In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RUN PETER CHHOUN,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S084996

San Bernardino County Superior Court Case No. FSB08658
The Honorable Bob N. Krug, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an information filed by the San Bernardino County District Attorney, appellant[1] was charged with six counts of murder (Pen. Code,[2] § 187, subd. (a); counts one, two, three, four, five, and eleven), one count of attempted murder (§ 187, subd. (a), 664; count six), one count of first degree residential burglary (§459; count seven), and three counts of first degree residential robbery (§ 211; counts eight, nine, and ten). With the exception of the first degree residential burglary count (count seven), each count contained a personal-use firearm allegation under section 12022.5, subdivision (a). Further, with respect to counts one, two, three, four and five, the information alleged a robbery special circumstance (§ 190.2, subd. (a)(17)), a burglary special circumstance (§190.2, subd. (a)(17)), and a multiple-victim special circumstance (§190.2, subd. (a)(3)). (2CT 504-516.)

Appellant pled not guilty and denied the special circumstance allegations. (2CT 517.) Further, the court severed count eleven for trial. Following a jury trial on counts one through ten, appellant was found guilty of five counts of murder (counts one, two, three, four, and five), one count

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[1] Appellant's co-defendants were Samreth Pan, Nhung Thi ("Karol") Tran, Vinh Quang Tran ("Scrappy"), and William Marsellus Evans. All of the codefendants were charged with counts one through ten, and appellant was additionally charged with count eleven. Vinh Tran and Evans were juveniles, and their cases were severed. (1PT RT 35-38, 48.) Karol Tran's case was severed as well (1PT RT 41, 48). Pan and appellant were tried together on counts one through ten, while the trial on count eleven was severed on Pan's motion. (2CT at 635; 1SuppACT at 132-40.) Ultimately, the trial court granted Pan's motion to dismiss following the close of the People's case. (3CT at 801.) Moreover, the remaining count, count 11, was dismissed in the interests of justice. (4CT at 1198.)

[2] All further statutory references are to the Penal Code unless otherwise stated.

of first degree residential burglary (count seven), and three counts of first degree residential robbery (counts eight, nine, and ten). (3CT 808-09; 4CT 932-940.) Appellant was acquitted of attempted murder (count six). (3CT 808-09; 4CT 941.) With regard to the personal-use firearm allegations, the jury found the allegation to be true on the first degree residential robbery counts (counts eight, nine, and ten), but found the allegation not to be true on the five murder counts (counts one, two, three, four, and five) and the attempted murder count (count six). The jury found all of the special circumstance allegations to be true. (3CT 808-09; 4CT 942-954.)

Following the penalty phase, the jury fixed the punishment at death. (4CT 1131-32, 1182.) In accordance with the jury's verdict, the trial court sentenced appellant to death on counts one, two, three, four, and five. (4CT 1198; 5CT 1202-10, 1218; 1SuppCT 97-106; 48RT 6315.) Further, the court sentenced appellant to a determinate term of 26 years, 8 months, calculated as follows: six years plus ten years for the firearm allegation under section 12022.5, subdivision (a) on count eight (principal term); one year, four months plus three years, four months for the firearm allegation under section 12022.5, subd. (a) on counts nine and ten; and one year, four months on count seven. The entire determinate sentence was stayed pursuant to section 654. (4CT 1198; 5CT 1200-01; 1202-10, 1219; 1SuppCT 97-106; 48RT 6316-6319.) On the People's motion, count eleven was dismissed pursuant to section 1385. (4CT 1198.)

STATEMENT OF FACTS

INTRODUCTION

Appellant, Karol Tran, Vinh Tran ("Scrappy"), William Evans, and Samreth Pan are fellow members of Tiny Rascals Gang ("TRG").

Henry Nguyen, his wife Trinh, and their children Doan, Daniel, David and Dennis lived on Elm Street in San Bernardino. Karol thought the Nguyen family kept lots of cash and jewelry inside their home. Karol told appellant, and he, Karol, Scrappy, and Evans decided to rob the family.

