sufficiently reliable to warrant admission despite its hearsay character.'" (*People v. Lawley* (2002) 27 Cal.4th 102, 153, quoting *People v. Duarte* (2000) 24 Cal.4th 603, 610-611.) In determining whether a declaration is trustworthy, a trial court may take into account the declaration and the circumstances under which it was made, the declarant's motivation, and the declarant's relationship to the addressee. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 607)

> There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry.

(*People v. Cervantes* (2004) 118 Cal.App.4th 162, 175, internal quotation marks and citations omitted.)

The hearsay exception of Evidence Code section 1230 allows admission only of those portions of a statement that are "'specifically disserving'" to the declarant's interest. (*People v. Duarte*, *supra*, 24 Cal.4th at p. 612, quoting *People v. Leach* (1975) 15 Cal.3d 419, 441.) Where only portions of a statement satisfy the criteria for admission under the exception, those portions not specifically disserving to the declarant

must be excised by the trial court. (*People v. Duarte*, *supra*, at p. 612; *People v. Leach*, *supra*, 15 Cal.3d at p. 441.)

A trial court's decision as to whether a statement is admissible as a declaration against interest is reviewed for an abuse of discretion. (*People v. Lawley*, *supra*, 27 Cal.4th at pp. 153-154; see also *People v. Geier* (2007) 41 Cal.4th 555, 585.)

2. In determining whether the trial court properly admitted Brooks's statement, this Court must review the evidence proffered at the pre-trial evidentiary hearing rather than the testimony presented at trial

At the outset, respondent notes that a trial court's ruling on the admissibility of evidence is reviewed in light of the information before the court at the time of its ruling. (See *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 998; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1176; see also *People v. Holloway*, *supra*, 33 Cal.4th at p. 133; *People v. Escobar* (1996) 48 Cal.App.4th 999, 1024.) In challenging the trial court's ruling on the admissibility of Brooks's statement, however, appellant incorrectly focuses on the evidence admitted at trial. (See AOB 112, 114, 117-118.) For example, based on testimony Kanisha gave *at trial*, appellant argues that the trial court's ruling on the admissibility of Brooks's statement was erroneous. While it appears that Kanisha testified at trial that Carey gave the drugs to Brooks (and therefore Brooks did not steal them) (see 7RT 1492-1493), the prosecutor's offer of proof at the evidentiary hearing painted a different picture. Indeed, Kanisha's testimony from the Harris trial clearly indicated that Brooks had stolen the drugs from Carey. (See 3CT 589, 592.) Thus, appellant's assertion that "it was abundantly clear from the prosecution's own motion that Brooks was not required to pay for the drugs up front: Carey offered to 'give' Brooks drugs as a means to 'earn money'" (AOB 114) is inaccurate because it is partly based on

Kanisha's testimony at appellant's trial, not the testimony from Harris's trial that the prosecutor relied on in his motion and which was before the trial court at the time it ruled on the motion.[44]

Moreover, in challenging the reliability of Brooks's statement, appellant erroneously asserts that "the prosecution's theory—that George Brooks told his sister Kanisha Garner[] that he robbed William Carey—was in conflict with the hearsay provided by Garner." (AOB 117.) This argument has the same flaw as the one previously discussed; it relies on Kanisha's testimony at trial and not on the proffered testimony that the trial court considered in ruling on the prosecutor's motion. While it is true that Kanisha's testimony from the Harris trial was, in certain respects, different from her testimony at appellant's trial, this was not fatal to admission of the challenged evidence.

Thus, to a large extent, appellant's challenge to the admission of Brooks's statement is based on the testimony actually elicited at trial, rather than on the offer of proof on which the trial court based its ruling. The problem with this approach is that it predicates a claim of trial court error on information that was not before the court when it made the ruling now under review. The trial court ruled on the admissibility of Brooks's

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[44] Appellant's argument also mischaracterizes the evidence proffered at the evidentiary hearing. The statement of facts in the motion indicated that about a week before Brooks was killed, Brooks told Kanisha that he "had gotten into some trouble with a local drug dealer who went by the name of Billy Pooh." (3CT 582.) These facts established at the outset that Brooks had wronged Carey in some manner. The statement of facts further stated that Carey "*had* offered to give [Brooks] some drugs as a means of earing some money," that there was an incident at Carey's house, and that Brooks took the drugs during the incident and left. (3CT 582) Thus, contrary to appellant's position that the prosecutor's motion indicated that the drugs were given to Brooks (and not stolen by him), these facts imply that the offer was *not* accepted by Brooks, who "got into trouble" when he stole drugs from Carey during a shootout at Carey's house.

statement at the evidentiary hearing before trial, based on the prosecutor's offer of proof, rather than on the testimony of the witness as later elicited at trial. And when that different testimony was elicited, appellant did not object. Accordingly, the only ruling made, and thus the only one this Court can review, is the one the trial court made based on the offer of proof at the evidentiary hearing. As will be discussed below, based on that offer of proof, the trial court did not abuse its discretion in admitting Kanisha's testimony about Brooks's statement.

3. The trial court acted within its discretion when it ruled that the challenged statements were admissible as declarations against interest

Appellant concedes that the portion of Brook's statement wherein he admitted he had obtained drugs for the purpose of sales was clearly adverse to his penal interests. (AOB 118). He argues that the portion of Brooks's statement regarding whom he had obtained the drugs from and the circumstances under which he had obtained them were inadmissible collateral statements which lacked any indicia of trustworthiness. (AOB 116-119.)[45] Respondent disagrees.

Respondent acknowledges that Evidence Code section 1230 does not apply to evidence of any statement or portion of a statement that is not specifically disserving to the interests of the declarant. (*People v. Duarte*, *supra*, 24 Cal.4th at p. 612; *People v. Leach*, *supra*, 15 Cal.3d at p. 441.) But, contrary to appellant's position, the portion of Brooks's statement that appellant challenges was clearly against his social interest, and therefore admissible under Evidence Code section 1230. The evidence proffered at the evidentiary hearing demonstrated that Brooks had "gotten into trouble"

[45] Because appellant does not challenge the Evidence Code section 1230 requirement that the declarant must be unavailable, respondent does not address that factor.

with Carey about a week before he was murdered (3CT 582), and that Kanisha had counseled Brooks not to deal with Carey because of appellant's "status in the projects." (3CT 588.) Brooks no longer wanted to have any dealings with Carey after he took the drugs from Carey's house, and Carey was looking for Brooks after Brooks had stolen the drugs. (3CT 589.) The proffered evidence further showed that on the night Brooks was murdered, appellant told Brooks that Carey was looking for him. (3CT 582-583.) As will be further discussed, that part of Brooks's statement which not only indicated that he had stolen the drugs from Carey, but that he had taken them during a shootout at Carey's house was trustworthy and most certainly put Brooks at risk of becoming an object of hatred, ridicule, or social disgrace, such that a reasonable person in his position would not have made the statement unless he thought it was true. (Evid. Code, § 1230.)

People v. Wheeler (2003) 105 Cal.App.4th 1423 is instructive. In *Wheeler*, the defendant was charged with murder, attempted voluntary manslaughter, and discharging a firearm for shooting at three men, one of whom the defendant believed had had an affair with his wife. (*Id.* at pp. 1425-1426.) At issue was the admissibility of the defendant's wife's statement—made to the defendant shortly before the murder—that she had committed adultery with the man the defendant killed. (*Id*. at pp. 1425-1430.) Although the *Wheeler* court noted that the social interest exception to the hearsay rule was rarely invoked, it found the statement was relevant evidence of motive for the murder and that it was sufficiently against the wife's social interests such that it was admissible under Evidence Code section 1230. The court also found the statement was trustworthy, based in part on the circumstances under which it was made and the declarant's relationship to the defendant. Thus, the *Wheeler* court held that the trial court properly admitted the wife's statement. (*Id*. at pp. 1427-1428, 1431.)

Here, as in *Wheeler*, the statement at issue was against the declarant's social interest. As the prosecutor argued in his motion (see 3CT 583, 585), Brooks's statement regarding whom he had stolen the drugs from and the circumstances surrounding the theft would most certainly subject Brooks to retaliation by Carey and appellant, and possibly the Bounty Hunters. Brooks knew that Carey was looking for him. (3CT 583, 589.) That Brooks told Kanisha he was in trouble with Carey and was no longer going to deal with him—just a week before he was murdered—unequivocally shows that Brooks's statement about what he had done to Carey was against his social interest. (See 3CT 582, 589.)