On August 9, 1995, Karol, the friendly face, knocked on the family's door. Henry opened the door and Scrappy rushed inside, followed by appellant and Evans. Karol went back to the car and waited. Scrappy and appellant both had nine-millimeter handguns. Appellant and Scrappy demanded money and jewelry from the family. Appellant also held a knife to three-year-old Dennis's hand or neck until the father "gave up the money." While Evans searched the house for loot, appellant shot the father. Evans then left the house, followed closely by Scrappy and appellant.

The next morning, a neighbor found the dead bodies of Henry and Trinh, along with three of their children, all of whom sustained multiple gunshots wounds. Dennis survived with only minor injuries.

GUILT PHASE

A. Prosecution Evidence

1. Elm Street killings

On the morning of August 10, 1995, Yen Nguyen called her brother Henry Nguyen's home ("the Elm Street house[3]"). (14RT 1969-1970, 1976.) Three-year-old Dennis, Henry's youngest child of four, answered the phone and stated, "Mommy's dead." (14RT 1976-1977.) Yen then

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[3] Appellant has noted that Elm is Elm *Avenue* and not Elm *Street* as it has been consistently referred to by the parties. Nonetheless, Respondent will refer to the street as "Elm Street," as that term was consistently used throughout the record.

called one of Henry's neighbors, whom she referred to as the Vu Lam family, and asked them to check in at Henry's home. (14RT 1977-1978.)

Meanwhile, another neighbor Tuyet Tran, Karol Tran's mother, went to the Elm Street house[4] about 8:00 or 9:00 a.m. and saw another Vietnamese person at the front door trying to get in. (14RT 1982-1984.) The person said that they could not get in and that a child was crying. (14RT 1984.) Tuyet went to the backdoor near the kitchen, tried the backdoor, and called to the child several times to open the door. (14RT 1984-1985.) Tuyet did not know whether the child opened the door, but Tuyet was able to get in through the backdoor. (14RT 1985.) When Tuyet went into the living room, she saw the bodies of Henry Nguyen and Trinh Tran lying on the floor. (14RT 1985.) The child, Dennis, was crying, seated next to his mother's body. (14RT 1986.) Tuyet thought Henry and Trinh had fainted, so she grabbed and shook Trinh's leg as if to wake her. (14RT 1985-1986.) When Trinh did not move, Tuyet got scared and ran out of the house. (14RT 1986.)

Lilah Garcia is another neighbor. (14RT 1994.) Her son told her that someone was outside screaming for help. (14RT 1995.) When Garcia went outside, she saw Tuyet screaming. (14RT 1996.) Garcia asked Tuyet if she needed any help. (14RT 1996.) Tuyet said, "Yes," and pushed Garcia into the Elm Street house. (14RT 1996.) On the living room floor, Garcia saw Trinh's body, which was cold to the touch. (14RT 1996-1997.) Garcia went to a bedroom where she heard screaming. (14RT 1996-1997.) In that room, she saw two children's bodies. (14RT 1998-1999.) Daniel Nguyen's body was "far up against the wall," and Doan Nguyen's body was at the foot of the bed. (14RT 1998.) Dennis was holding Daniel's head and was

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[4] It was not apparent why Tuyet went to the Elm Street house, other than someone told her something, and as a result, she went there.

"just crying screaming." (14RT 1998-1999.) Garcia grabbed Dennis and returned to the living room where she saw Henry and David Nguyen's bodies lying on the floor. (14RT 1999-2000.) By that point, there was another person, a Vietnamese woman, in the house. (14RT 2000-2001.) Garcia tried to get Dennis to go to the woman, but he held onto Garcia and would not let go. (14RT 2000-2001.)

The previous evening, Garciela Elias, who lived across the street from the Elm Street house, was in her kitchen when she heard her dog barking followed by "pop, pop, pop," which sounded like gunfire. (14RT 2004-2005.) She went to her door and looked outside, but she did not see anything. (14RT 2006.) Elias heard four total shots, one shot followed by three in succession. (14RT 2006.) The next morning after she returned from dropping her husband off at work, someone standing in the middle of the street stopped her. (14RT 2007.) She could only understand the person to be repeating, "dead," and the person handed her a phone. (14RT 2007-2008.) Elias talked to the person on the other side of the phone call, whom she believed to be a police officer. (14RT 2008.) After the phone call, she went to the Elm Street house where she saw Dennis. (14RT 2008.) Dennis had blood on his left arm and was crying. (14RT 2008.)