Appellant's argument that Brooks somehow improved his standing by stealing from Carey is absurd. (See AOB 119.) Indeed, the record demonstrates the opposite. Brooks admitted that he was in trouble for what he had done to Carey, and Brooks knew that Carey was looking for him. (3CT 582, 589.) Brooks's desire to avoid further dealings with Carey demonstrates that Brooks knew he would become an object of hatred, ridicule or social disgrace within the Bounty Hunter community for stealing from Carey. (3CT 589.) And Kanisha's warning to Brooks that he should not deal with Carey anymore because of appellant's "status in the projects" is further evidence that by stealing from Carey, Brooks clearly acted against his social interest. Indeed, none of this evidence even remotely suggests that Brooks's statement to Kanisha could have improved his social standing with anyone. (*People v. Wheeler*, *supra*, 105 Cal.App.4th at p. 1428.) Surely, based on its years of experience, the trial court understood that Brooks's theft was a brazen act that would surely have negative consequences.[46]

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[46] For example, the gang expert testified at trial that if one gang member stole from another, high-ranking member, the member who was

(continued…)

Appellant's reliance on *People v. Lawley*, *supra*, 27 Cal.4th 102, and *People v. Garcia* (2008) 168 Cal.App.4th 261, is misplaced. (AOB 116-119.) In *Lawley*, the defendant, who was charged with murdering Kenneth Stewart, sought to admit testimony that Brian Seabourn had stated he had killed someone (Stewart), that the killing was at the direction of the Aryan Brotherhood, and that an innocent person was in jail for the crime. (*People v. Lawley*, *supra*, 27 Cal.4th at pp. 151-152.) The trial court ruled Seabourn's statements that he had killed a man and that someone had hired him to do so were admissible as declarations against penal interest. (*Id*. at p. 152.) With respect to the statement that the Aryan Brotherhood had directed Seabourn to kill the victim, the trial court found it was inadmissible "because *who* told him to do so" was not against Seabourn's penal interest. (*Ibid.*, emphasis in original.) The *Lawley* court concluded the trial court did not abuse its discretion when it ruled admissible Seabourn's admission that he had killed Stewart and was hired to do so. This Court further concluded the trial court acted within its discretion in ruling inadmissible the statement that the Aryan Brotherhood had hired Seabourn to kill Stewart. (*Id.* at p. 154.)

The *Lawley* court also found the excluded evidence was not admissible as a declaration against social interest. Noting that Seabourn was allegedly seeking full membership in the Aryan Brotherhood, this Court concluded that Seabourn's statement that he was hired by the gang to kill Stewart "might have been an exercise designed to enhance its prestige or his own." But this Court further remarked, "Defendant, at least, fails to cite any evidence in the record suggesting Seabourn's statement created a

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(…continued)
the victim of the theft would need to get back either his drugs or his money. Otherwise, the member would look weak and would lose his stature in the gang. (8RT 1763.)

risk of making him an object of hatred, ridicule, or social disgrace in the relevant community." (*People v. Lawley*, *supra*, 27 Cal.4th at p. 155.)

In *Garcia*, codefendants Pedro Garcia and Geraldo Ojito were convicted of first degree murder. On appeal, Ojito challenged the trial court's admission of two notes attempting to intimidate witnesses that were written by his cellmate Miguel Thompson, an associate of the Mexican Mafia. (*People v. Garcia*, *supra*, 168 Cal.App.4th at pp. 268-269, 286-287.) Ojito argued that the first note "should have been excluded under the general rule that evidence of an attempt by a third person to suppress evidence is inadmissible against a defendant when the attempt did not occur in the defendant's presence and the defendant did not authorize the attempt" (*id*. at p. 287), and that the second note was inadmissible hearsay and its admission violated his rights under the confrontation clause of the Sixth Amendment. (*Ibid.*)[47]

The *Garcia* court found the first note was properly admitted by the trial court for the nonhearsay purpose of showing why certain witnesses were afraid to testify. (*People v. Garcia*, *supra*, 168 Cal.App.4th at pp. 287-288.) With respect to the second note, the court found some of the statements in the note were not hearsay because they were requests or directions to a third person to do something. (*Id*. at pp. 288-289.) But the court found the statements could be "reasonably viewed" as implied hearsay. (*Id*. at pp. 289.) The *Garcia* court rejected the People's argument that the second note was admissible as a statement against penal interest.

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[47] In the second note, Thompson stated that the first note, which he had written to "Chore," had been turned over and that "they are tripping in court that I'm doing or did you a favor on that." Thompson further stated that if Ojito had contact with Thompson's attorney he should "tell her that someone else wrote it, not us or me." (*People v. Garcia*, *supra*, 168 Cal.App.4th at p. 287.)

Noting that only portions of the note that were specifically disserving to Thompson's interest were admissible, the *Garcia* court explained that Thompson's statement in the second note that he had written the first note to "Chore" was disserving to Thompson's interest, but the statements suggesting that Ojito authorized or participated in the writing of the first note were disserving to Ojito's, not the declarant Thompson's, penal interest. (*Id.* at pp. 289-290.)

Appellant's comparison to *Lawley* is misplaced. As previously discussed, the *Lawley* court found that a statement made by Seabourn that he had killed the murder victim at the direction of the Aryan Brotherhood was not admissible because Seabourn was trying to become a full member of the gang, and therefore the statement was designed to enhance his or the gang's prestige. (*People v. Lawley*, *supra*, 27 Cal.4th at pp. 152, 154-155.) In so holding, this Court noted that the defendant did not cite to anything in the record which indicated Seabourn's statement about the Aryan Brotherhood was against his social interest. Here, as discussed above, the record contains considerable evidence that Brooks's statement regarding whom he had stolen from and the circumstances under which the theft occurred were against Brooks's penal and social interests.

This instant case can also be distinguished from *Garcia*. Here, Brooks's statement was only about him and his involvement in stealing the drugs from Carey. Thus, it was clearly against Brooks's interests. In *Garcia*, the court found that some statements that were made by declarant Thompson were against his interest. But, the court found statements that Thompson made regarding the codefendant's involvement in writing the first intimidation note were against the codefendant's interest only and therefore were not admissible as statements against Thompson's interest.

Moreover, the circumstances under which Brooks made the statement show reliability. Similar to the declarant and the defendant in *Wheeler*,

Brooks and Kanisha were family members. The siblings had a close relationship; Brooks told Kanisha about almost everything he did. (3CT 591.) "A close family relationship between the declarant and immediate addressee gives the declarant a reason to be truthful." (Imwinkelried, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Declarations Against Social Interest: The (Still) Embarrassingly Neglected Hearsay Exception* (1996) 69 S. Cal. L.Rev. 1427, 1441-1442 [hereafter *Declarations Against Social Interest*].) Notably, Brooks voluntarily made the statement to Kanisha. (3CT 590-591.) And nothing in the record shows Brooks's relationship with Kanisha would have caused him to make such statements falsely. Kanisha's concern and response further show how she believed Brooks's statement. All of these factors demonstrate that Brooks's statement was sufficiently trustworthy to be admissible. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 335 [a conversation that occurs between friends in a noncoercive setting which fosters uninhibited disclosures is a most reliable circumstance]; *Declarations Against Social Interest*, *supra*, at pp. 1437-1438 ["[T]he United States Supreme Court, lower courts and several of the leading treatise writers all have argued that the existence of [] a [familial] relationship favors the admission of the declaration, since the declarant is likely to speak truthfully to the person standing in that relation," fns. omitted].)

By once again incorrectly relying on Kanisha's trial testimony, appellant asserts Brooks's statement was not reliable because the prosecutor himself argued that Kanisha's version of what Brooks had told her was false. He cites to the motion and the prosecutor's opening and closing arguments to support this assertion. (AOB 118.) But the prosecutor never made this argument. During cross-examination *at trial*, Kanisha testified that Carey gave Brooks the drugs. (7RT 1492-1493.)

Although the prosecutor did not challenge this testimony, the prosecutor's version of the events and his interpretation of Kanisha's testimony never waivered from the original evidence he had proffered at the evidentiary hearing. For example, in his opening statement, cited by appellant, the prosecutor remarked:

> You are going to hear that George Brooks, G-rail, remember, he is one of our murder victims, ripped off or robbed William Carey, another Bounty Hunter gang member that goes by the name of Billy Pooh during a drug transaction. This is a no-no in the Bounty Hunters. You don't rob people like Billy Pooh. You have seen what the consequences are. You are going to hear that that happened just a few weeks prior to the murders.

(See 5RT 1099-13.)

Later, in his closing argument, the prosecutor argued (as cited by appellant):

> That brings us full circle, because this is where it all started with William Carey, getting his money taken or drugs taken by George Brooks, and Donte Mc Daniel is here to tell him that he took care of business. Giving him the update. I took care of this problem of yours, leaving death and destruction and virtual mayhem in his wake.
>
> . . .
>
> What is the motive in this case?
>
> Payback. You don't take money or drugs from Billy Pooh and expect no consequences. That's just a fact of life among the Bounty Hunters.
>
> A person of Billy Pooh's standing within the gang cannot allow that type of act to go unpunished. And the punishment has to be the most severe. Because these gang members when they commit their crimes are committing them not just to hurt other people, but to create fear, to enhance the reputation, so that word gets spread.
>
> You don't think word didn't get spread of this shooting?

> If you take money from Billy Pooh, not only will you die,
> you will die the most gruesome and most painful of death.

(9RT 1847-1848, 1850-1851.) There is nothing in these arguments that even remotely suggests that the prosecutor wanted the jury to conclude that Kanisha's version of what Brooks had told her was false. Needless to say, under either version of Kanisha's testimony, Brooks had taken or obtained drugs from Carey, had not paid Carey back for them, and was concerned about possible retaliation.

In sum, there was nothing included in the proffered evidence that was not disserving to Brooks or collateral to his inculpatory statements. (*People v. Leach*, *supra*, 15 Cal.3d at p. 441.) Consequently, the trial court did not abuse its discretion by finding Brooks's entire statement admissible under Evidence Code section 1230. (*People v. Lawley*, *supra*, 27 Cal.4th at pp. 153-154; see also *People v. Geier*, *supra*, 41 Cal.4th at p. 585.)

Appellant also contends the ruling deprived him of his state and federal constitutional right a fair and reliable capital sentencing hearing and due process. (AOB 113.) Appellant has forfeited his state constitutional claims because he did not raise them below. As previously discussed, he only raised an objection to the evidence based on the federal Constitution. Regardless, because the trial court properly admitted a hearsay statement under the ordinary rules of evidence, no constitutional violation occurred. (See *People v. Seumanu* (2015) 61 Cal.4th 1293, 1309; *People v. Linton* (2013) 56 Cal.4th 1146; *People v. Prince* (2007) 40 Cal.4th 1179, 1243.) Nor was there a violation of the Confrontation Clause, which only excludes testimonial hearsay, because, as defense counsel conceded (3RT 483), Brooks's statement was not testimonial. (*Giles v. California* (2008) 554 U.S. 353, 376 [128 S.Ct. 2678, 171 L.Ed.2d 488] ["only *testimonial* statements are excluded by the Confrontation Clause"].)

Appellant's due process claim is equally unavailing. "[T]he admission of evidence, even if error under state law, violates due process only if it makes the trial fundamentally unfair." (*People v. Partida* (2005) 37 Cal.4th 428, 436; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 67-75 [112 S.Ct. 475, 116 L.Ed.2d 385].) Appellant has not satisfied this high constitutional standard. Brooks's statement was not a significant portion of the prosecution's case-in-chief, and it was far from the primary evidence of appellant's guilt. Moreover, there is no due process bar to the admission of relevant, non-testimonial hearsay. (*Desai v. Booker* (6th Cir. 2013) 732 F.3d 628, 630-631.)

E. Regardless, Any Error in Admitting Brooks's Statement Was Harmless

Assuming arguendo the trial court erred in admitting the challenged portion of Brooks's statement, such error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, which is the standard applicable to state law error in the admission of hearsay evidence. (See *People v. Seumanu*, *supra*, 61 Cal.4th at p. 1308, citing *People v. Duarte*, *supra*, 24 Cal.4th at pp. 618-619.) Under the *Watson* standard, an error warrants reversal if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Appellant contends that in addition to violating state law, the admission of the Brooks's statement violated his federal right to due process and should thus be reviewed under the "harmless beyond a reasonable doubt" prejudice standard set forth in *Chapman*. (AOB 120-121.) As noted above, appellant has failed to show any due process violation. In any event, appellant cannot show prejudice under either standard.

Appellant contends that if Kanisha's testimony had not been admitted, there was a reasonable probability the jury would not have accepted the

prosecutor's "weakly supported" theory of gang retaliation. In support of this contention, he attacks three specific pieces of evidence related to motive, arguing that they were "trivial" and "ambiguous." (AOB 120-124.) Respondent disagrees.

At the outset, respondent notes that the jurors were instructed with CALJIC No. 2.51 that motive was not an element of murder or attempted murder, and that the presence of a motive could, at most, "tend to establish" guilt. (See 9RT 1970; 9CT 2227.) Thus, in light of this instruction (and the overwhelming evidence of appellant's guilt), evidence of motive was not as important as appellant suggests.

Nevertheless, contrary to appellant's position, the other evidence of motive introduced by the prosecution was strong. The evidence showed that appellant, Carey, Brooks, and Harris were all members of the Bounty Hunter Bloods, and that Carey was one of the biggest narcotics dealers in Nickerson Gardens. (See 8RT 1748-1750, 1752, 1756-1759.) The evidence also showed that appellant and Carey had a close relationship. For example, a program from Carey's funeral was found at appellant's "wife's" house (8RT 1627-1628), and the gang expert testified that he had seen appellant and Carey together a number of times. (8RT 1758.) Appellant's bragging to Carey about his participation in the murders while they watched a news story about the incident on television (see 6RT 1254-1256, 1626), was compelling evidence of appellant's and Carey's close relationship and motive for the crimes. Given Carey's status in the Bounty Hunters, appellant's behavior supports the inference that appellant wanted Carey to be proud of what appellant had done. He said to Carey, "that was your boy," and acted as though he had "saved the projects or something." (8RT 1626.) As the gang expert testified, such criminal acts would bolster appellant's status and reputation within the gang. (8RT 1756, 1762-1763.)

Dillard's testimony that appellant asked Brooks where he had been and told Brooks that Carey was looking for him on the night before the murders (5RT 1106-1107) strongly suggests that appellant killed Brooks at the behest of Carey. Moreover, Sims's testimony that appellant was at her house just prior to the murders and told Harris that someone had "messed [him] over" and they needed to go "handle" him (7RT 1420-1421) established appellant's motive for murdering Brooks.

Furthermore, as previously discussed at length in Argument II.H., overwhelming evidence supported appellant's convictions. Thus, based on the strong evidence of appellant's guilt, appellant cannot show, under either *Watson* or *Chapman*, that he was prejudiced by any error in the admission of the challenged statement. (*People v. Homick* (2012) 55 Cal.4th 816, 872 [erroneously admitted hearsay harmless in light of compelling evidence of defendant's guilt]); *People v. Guillen* (2014) 227 Cal.App.4th 934, 1016 [same].)

Lastly, appellant specifically argues that the admission of Brooks's statement prejudiced him with respect to the gang enhancement allegations and the determination of penalty. (AOB 124-128.) Regarding the gang enhancement, other evidence was introduced by the prosecutor to show the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang. Appellant and Harris, both members of the Bounty Hunter Bloods, committed the murders and attempted murders together. This alone was sufficient to support the gang enhancement. "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; see also *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ["jury could reasonably infer the requisite

association from the very fact that defendant committed the charged crimes in association with fellow gang members"].) Thus, even if Brooks's statements had not been admitted, other evidence clearly supported the gang enhancement. Accordingly, this argument fails.

Appellant's argument regarding the penalty phase also fails. As previously discussed, the prosecutor presented overwhelming evidence of appellant's guilt as well as evidence of his prior convictions and bad acts during the penalty phase. In light of such compelling evidence, the admission of Brooks's statement surely did not prejudice appellant in the penalty phase.

In sum, the trial court properly exercised its discretion in admitting Brooks's statement to Kanisha. Even if the trial court erred, appellant suffered no prejudice. Therefore, this Court should reject this claim.

IV. SUBSTANTIAL EVIDENCE SUPPORTED THE GANG ENHANCEMENTS

In his fourth claim, appellant contends insufficient evidence supported the four gang enhancements found true by the jury. He specifically asserts that the prosecution presented insufficient evidence that the Ace Line clique was a criminal street gang under section 186.22, subdivision (f). Aside from asking for reversal of the gang enhancements, appellant further asserts that the gang evidence used by the prosecutor to prove the gang enhancements prejudiced his entire case in violation of his state and federal constitutional rights to a fair trial, due process, and a reliable capital sentencing hearing. (AOB 128-150.) Respondent disagrees. First, appellant forfeited the sufficiency claim by failing to raise it in the trial court at the close of the prosecution's case-in-chief. Second, even assuming the sufficiency claim is not forfeited, it is meritless because the prosecution was not required to present evidence that the Ace Line clique

was a criminal street gang. Third, appellant's evidentiary claim is similarly forfeited and meritless.