David Alvarado, who lived five to six houses away from the Elm Street house, heard a sound like gunshots between 8:00 and 10:00 p.m. the day before the victims' bodies were discovered. (14RT 2011-2012.) After he heard eight to ten gunshots in rapid succession, Alvarado saw a red car pass by. (14RT 2013-2014.)

Detective John Waterhouse of the San Bernardino Police Department interviewed Alvarado on August 10. (19RT 2770.) Alvarado told Detective Waterhouse that on August 9 around 10:00 p.m., he heard ten gunshots in rapid succession. (19RT 2770.) Before the shots, Alvarado noticed a red car at the intersection of Gould and Elm. (19RT 2770-2771.)

The car was driving slowly as it made a right turn onto Elm. (19RT 2770-2771.) Alvarado heard gunshots shortly thereafter. (19RT 2770-2771.)

On the morning of August 10, Officer Patrick Pritchett, a traffic officer with the San Bernardino Police Department, was one of the first officers at the scene. (14RT 2017-2018.) When he arrived, he saw Tuyet and Garcia. (14RT 2018.) Garcia was carrying Dennis. (14RT 2018.) He also saw blood on Dennis's left hand and upper left arm. (14RT 2018.) Officer Pritchett saw the three bodies in the living room. (14RT 2023.) Trinh had a white substance, believed to be toothpaste, coming out of her nose and ears. (14RT 2020.)

Detectives Vincent Kilbride and David Dillon, homicide detectives with the San Bernardino Police Department, were the primary detectives on the Elm Street killings. (14RT 2045.) Detective Dillon was the primary investigating officer. (14RT 2047; 18RT 2611.) Detectives Kilbride and Dillon arrived together at the scene within a half-hour of being dispatched there. (17RT 2399.)

Officer Thomas Holcombe met Dennis and his uncle at the emergency room. (14RT 2030.) Dennis had a gunshot wound to his hand. (14RT 2031.)

Detective Brian Cartony spoke with Dennis at the ER. (14RT 2035.) At first, Detective Cartony believed that Dennis could only speak Vietnamese, but he later learned that Dennis could speak English as well. (14RT 2038.) With the aid of a child psychologist, Dennis told Detective Cartony that a man shot him in the hand. (14RT 2042; 24RT 3233-3235.) Dennis also said that there was a knock at the door and his father answered. Dennis said one man put a gun to his father's head and demanded money.

Another suspect grabbed a necklace from Dennis' neck.[5] A suspect then removed a necklace from Dennis's mother's neck. One suspect put a gun to his father's head and shot him. Another suspect said, "Get down." Dennis said the men all left through the rear door into the backyard. When asked if they spoke English like the officer or Vietnamese, Dennis said, "Like me." Dennis said that all of the suspects had guns the color of the officer's pepper spray canister. (24RT 3233-3235.)

After the shooting, appellant told Marshall Ibarra, a fellow TRG member, that he shot a family and "got five counts of murder." (18RT 2623, 2631-2632.) Appellant also said that he had done some of the shooting. (18RT 2641.) Appellant also told Jonathan, Marshall's brother, that he committed a robbery, killed five people, and one person got away. (20RT 2845-2848.)

On the day of the murders, Kunthea Sar, also known as Stacy or "Precious," was at Karol's house. (26RT 3496-3497.) Precious overhead a loud conversation about committing a robbery. (26RT 3499, 3507.) She heard appellant say something about knocking on the door and threatening someone for money. (26RT 3502-3503.) Appellant, Scrappy, Evans, and Karol then left Karol's house. (26RT 3500.) They were gone for about an hour. (26RT 3503.) When they returned, Karol was crying and upset. (26RT 3500.) Precious heard Karol say that she got into a fight with a Black girl. (26RT 3498-3499, 3518.) Evans was also sad and crying. (26RT 3501.) Appellant said that Scrappy was crazy because he killed a little kid. (26RT 3501, 3505, 3526, 3537-3538.) Appellant also said that the woman did not want to give him the money, he shot her, and it did not

[5] Dr. Sheridan testified that the red-like abrasions depicted on a photo of Dennis were consistent with a necklace being around the child's neck and being yanked off. (34RT 3339-3340.)

matter. (26RT 3506, 3515, 3536, 3542-3543.) One of the four said that they killed the family and killed a little kid. (26RT 3533-3534.)

Precious saw Karol receive $600. (26RT 3506, 3522.) She did not see the others receive any money, but appellant, Evans, and Scrappy had money that they did not have before they had left. She knew that one of the reasons they were going to commit the robbery was because they did not have any money. (26RT 3502-3503, 3506.) Appellant and Scrappy gave $20 to Precious. (26RT 3503-3504, 3513-3514, 3522.) Afterwards, Karol took Precious and the other TRG girls to the mall, where they ate, took pictures, and went karaoke singing. (26RT 3522-3525.)

None of the latent fingerprints collected from the scene matched any of the defendants. (18RT 2658, 2680; 19RT 2795-2798, 2809-2825; 23RT 3141.)

William Matty, Criminalist at the San Bernardino County Sheriff's Department Crime Lab, examined casings collected from the Elm Street crime scene and two sets from the Sacramento case.[6] (18RT 2661-2664, 2679; 24RT 3351-52.) The casings from the Elm Street crime scene were all fired by the same gun, a nine-millimeter Glock or Sigma. (24RT 3354, 3362; 22RT 3065, 3067-3070.) Because of the rifling pattern on bullets, Matty believed that the gun was a Glock. (24RT 3354-3356, 3362-3364.) The five casings that came from the crime scene in Sacramento were fired by the same gun, also either a nine-millimeter Glock or Sigma but a different gun than the Elm Street gun. (24RT 3355, 3362-3363, 3357.)

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[6] The trial court admitted evidence concerning an attempted home invasion robbery that killed two residents that occurred in Sacramento about two weeks before the Elm Street murders. As appellant challenges the admissibility of this evidence, Respondent discusses the bulk of this evidence in its own section. Also, Matty gave additional firearms evidence comparing the casings involved in the Elm Street, Sacramento, and other related crimes during the penalty phase trial.

The casing that was recovered from the brown car that appellant, Evans, and Scrappy were arrested in (associated with the Sacramento case file) was fired by the Elm Street gun. (24RT 3357, 3363-3364.)

In mid-August 1995, TRG member Kao Vang saw appellant, Evans, and Scrappy in the Seattle area. (23RT 3156.) She saw appellant take a necklace, which she described as Scrappy's necklace, from Scrappy and give it to Richard Keo, also known as "Spanky," for $100.[7] (23RT 3157-3159, 3181-3183.) At first, Vang only saw the necklace and not a pendant. (23RT 3158.) Later on, she saw the pendant with a green jade stone in a gold setting surrounded by diamonds. (23RT 3159.) The pendant she saw looked like the pendant that Detective Dillon later collected from Keo and that was taken from the mother during the Elm Street robbery. (14RT 1978; 17RT 2472-2473; 23RT 3160, 3184.)

Vang wrote letters to appellant in jail. (23RT 3162.) In one letter, Vang asked appellant how much the necklace was worth and told him that Keo wanted his money in exchange for the necklace.[8] (23RT 3165-3166.) In another letter, Vang asked appellant if he remembered the jade charm that he gave Spanky. (23RT 3167.) Appellant also wrote her about the necklace, asking her to give the pendant to him. (23RT 3181-3182.)

Detective Dillon interviewed Evans and Karol. (23RT 3189-3190.) Evans said that he saw Scrappy with Trinh as he was leaving the house. (23RT 3190.) Evans did not know anything about toothpaste. (23RT 3190.) Evans and Karol both said that they heard one shot followed by a

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[7] Kao Vang later testified that she saw Scrappy with the necklace and never saw appellant with the necklace. (23RT 3171, 3179-3180.)

[8] When asked if she told Detective Dillon that appellant did not sell the necklace to Spanky but rather gave it to Spanky as collateral for a $100 loan, Kao said that she did not remember. (23RT 3159-3160.)

series of shots, and after the series of shots, the remaining people ran out of the house quickly. (23RT 3189-3191.)