A. The Gang Expert's Testimony Regarding the Bounty Hunter Bloods

Detective Kenneth Schmidt of the LAPD was the prosecution's gang expert. He provided extensive testimony about the Bounty Hunter Bloods. From 1998 through 2006, Detective Schmidt worked as a gang detective, gathering intelligence on and conducting arrests of members of the Bounty Hunter Bloods. (8RT 1740-1741.)

Detective Schmidt opined that in 2004, there were approximately 550 to 600 registered members of the Bounty Hunters. He explained that "registered" members were people who were put into a computer file based on contact with law enforcement. (8RT 1743.) The Bounty Hunter Bloods had common signs and symbols. For example, members wore hats with the letter "B" on them, used hand signals in the shape of a "B," and wore the color red. The gang's territory was "predominantly in and around the area of Nickerson Gardens." (8RT 1744.)

Detective Schmidt testified that some of the Bounty Hunters' primary activities were narcotics sales, street robberies, and crimes involving shootings and murder. (8RT 1744.) He identified Ravon Baylor and Lamont Sanchez as members of the Bounty Hunters. Baylor and Sanchez had both been convicted of murder and attempted murder. (8RT 1744-1745, 1747.)

Detective Schmidt identified appellant in court. He had had "numerous contact[s]" with appellant inside Nickerson Gardens. (8RT 1747-1748.) Detective Schmidt testified about appellant's numerous gang-related tattoos. For example, appellant had "Nickerson" tattooed across his back. Detective Schmidt explained that the tattoo showed appellant's allegiance to the gang, especially in light of the "B" and "H" tattoos, which

stood for Bounty Hunter, that appellant had on the back of his arms. (8RT 1748-1749, 1752.) Above the "B" tattoo was "111," which, according to Detective Schmidt, referred to 111th Street and the "Ace Line" clique. (8RT 1750.) Appellant had a "D Dogg" tattoo, which Detective Schmidt explained was appellant's gang moniker. The two g's were crossed out. Detective Schmidt testified that the "gg" stood for the Grape Street gang, which was a rival of the Bounty Hunters. (8RT 1752-1753.)

Appellant also had a tattoo of "AL" next to a tattoo of "CK." Detective Schmidt explained that this symbolized "Ace Line Crip Killer," which in turn referred to a "Bounty Hunter from the area of 111th Street and Crip Killer." (8RT 1754.) Detective Schmidt opined that the Bloods and Crips were rivals. Another tattoo, "Nake Dog BHIP," indicated that a Bounty Hunter member had died and that he should rest in peace. Detective Schmidt testified that the tattoo was a show of respect among the gang. (8RT 1754.) Another tattoo, "BIP," stood for "Blood in Peace." (8RT 1755.)

According to Detective Schmidt, the Bounty Hunters "as a whole" were within the area in and around Nickerson Gardens, and the Bellhaven Bloods and Block Bloods were "pretty much" the Bounty Hunter gang. (8RT 1750.) The expert testified there was no structured hierarchy in the gang, other than the "O.G.s" (older gangsters) who had been around longer. He explained that members with more money had more stature, that members who dealt narcotics had a higher stature, and that narcotics were sold in the different areas where members grew up. (8RT 1750-1751.) Detective Schmidt explained how the numerous cliques were associated with different streets: Deuce Line was associated with 112th Street, Four Line with 114th Street, and Five Line with 115th Street. He further testified there were parking lots named for different areas, including the Shad, Folsom, Nelson, and Hunter lots. (8RT 1751.)

When asked to describe the relationship that existed between the Bounty Hunter cliques, Detective Schmidt testified, "Other than they are all Bounty Hunters. They all grow up together. They live together. It just could be at anyone [*sic*] point in time where they're living at that point in time, they'll say they're Ace line or Five Line." (8RT 1751.) He further testified that the cliques did not always get along, explaining how some members would take over an area where other members had been selling narcotics. According to Detective Schmidt, members wanted the stature of having an area where they were earning a lot of money. (8RT 1751.)[48] He indicated that members of the Bounty Hunters might fight over narcotics, robberies, or women. (8RT 1775.) Detective Schmidt testified that the Blood gangs "generally tr[ied] to get along." (8RT 1755.)

Detective Schmidt testified about how members could elevate their status within the gang by "putting in the work," and what the concept of respect meant to the members. (8RT 1756.) He explained how the gang used fear and intimidation to carry out its activities and to prevent witnesses from testifying. (See 8RT 1761-1762.) Gang members boasted about their involvement in criminal activities to enhance their reputation. (8RT 1762.) According to Detective Schmidt, members of the Bounty Hunters were not equally active or violent. He explained that each individual member decided for himself how active or violent he wanted to be, and that depended on how much that member wanted people to fear him or how much he wanted to elevate his stature within the gang. (8RT 1782.)

Detective Schmidt had seen appellant and Carey together numerous times. He described Carey as one of the lead narcotics sellers in Nickerson

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[48] On cross examination, Detective Schmidt testified that there was "inner gang fighting" or "feuds" over the parking lots. He agreed that Nickerson Gardens was a "medium size town" in which the "Hatfields" and "McCoys" lived. (8RT 1777.)

Gardens. (8RT 1757-1758.) Detective Schmidt testified that Harris, Brooks, Dillard, and Prentice Mills were all members of the Bounty Hunter Bloods. (8RT 1758-1759.) Based on a hypothetical mirroring the facts of the instant case, Detective Schmidt opined that the crimes were committed for the benefit of, at the direction of, or in association with the Bounty Hunters. (8RT 1762-1764.)

B. Appellant Forfeited the Instant Claim Because He Failed to Move for a Judgment of Acquittal After the Close of the People's Case-in-chief and He Did Not Object to the Gang Evidence Below

After the prosecution rested, appellant did not move under section 1181.1 for a judgment in his favor. (See 8RT 1788.) Having failed to raise any issue about the gang enhancements in a motion for judgment under section 1118.1, appellant forfeited his claim that the prosecution failed to present sufficient evidence of an associational nexus between the Ace Line clique and the Bounty Hunters gang. (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1469 ["a defendant . . . who does not move for acquittal pursuant to section 1118.1 at the close of the prosecution's case[] waives any claim that the evidence was at that point insufficient."].)

The evidentiary claim is similarly forfeited because appellant did not object to the admission of the gang evidence below. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 408; *People v. Williams* (2013) 56 Cal.4th 630, 684; Evid. Code, § 353, subd. (a).)

C. Regardless, the Instant Sufficiency Claim Is Meritless Because the People Sufficiently Proved that Appellant Committed the Charged Offenses for the Benefit of, or in Association with, the Bounty Hunter Bloods, Which Was a Criminal Street Gang

To support the gang allegation, the prosecution was required to prove that appellant committed the charged crimes for the benefit of, or in association with, a criminal street gang. Pursuant to section 186.22,

subdivision (f), a criminal street gang is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more" criminal acts enumerated in subdivision (e) of the statute, and which has "a common name or common identifying sign or symbol, [and] whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (*People v. Gardeley* (1996) 14 Cal.4th 605, 616, internal quotation marks and emphasis omitted; § 186.22(f).)

Substantial evidence is evidence that is "reasonable in nature, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 576, internal quotations and citations omitted. When reviewing the sufficiency of the evidence, an appellate court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Davis* (1995) 10 Cal.4th 463, 509, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560], emphasis in original.) An appellate court views the evidence in the light most favorable to the prosecution and must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Relying on *People v. Williams* (2008) 167 Cal.App.4th 983, appellant argues the prosecution failed to show a connection between the Bounty Hunter Bloods and appellant's Ace Line clique. (AOB 128-144.) Appellant contends that if any evidence regarding how the cliques associated with each other was admitted, it showed that the cliques had an adversarial relationship with one another. (AOB 142-143.) In essence, appellant argues the prosecution was required to prove either that the Ace

Line itself was a criminal street gang or to establish "some sort of collaborative activities or collective organizational structure" linking Ace Line to the Bounty Hunters "so that the various groups reasonably can be viewed as parts of the same overall organization." (*People v. Williams*, *supra*, 167 Cal.App.4th at p. 988.) This argument is meritless, however, because the record shows the prosecution affirmatively proved that appellant was a member of the Bounty Hunters, which is a criminal street gang.

In *Williams*, the defendant, who was a member of the Small Town Peckerwoods gang, suffered a conviction for murder with an active participant in a street gang special circumstance (§ 190.2, subd. (a)(22)), and a conviction for being an active participant in a criminal street gang (§ 186.22, subd. (a)). (*Williams*, *supra*, 167 Cal.App.4th at pp. 985-987.) The defendant argued there was no evidence he was an active participant in the larger Peckerwoods gang, and no evidence linking the Small Town Peckerwoods, of which he was a member, to the larger gang. (*Id*. at p. 987.) Thus, the issue on appeal was "the relationship that must exist before a smaller group can be considered part of a larger group for purposes of determining whether the smaller group constitutes a criminal street gang." (*Id*. at p. 985.)

The gang expert in *Williams* testified that the Peckerwoods were a criminal street gang as defined by the Penal Code, and that smaller groups like the Small Town Peckerwoods were all subsets of the Peckerwood organization. (*People v. Williams*, *supra*, 167 Cal.App.4th at p. 988.) The court of appeal observed that the expert's conclusion "appear[ed] to have been based on commonality of name and ideology, rather than concerted activity or organizational structure." (*Ibid*.) The court explained that having a similar name was not "of itself, sufficient to permit the status or deeds of the larger group to be ascribed to the smaller group." (*Id*. at p.

987.) The court further remarked that there must be something more than a shared ideology or philosophy, or a name that contains the same word before multiple subsets can be treated as a whole when deciding whether a group constitutes a criminal street gang. The *Williams* court continued, "[S]ome sort of collaborative activities or collective organizational structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization." (*Id*. at p. 988.)

Here, unlike in *Williams*, the evidence directly linked appellant to the larger umbrella gang, not exclusively to the local clique or subset. There was no bootstrapping in this case—the prosecution proved that appellant was a Bounty Hunter Blood. In fact, the gang expert opined that appellant was a Bounty Hunter Blood. He did not opine that appellant was Bounty Hunter solely by virtue of his membership in the Ace Line Clique. If anything, the evidence showed that the cliques were merely a geographical identifier for the Bounty Hunter members. Depending on where a Bounty Hunter member lived at any given time, he was both part of that street's clique and still a member of the Bounty Hunters. (See 8RT 1751.)

The prosecutor focused on appellant's ties to the Bounty Hunters, not his connection to the Ace Line clique. Indeed, the cliques did not play an important role in the prosecutor's case. For example, no evidence was introduced by the prosecutor that other Bounty Hunters—Carey, Brooks, Harris, Dillard or Mills—were in specific cliques. The predicate offenses proffered by the prosecutor were for crimes committed by Bounty Hunter Bloods members, not by members of a specific clique of the gang. (See 8RT 1744-1745.) The prosecutor admitted evidence of appellant's numerous tattoos, which clearly identified him as a Bounty Hunter. (See 8RT 1748-1750, 1754-1755.) Certainly, because appellant also had some tattoos that represented the Ace Line clique (see 8RT 1750, 1753-1754), the

prosecutor had the gang expert explain their meaning. When the gang expert was asked to explain what the "AL"(Ace Line) and "CK" (Crip Killer) tattoos signified, he stated that it referred to "Bounty Hunter from the area of 111th Street and Crip Killer stands for any Crip gang." (8RT 1754.) This testimony in particular demonstrates that appellant was first and foremost a Bounty Hunter. Finally, appellant's close association with other members of the Bounty Hunters indicated that he was a member of the umbrella gang. For example, appellant had a close relationship with Carey and committed the charged crimes with Harris, both of whom were fellow Bounty Hunters.

Because the prosecutor proved appellant's membership in the Bounty Hunters, he was not required to prove the existence of a collective organizational structure between Ace Line and the Bounty Hunters, or to establish that Ace Line was itself a criminal street gang. Appellant was directly linked to the larger Bounty Hunters Bloods gang as a member of that group. Nothing further was needed, as appellant does not dispute that the Bounty Hunter Bloods was a criminal street gang within the meaning of section 186.22 or that appellant committed the charged offenses in association with other Bounty Hunters (e.g., Harris) and with the specific intent to facilitate criminal conduct of the Bounty Hunters. Needless to say, the prosecution presented substantial evidence to prove the undisputed elements of the gang enhancement, as summarized above.

Finally, respondent notes that since appellant filed his opening brief, this Court issued an opinion in *People v. Prunty* (2015) 62 Cal.4th 59. While *Prunty* addressed what must be shown to establish the "'ongoing organization'" element of a criminal street gang (*id*. at p. 71), it did so in circumstances quite different than those presented here. Thus, *Prunty* is not applicable to the instant case.

In *Prunty*, this Court considered the type of showing the prosecution must make when its theory of why a criminal street gang exists depends on the conduct of one or more gang subsets. (*Id*. at p. 67.) The issue is a "narrow" one and "arises only when the prosecution seeks to prove a street gang enhancement by showing the defendant committed a felony to benefit a broader umbrella gang, but seeks to prove the requisite pattern of criminal gang activity with evidence of felonies committed by members of subsets to the umbrella gang." (*Id*. at p. 91 (conc. & dis. opn. of Corrigan, J.); *People v. Ewing* (Jan. 27, 2016, C072783) __Cal.App.4th __ [2016 Cal.App.LEXIS 59, 21-22] [*Prunty* "appears limited to a discrete factual scenario"].) The *Prunty* court concluded that "where the prosecution's case positing the existence of a single 'criminal street gang' for purposes of section 186.22(f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets." (*People v. Prunty*, *supra*, 62 Cal.4th at p. 71.) That was not the prosecution's theory here. Hence, *Prunty* does not apply to the factual scenario presented here.

D. Admission of the Gang Evidence Did Not Violate Appellant's Right to a Fair Trial, a Fair and Reliable Penalty Hearing, or Due Process

Finally, appellant argues that because insufficient evidence supported the gang enhancements, and the prosecutor used that "irrelevant" and "highly inflammatory" gang evidence to prove the underlying offenses, this Court should reverse the entire judgment. Appellant asserts the gang evidence violated his right to a fair trial, a fair and reliable penalty hearing, and due process. (AOB 144-150.) Respondent disagrees. As will be discussed, the gang evidence was properly admitted to prove intent and motive.

As previously discussed, the admission of evidence results in a due process violation only if it makes the trial fundamentally unfair. (*People v. Partida*, *supra*, 37 Cal.4th at p. 436; see also *Estelle v. McGuire*, supra, 502 U.S. at pp. 67-75.) "Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must be of such quality as necessarily prevents a fair trial. Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, emphasis in original; internal quotation marks and citations omitted; accord *People v. Fuiava* (2012) 53 Cal.4th 622, 697.)

Appellant's attempt to analogize the facts of this case to those in *People v. Albarran* (2007) 149 Cal.App.4th 214 is unavailing. (See AOB 145-146.) The *Albarran* opinion addressed "one of those rare and unusual occasions where the admission of [gang] evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Id*. at p. 232.) There, a prosecutor had introduced evidence of the defendant's membership in a gang to substantiate certain enhancement allegations that were dismissed for insufficient evidence by the trial court, but engaged in "overkill" by subjecting jurors to police testimony about the gang which "consumed the better part of an entire trial day." (*Id*. at p. 228 & fn. 10.) The testimony focused on the identities of other gang members, descriptions of unrelated criminal activity committed by other gang members, evidence of the gang's threats to kill police officers, and references to the Mexican Mafia, all of which was irrelevant to the underlying charges. (*Id*. at pp. 227-230.) The court of appeal concluded that the admission of gang evidence with "no connection to [Albarran's] crimes" was so prejudicial "that it raised the distinct potential to sway the jury to convict regardless of Albarran's actual guilt." (*Id*. at pp. 227-228.)

Accordingly, the court found the admission of the irrelevant and inflammatory evidence violated Albarran's due process rights. (*Id*. at p. 222.)

This case is not one of those rare and unusual occasions to which the *Albarran* court referred. Here, unlike in *Albarran*, the gang expert's testimony about the Bounty Hunters and gangs in general was relevant and probative. First of all, the evidence was relevant and admissible to prove the gang enhancements as shown above. In addition, "evidence of gang membership is often relevant to, and admissible regarding, the charged offense." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Here, the gang expert's testimony about appellant's gang affiliation—including evidence of the Bounty Hunters' territory, membership, signs, symbols, beliefs and practices, criminal enterprises, and rivalries—was properly admitted by the prosecutor to prove motive and intent with respect to the underlying offenses. (See *ibid.*) For example, the gang expert's testimony about gang culture and gang members' sense of respect aided the jury in understanding how the theft of a few ounces of drugs from a prominent gang member could escalate into a senseless and brutal murder when gang members are involved. The gang evidence further assisted the jury in understanding why appellant and Harris would so savagely kill (or attempt to kill) the innocent bystanders. Thus, the gang evidence was extremely relevant to the prosecution's theory that Brooks's murder was gang related. Certainly, the gang evidence was not inflammatory when compared to appellant's brutal crimes. Accordingly, contrary to appellant's position (see AOB 145-146), the gang expert's testimony was neither inflammatory nor prejudicial, and it did not render his trial fundamentally unfair.