Detective Dillon also interviewed jail inmate Mark Milazo. (24RT 3236.) Milazo said he was in jail with appellant when appellant told him about a robbery. (24RT 3236.) Milazo said that appellant said that Scrappy squirted toothpaste in "her" face and said, "that's poison." (24RT 3636-3237.) Milazo also said that appellant said that Scrappy said, "Tell him where the fuckin' money is or she's going to die." (24RT 3237.)

2. Henry, Trinh, Doan, Daniel, and David's injuries

Frank Sheridan, Chief Medical Examiner for San Bernardino County, performed the autopsies on Henry Nguyen, Trinh Tran, and Doan, Daniel, and David Nguyen. (24RT 3239-3241.)

a. Henry

Henry died from two gunshot wounds, both of which alone were fatal. (24RT 3246-3247, 3252, 3255.) One gunshot entered in the back of the chest and came out on the right side of the neck toward the front. (24RT 3248.) The bullet did not go through the chest cavity; it travelled up at an angle through the upper back muscles and through the cervical spine at the lower part of his neck. (24RT 3249.) This bullet caused injury to the spinal cord and was thus fatal. (24RT 3249.) Dr. Sheridan could only determine that the bullet was fired from more than two-and-one-half to three feet away due to an absence of soot or tattooing. (24RT 3249-3250.) The other gunshot entered on the left side of the head above the left ear and exited on the right side of Henry's head in about the same position. (24RT 3251-3252.) The burning of the wound edges, the fracturing pattern, and dense deposit on the skull indicated that the gun muzzle was placed against the head at the time that the shot was fired. (24RT 3251.) The bullet went across the head through the skull and brain before exiting, and as such, it

was fatal. (24RT 3252, 3258.) This wound would have caused brain death and would have been fatal almost instantaneously. (24RT 3258.) The gunshot through the neck likely occurred while Henry was in the prone position because the gun would have had to have been in a low position if the person were upright. (24RT 3250-3251, 3259-3260.)

In addition, there were four defined superficial cuts on the skin on the back of the neck. (24RT 3282-3253.) A sharp object, put to the skin and dragged across, caused the cuts. (24RT 3253.) The very tip of a knife could have caused the cuts. (24RT 3253.) The cuts did not look like the edge of a knife pulled across, rather a sharp object being stuck in and dragged across. (24RT 3253.)

b. Trinh

Trinh was shot three times. (24RT 3264.) She was shot twice in the head and once in the leg. (24RT 3264-3265.) Specifically, as to the leg wound, the bullet entered Trinh's left thigh at mid-thigh from the back. (24RT 3265.) There was no exit wound, and the bullet was recovered. (24RT 3265.) The bullet was copper jacketed and measured nine millimeters. (24RT 3265.) This injury was not fatal. (24RT 3265.) As to the head wounds, one bullet entered near the back of her head and exited on her chin. (24RT 3266-3267.) The bullet went into the skull, through the brain, from the top of the mouth to the bottom of the mouth and exited the chin. (24RT 3266-3267.) There was some soot around the entrance wound and singeing of her hair, which indicated that the gun muzzle was not in contact with her head but within a foot of it. (24RT 3266.) The other gunshot entered on the right side of her scalp a few inches above her ear and exited in the corresponding position on the left side of the scalp. (24RT 3285.) The muzzle of the gun would have been within a foot of her head. (24RT 3286.)

Both of the gunshot wounds to the head were fatal. (24RT 3288.) They both would have caused brain death instantaneously but were inflicted while her heart was beating because there was hemorrhaging along the bullets' paths. (24RT 3289-3290.) It was not possible to determine which gunshot was first, but whichever one was first would have caused Trinh to go down. (24RT 3290.) Thus, the second shot would have been made after she was already down. (24RT 3290.)

c. Doan – age 13

Doan was shot several times. The fatal shot entered her back at a downward angle close to her right shoulder. (24RT 3293-3294.) The bullet went through her lungs and grazed her flexed forearm after exiting her left armpit. (24RT 3294-3295.)

Doan was also shot in the head while she was likely lying on a mattress.[9] (24RT 3296.) The bullet entered on the right side of her head below and behind her ear. (24RT 3296.) It went through the mouth, left jaw, and came out left check in the jaw area. (24RT 3296-3297, 3305-3306.)