Regardless, any error in admitting the gang evidence was harmless under either the *Watson* or *Chapman* because, as previously discussed, overwhelming evidence supported the jury's guilty verdicts, and the gang

evidence was hardly inflammatory in comparison to appellant's crimes. (*People v. Champion* (1995) 9 Cal.4th 879, 923 [alleged error in admission of gang evidence is subject to the standard of review set forth in *Watson*].) Moreover, based on the trial court's admonitions and instructions (see 9CT 2235; 9RT 2004-2005), the jury was well aware that most of the gang expert's testimony was admitted to prove the gang enhancement allegations only, especially the testimony about crimes committed by other Bounty Hunters and the primary activities of the gang. This was not a case in which the subject gang evidence was so extraordinarily prejudicial that it could have swayed the jury to convict appellant regardless of his actual guilt.

With respect to the penalty phase, any state law error at that phase requires reversal only when there is a "'reasonable (i.e., realistic) possibility' the error affected the verdict." (*People v. Cowan* (2010) 50 Cal.4th 401, 491.) The standard is essentially the same as the *Chapman* harmless-beyond-a-reasonable-doubt standard. (*Ibid*.) Here, given the brutal nature of the crimes and the compelling evidence of appellant's prior convictions and bad acts, there is no reasonable possibility that the jury would have returned a different verdict at the penalty phase had the gang evidence not been admitted.

V. THIS COURT MAY CONDUCT AN INDEPENDENT REVIEW OF THE TRIAL COURT'S IN CAMERA *PITCHESS*[49] HEARINGS

Appellant filed a number of *Pitchess* motions for discovery with respect to the following law enforcement personnel: Los Angeles County Sheriff's Deputies Esquivel, Boling, Jimenez, and Orosco; and LAPD Officers J. Arenas, C. Bodell, C. Bourbois, Chavez, Coughlin, Craig, G.

[49] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

Davila, Moreno, J. Moya, B. Perez, Rogers, N. Sanchez, E. Shear, R. Smith, Eric Sorenson, and M. Turner. (See Supp. CT IV 17-110; 111-122 [confidential]; 2CT 417-435 [confidential].)

The trial court held several in camera hearings on the motions. (See 3RT 355-364 [sealed], 374-381 [sealed]; 4RT 799-837 [sealed]; 10RT 2010-5 through 2010-12 [sealed].) The trial court denied all of appellant's discovery requests except for certain requests pertaining to Deputy Jimenez. (See 3RT 365-366, 382-383; 10RT 2011.)

Appellant asks this Court to independently review the sealed transcripts from the in camera hearings and the documents reviewed by the trial court to determine whether the trial court's rulings were erroneous. (AOB 151-154.) Respondent does not object.

When requested by an appellant, an appellate court may independently review the transcript of the trial court's in camera *Pitchess* hearing to determine whether the trial court disclosed all relevant complaints. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229-1232.) "If the trial court concludes the defendant has fulfilled [the] prerequisites and made a showing of good cause, the custodian of records should bring to court all documents 'potentially relevant' to the defendant's motion." (*Id*. at p. 1226.) "The trial court shall examine the information in chambers, out of the presence and hearing of all persons except the person authorized [to possess the records] and such other persons [the custodian of records] is willing to have present." (*Ibid*., quotation marks and citations omitted.) A trial court is vested with broad discretion in ruling on a defendant's motion to discover peace officer records, and a trial court's ruling on a *Pitchess* motion is reviewed for abuse of discretion. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

Respondent expects that an examination of the records will show that the trial court followed the proper procedures for the in camera hearing, and

that the court properly exercised its discretion. Accordingly, the judgment should be affirmed. If, however, this Court should determine that a review of the relevant personnel records reveals the existence of discoverable materials, the appropriate remedy would be to remand to the trial court for a determination of whether appellant was prejudiced by the non-disclosure of such materials. (See *People v. Gaines* (2009) 46 Cal.4th 172, 182 [on remand from denial of a *Pitchess* motion, a defendant must demonstrate "a reasonable probability of a different outcome had the evidence been disclosed"]; *People v. Guevara* (2007) 148 Cal.App.4th 62, 69 [judgment conditionally reversed and case remanded for a new *Pitchess* hearing "in which the proper procedure is followed"].)

VI. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE AT THE PENALTY PHASE OF ANDERSON'S CANCER; REGARDLESS, ANY ERROR WAS HARMLESS

In his sixth claim, appellant argues the trial court erred at the penalty phase when it permitted the prosecutor to introduce evidence of Anderson's numerous bouts with cancer. He claims the erroneous admission of the evidence violated his right to a fair penalty trial and a reliable determination of penalty under the federal and state Constitutions. (AOB 155-169.) This claim is meritless. The trial court did not err in admitting evidence of the murder victim's illness at the penalty phase as a circumstance of the offense under section 190.3, factor (a). Even if the trial court erred in admitting the evidence, any error was harmless.

A. The Trial Court Rules the Evidence of Anderson's Cancer Is Admissible

Anderson's daughter, Neisha Sanford, testified at the first penalty phase trial that her mother was suffering from cancer when she was murdered. Sanford explained that Anderson had been receiving cancer

treatment "off and on." (11RT 2346.) Sanford testified that Anderson "probably" had a drug addiction because of what she was going through with her illness. (11RT 2353.) Sanford's sons had been at Anderson's apartment "practically everyday [*sic*] up until the day of the murders." (11RT 2354.) Sanford explained that because Anderson's cancer was getting worse, Anderson wanted to spend more time with her grandsons. (11RT 2355.)

On December 8, 2008, prior to the start of the second penalty phase trial, an Evidence Code 402 hearing was held regarding the admissibility of the evidence of Anderson's cancer. Defense counsel noted that Sanford had testified about Anderson's cancer at the first penalty phase trial, and argued the prosecutor should not be permitted to introduce any testimony or photos related to Anderson's illness. (19RT 3486.) The prosecutor explained that Anderson had been battling cancer "on and off for quite some time," that she had gone into remission, and that she became ill again around the time she was murdered. The prosecutor stated he had introduced the evidence at the first penalty phase trial because it showed Anderson was even more vulnerable at the time she was killed, and he argued the evidence was relevant under section 190.3, factor (a). (19RT 3486.) The prosecutor further argued that because Anderson knew she was ill, "each day [was] precious." (19RT 3487.)

The prosecutor further noted Anderson's cancer was "reasonable and permissible" victim impact and section 190.3, factor (a) evidence. He explained that the evidence of Anderson's illness was also relevant because the trial court had ruled that the defense could introduce evidence of Anderson's drug use, and her illness helped clarified why she may have been using drugs. (19RT 3488-3489.) The prosecutor further argued that the jury should be entitled to hear "the whole picture of who she was and what she was going through at the time that [appellant] murdered her."

(19RT 3491.) Defense counsel responded that Anderson's illness was not proper victim impact evidence, that it was prejudicial, and was being used to "inflame the passions of the jury." (19RT 3492.)

The trial court ruled the prosecutor could introduce evidence of Anderson's cancer, but also ruled the defense could present evidence that Anderson had drugs in her system when she was murdered. (19RT 3495.)

At the second penalty phase trial, Sanford testified that her two sons had a very close relationship with Anderson. (21RT 4091-4092.) Sanford's sons were at Anderson's house almost every day and would often sleep over because Anderson wanted to spend more time with them due to her illness. Sanford's sons were at Anderson's apartment on the night before Anderson was murdered. (21RT 4094, 4099-4100.)

Sanford also testified that Anderson had been battling cancer since 1989, that she had had surgery and was in remission, but that the illness was "kind of back and forth." According to Sanford, during the time that Anderson was sick and undergoing treatment, Anderson would drink and take drugs to deal with her situation. (21RT 4095.)

B. Anderson's Cancer Was Proper Evidence for the Jury to Consider as a Circumstance of the Crime

In a death penalty case, the Eighth Amendment does not prohibit the jury from considering evidence of "the specific harm caused by the crime in question." (*People v. Prince*, *supra*, 40 Cal.4th at 1286, quoting *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].) This Court has found such evidence admissible as a "circumstance of the crime" under section 190.3, factor (a), but has cautioned "that allowing such evidence under factor (a) does not mean that there are no limits on emotional evidence and argument." (*Ibid*., internal quotation marks and citations omitted; *People v. Edwards* (1991) 54 Cal.3d 787, 833.) "Victim impact evidence is designed to show . . . each victim's uniqueness as an

individual human being." (*People v. Vines* (2011) 51 Cal.4th 830, 887, quoting *Payne v. Tennessee*, *supra*, 501 U.S. at p. 823, internal quotation marks omitted.) The admission of victim impact evidence is reviewed for abuse of discretion. (*People v. Trinh* (2014) 59 Cal.4th 216, 245.)

In *People v. Jurado* (2006) 38 Cal.4th 72, the defendant argued that evidence that the victim was pregnant when he murdered her was irrelevant and unduly prejudicial. (*Id*. at pp. 130-131.) This Court found the trial court properly admitted the evidence of the murder victim's pregnancy at the penalty phase as a circumstance of the offense. This Court further found the evidence was not unduly prejudicial, because in murdering the victim, the defendant had also terminated the life of a healthy fetus and therefore, it "was part of the harm caused by defendant's crime and thus was a legitimate, though emotional, consideration for the jury in making its penalty decision." (*Id.* at p. 131.) This Court noted the defendant had not challenged the manner in which the pregnancy evidence was presented, but nevertheless concluded it was not introduced in an unnecessarily inflammatory manner. (*Ibid.*)

As in *Jurado*, the evidence of Anderson's cancer was relevant but not prejudicial and properly showed her "uniqueness as an individual human being." (*People v. Vines*, *supra*, 51 Cal.4th at p. 887.) The evidence was relevant as a circumstance of the crime as it was an intricate part of Anderson at the time of her murder. Because of her illness, Anderson was trying to spend as much time as possible with her grandsons, with whom she had a very close relationship. (21RT 4094, 4099-4100.) Thus, the specific harm caused by a appellant's crime was to cut short the precious time that Anderson's family had to spend with her. The cancer evidence also helped explain why Anderson was using drugs at the time of the murder and thereby rebutted appellant's attempt to tarnish her character.

Moreover, the probative value of the evidence of Anderson's cancer was not substantially outweighed by any potential prejudice. While the evidence arguably may have been emotional, it was important for the jury to understand how Anderson's murder impacted her family at a time in which she was spending even more time with her grandsons and other family members due to her illness. The evidence was no more emotional than the evidence of the victim's pregnancy and death of her child that was presented in *Jurado*. And, as in *Jurado*, the evidence was not presented in an inflammatory way. (*People v. Jurado*, *supra*, 38 Cal.4th at p. 131.)

Accordingly, this Court should reject defendant's claim that the trial court abused its discretion in admitting the evidence of Anderson's cancer.

Finally, contrary to appellant's argument (AOB 166-169), any error in admitting the evidence was harmless under either *Watson* or *Chapman*. Anderson was an innocent bystander who was brutally murdered in cold blood insider her own home. She suffered two fatal gunshot wounds, one to her face and the other to her chest. (See 7RT 1397-1398, 1403.) As evidenced by the stippling on Anderson's face, she was shot point blank, literally staring down the barrel of the gun that was used to kill her. (7RT 1390-1393.) That Anderson had cancer when she was murdered was nowhere near as inflammatory as the details of her murder, and, as a result, her illness undoubtedly had no effect on the jury's verdict.

VII. THE SECOND PENALTY PHASE JURY WAS PROPERLY INSTRUCTED

In his next claim, appellant argues the trial court erred in refusing to instruct the second penalty phase jury on lingering doubt. (AOB 170-189.) He urges this Court to "reconsider the confusing and contradictory rules governing the presentation and consideration of evidence regarding lingering doubt." (AOB 171, 179-183.) Finally, appellant asserts the error

warrants reversal of his death sentence. (AOB 170, 189-193.) The claim is meritless.

As this Court has repeatedly held, there is no federal or state right to a lingering doubt instruction. Instead, this Court has held that "the standard instructions on capital sentencing factors, together with counsel's closing argument, are sufficient to convey the lingering doubt concept to the jury." (*People v. Edwards* (2013) 57 Cal.4th 658, 765; accord, *People v. Williams* (2015) 61 Cal.4th 1244, 1287; *People v. Rogers* (2013) 57 Cal.4th 296, 348-349; *People v. Streeter* (2012) 54 Cal.4th 205, 265-266.) Appellant has not put forward any basis in law or fact that would distinguish the instant case from precedent or require reconsideration of well-settled precedent.

Despite this Court's previous holdings regarding this issue, appellant nevertheless argues that in the instant case, such an instruction was necessary for a number of reasons including: (1) he had requested a lingering doubt instruction; (2) the second penalty phase jury was not the jury that had rendered the guilty verdicts; (3) his request for the lingering doubt instruction was denied for an "illogical reason;" (4) the trial court repeatedly instructed to the jury that it "'must accept'" the guilt phase jury's finding that appellant had personally killed Anderson; (5) the prosecutor's argument that appellant had personally killed Anderson "relied heavily on an appeal to the findings of the prior jury;" and (6) the context in which the penalty jury heard the prosecutor's argument, the trial court's instructions, and the trial court's rulings on defense counsel's objections during the prosecution's penalty phase closing argument. (AOB 184-189.)

People v. Gonzales and Soliz (2011) 52 Cal.4th 254 (hereafter *Gonzales*), is instructive. The trial court in *Gonzales* refused to instruct on lingering doubt, finding that the instruction was only appropriate when the jury that had decided guilt also decided penalty. (*Id.* at p. 325.) Similarly,

as the trial court in the instant case found, the instruction was not appropriate because the second penalty phase jury was not the same jury that had convicted appellant of the charged offenses. (24RT 4515, 4677.) Thus, contrary to appellant's assertion (AOB 185), this was not an "illogical" reason for the trial court to refuse appellant's request for a lingering doubt instruction.

Moreover, contrary to appellant's position (AOB 185-188), the trial court and the prosecutor's reminders to the penalty phase jurors that they had to accept the findings of the guilt phase jury did not leave "no room for consideration of residual doubt." (AOB 185.) In *People v. DeSantis* (1992) 2 Cal.4th 1198, a case relied on by the *Gonzalez* court, this Court noted that to the extent that a trial court's rulings and a prosecutor's comments "merely reminded the jury that it was not to redetermine *guilt*, those actions did not remove the question of lingering doubt from the jury, but only told it the truth: that in the penalty phase defendant's guilt was to be conclusively presumed as a matter of law because the trier of fact had so found in the guilt phase." (*Id*. at p. 1238, emphasis in original, citation omitted.) Indeed, the jury here was "'steeped in the nuances of the case, much as if the same jury had decided guilt and penalty.'" (*People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 326, quoting *People v. DeSantis*, *supra*, 2 Cal.4th at p. 1240.)

Appellant presented numerous witnesses in mitigation, and during closing argument, defense counsel urged the jury to consider the mitigating evidence, referring to CALJIC Nos. 8.85 and 8.88. (See 24RT 4605-4607, 4612-4620, 4622-4628, 4635-4647, 4654-4655, 4660-4670.) Thus, as this Court noted in *Gonzales*, if the second penalty jury was convinced by defense counsel's arguments in mitigation based on the circumstances of the capital crimes, it could have utilized section 190.3, factors (a) and (k), as expressed in CALJIC No. 8.85, to sentence appellant to LWOP instead

of death. (*People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 326.) The jury did not need a lingering doubt instruction to do so. (*Ibid*.)

Finally, even if appellant did have a federal constitutional right to a lingering doubt instruction, there was no error here. As previously discussed, the trial court permitted defense counsel great latitude to raise such a doubt with the second penalty phase jury. (*People v. DeSantis*, *supra*, 2 Cal.4th at p. 1240 [no Eighth Amendment violation where "[t]he trial court placed no limitation whatsoever on petitioner's opportunity to press the residual doubts question with the sentencing jury"].) Accordingly, the trial court did not err when it refused to instruct on lingering doubt.

Regardless, any error was harmless. Although the jury had to accept the guilt phase findings, appellant was allowed to present evidence to challenge certain guilt phase findings and the general instructions allowed the jury to consider the lingering doubt evidence. Ultimately, the guilt evidence was overwhelming and the aggravating evidence was too strong to overcome, even if a lingering doubt instruction had been given.

VIII. INSTRUCTIONS ON UNANIMITY AND BURDEN OF PROOF WITH RESPECT TO AGGRAVATING FACTORS ARE NOT REQUIRED BY STATUTE OR THE CALIFORNIA CONSTITUTION

In his eighth claim, appellant contends that pursuant to section 1042 and article I, section 16, of the California Constitution, a jury's penalty determination as well as various components of a capital trial are "issue[s] of fact" that require unanimity and proof beyond a reasonable doubt. (AOB 194-224.) This claim is meritless and should be rejected.

This Court has repeatedly held that a penalty phase jury is not required to find each aggravating factor beyond a reasonable doubt, nor is unanimity on the aggravating factors necessary. (See, e.g., *People v.*

Williams, *supra*, 56 Cal.4th at pp. 697-698; *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 333; *People v. Prieto* (2003) 30 Cal.4th 226, 275; *People v. Taylor* (1990) 52 Cal.3d 719, 749; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777.)

Moreover, this Court has also continually held that the penalty phase determination is normative, not factual, and thus is not subject to a burden of proof. (*People v. Merriman* (2014) 60 Cal.4th 1, 106; *People v. Prieto*, *supra*, 30 Cal.4th at pp. 263, 275; *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 779; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Nevertheless, appellant received a jury trial on the penalty determination, and the jury made the pertinent findings as required by the applicable instructions before reaching a unanimous verdict of death. There is no precedent for appellant's position that section 1042 and article I, section 16 of the California Constitution imposed additional procedural requirements on the jury's penalty determination.

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

Appellant's next contention is a series of subclaims concerning the validity of California's death penalty scheme. Appellant admits that each subclaim has previously been rejected by this Court. (AOB 226-245) Because he offers no persuasive reasons for this Court to reconsider its prior rulings, these claims should be denied.

In recent cases, this Court has confirmed its rejection of all the various challenges raised by appellant: (1) "The statute (§ 190.2) does not impose overbroad death eligibility, either because of the sheer number and scope of special circumstances which define a capital murder, or because the statute permits capital exposure for an unintentional felony murder" (AOB 226-

227; *People v. Anderson* (2001) 25 Cal.4th 543, 601; see, e.g., *People v. Marks*, *supra*, 31 Cal.4th at p. 237; *People v. Box* (2000) 23 Cal.4th 1153, 1217; *People v. Ochoa* (1999) 19 Cal.4th 353, 479); (2) section 190.3, subdivision (a) is a proper aggravating factor, and permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase does not result in an arbitrary and capricious imposition of the death penalty (AOB 227-228; see *People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401); (3) capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative (AOB 229-230; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137), and neither the due process clause nor the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty (AOB 230-231; *People v. Blair* (2005) 36 Cal.4th 686,753); (4) CALJIC No. 8.85 does not violate the Sixth, Eighth, or Fourteenth Amendments by omitting a burden of proof as to either mitigation or aggravation (AOB 231-232; *People v. Williams* (2013) 56 Cal.4th 165, 201); (5) unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard (AOB 232-234; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Taylor*, *supra*, 52 Cal.3d at p. 749); (6) instruction that death is "warranted" when aggravating evidence substantially outweighs mitigating evidence is neither "inadequate or misleading" (AOB 234-235; *People v. Arias*, *supra*, 13 Cal.4th at p. 171); (7) use of "extreme" and "substantial" in the sentencing factors does not act as a barrier to the consideration of mitigating evidence in violation of the federal Constitution (AOB 235; *People v. Avila* (2006) 38 Cal.4th 491, 614-615); (8) the phrase "so substantial" does not facilitate impermissibly broad sentencing discretion in violation of the Eighth and Fourteenth

Amendments (AOB 235-236; *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14); (9) the failure to delete inapplicable sentencing factors set forth in CALJIC No. 8.85 did not violate appellant's constitutional rights (AOB 236-237; *People v. Cook* (2006) 39 Cal.4th 566, 618); (10) "[T]he trial court is not required to instruct the jury as to which of the listed sentencing factors are aggravating, which are mitigating, and which could be either, depending upon the evidence" (AOB 237; *People v. Manriquez* (2005) 37 Cal.4th 547, 590; see also *People v. Cunningham* (2015) 61 Cal.4th 609, 672); (11) "CALJIC No. 8.88 is not inconsistent with section 190.3 nor is it unconstitutional for failing to inform the jury that if mitigating circumstances outweigh those in aggravation, it "shall" return a sentence of LWOP (AOB 238-239; *People v. Cage* (2015) 62 Cal.4th 256, 292; *People v. Boyce* (2014) 59 Cal.4th 672, 724); (12) sympathy for a defendant's family is not something a capital jury can consider in mitigation (AOB 239-242; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 456); (13) the trial court is not required to instruct the jury that it should presume LWOP is an appropriate sentence (AOB 242-243; *People v. Valdez* (2012) 55 Cal.4th 82, 179; *People v. Arias*, *supra*, 13 Cal.4th at p. 190); (14) the jury is not required to make written findings disclosing the reasons for its penalty determination (AOB 243; *People v. Smith* (2007) 40 Cal.4th 483, 527; *People v. Fauber* (1992) 2 Cal.4th 792, 859); (15) inter-case proportionality review is not required in capital cases (AOB 243-244; *People v. Fierro* (1991) 1 Cal.4th 173, 253); (16) the California capital sentencing scheme does not violate the equal protection clause (AOB 244; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 590); and (17) California's use of the death penalty does not violate international norms of humanity and decency (AOB 245; *People v. Jennings* (2010) 50 Cal.4th 616, 690-691; *People v. Bennett* (2009) 45 Cal.4th 577, 632; *People v. Mungia* (2008) 44 Cal.4th 1101, 1143 ["California's status as being in the minority of jurisdictions worldwide that

impose capital punishment, especially in contrast with the nations of Western Europe, does not violate the Eighth Amendment]; *People v. Kelly* (2007) 42 Cal.4th 763, 801 ["a sentence of death that complies with state and federal constitutional and statutory requirements does not violate international law"].)

In sum, appellant raises arguments that have been soundly rejected by this Court in the past and does not provide any valid reason for this Court to revisit its prior holdings. Thus, his contentions must be rejected once again.

X. APPELLANT IS NOT ENTITLED TO ANY APPELLATE RELIEF AS A RESULT OF THE CUMULATIVE EFFECT OF THE ALLEGED ERRORS

In his final claim on appeal, appellant asserts that he was prejudiced as a result of the guilt and penalty phase errors alleged herein. (AOB 245-248.) As explained above, there were no prejudicial errors in this case and, thus, appellant is not entitled to any relief as a result of the cumulative effect of any nonexistent or harmless errors. (See, e.g., *People v. Russell* (2010) 50 Cal.4th 1228, 1274; *People v. Bacon* (2010) 50 Cal.4th 1082, 1129; *People v. Lynch* (2010) 50 Cal.4th 693, 767; *People v. Loker* (2008) 44 Cal.4th 691, 756-757; *People v. Gray*, *supra*, 37 Cal.4th at p. 238.) Appellant is entitled to a fair trial, not a perfect one; he received a fair trial. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box, supra,* 23 Cal.4th at p. 1219; *People v. Marshall* (1990) 50 Cal.3d 907, 945; see *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96].)

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the judgment and the sentence of death.

Dated: March 8, 2016

Respectfully submitted,

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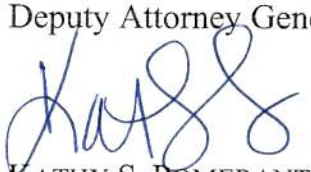

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **50,179** words.

Dated: March 8, 2016

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DECLARATION OF SERVICE

Case Name: **People v. Donte Lamont McDaniel**
No.: **S171393**

I declare:

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

On **March 8, 2016**, 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:

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On **March 8, 2016**, I caused **1** original and **8** copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by U. S. MAIL.

On **March 8, 2016**, I caused one electronic copy of the **RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On **March 8, 2016**, I served the attached **RESPONDENT'S BRIEF** by transmitting a true copy via electronic mail using the email addresses as follows:

Peter R. Silten
Supervising Deputy State Public Defender
Via Email: silten@ospd.ca.gov

Elias Batchelder
Deputy State Public Defender
Via Email: batchelder@ospd.ca.gov

David Barkhurst, Deputy District Attorney
Via Email: Courtesy Copy

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **March 8, 2016**, at Los Angeles, California.

Nora Fung
Declarant

Signature

KSP: nf
LA2009505912
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