Doan was also shot in the right hand, while her hand was near her head, and in the calf of her flexed left leg. (14RT 3297-3304.)

The gunshot to the chest would have caused Doan's blood pressure to drop quickly. (24RT 3307, 3309.) Thus, the other wounds could not have been inflicted long after. (24RT 3309.) Also, if Doan's hand was up against her head, it indicated that she was incapacitated, but conscious. (24RT 3310.) Dr. Sheridan opined that the shot to the chest occurred first, followed by the two shots to the head, one after another. (24RT 3310-3312.) While it was possible that her hand rose to her head as a result of a

[9] Detective Dillon found a bullet embedded in the mattress underneath Doan's head. (24RT 3365.)

postmortem muscle spasm, he believed that the hand's position indicated a defensive motion, which required consciousness. (24RT 3311-3312.)

d. Daniel – age 11

Daniel was shot twice. (24RT 3313.) The fatal shot entered his chest at a slightly downward angle, went through his right lung, and extensively damaged his spinal cord. (24RT 3314-3315.) Daniel was also shot in the shin-calf area of his right leg. (24RT 3315.)

e. David – age 10

David was shot in the back three times. (24RT 3319.) One shot was to the lower part of the back of his skull and went through his spine. (24RT 3320.) This wound would have paralyzed David's arms and legs, interfered with his breathing, and would have killed him within minutes. (24RT 3320, 3324.)

David was also shot in the chest twice. (24RT 3321.) One bullet went through his left lung and the superior vena cava. (24RT 3321, 3326-3327.) This wound was the most lethal of all of the gunshots. (24RT 3323, 3325.) The other gunshot went through David's right lung and would have been fatal unless David received surgical treatment right away. (24RT 3321-3323.)

All of the shots could have been inflicted at the same time, but Dr. Sheridan was almost certain that the two shots to the chest were inflicted at the same time within a rapid sequence. (24RT 3324, 3329, 3338-3339.) If the shot to the neck occurred at a different time, it had to have been before the two shots to the chest and could have been separated by the shots to the chest by five to ten minutes. (24RT 3339.)

3. Evans's Testimony

In August 1995, Evans was 16 years old and a member of TRG. (17RT 2402, 2405.) When appellant and Karol discussed a potential

robbery at Karol's house, Pan was not present. (17RT 2416-2417.) Karol did not want to go because she feared being recognized by the residents. (27RT 2511-2512, 2540.) Karol believed that the people in the house kept money and jewelry at home. (17RT 2512.) Appellant made Karol go. Appellant did not say anything about killing anyone. (17RT 2559.) Evans did not really hear the discussion but he knew what they were talking about. Appellant told Evans that there was going to be a robbery and asked Evans if he would participate. Because appellant was a shot caller in TRG, Evans felt inclined to participate, but he did not want to go. (17RT 2417-2418, 2555.)

Evans, Karol, appellant, and Scrappy left Karol's house in a red Honda Civic that belonged to someone who was at Karol's house. (17RT 2418-2420, 2536.) Appellant had a Glock nine-millimeter handgun when they left Karol's house. (17RT 2420, 2522.) Although appellant had a gun, he wanted another one, so they picked up another one from Pan, who was at his mother's house. (17RT 2421, 2423, 2520.) Appellant gave Pan's gun to Evans, who gave it to Scrappy before they arrived at the Elm Street house. (17RT 2424, 2428, 2508.) Appellant then drove to the Elm Street house. (17RT 2425, 2527.)

When they arrived, Karol and Scrappy got out of the car. (17RT 2425-2426.) Karol went to the door, while Scrappy stood near the bushes on the right side of the door. (17RT 2426-2427.) When someone answered the door, Scrappy rushed inside, and Karol went back to the car. (17RT 2428.) Appellant and Evans got out of the car and went to the house. (17RT 2429.) Evans was unarmed when he went into the house. (17RT 2430.) Appellant still had his Glock nine-millimeter handgun. (17RT 2428.) When Evans and appellant went inside the house, Scrappy was yelling in Vietnamese. (17RT 2429.) Evans did not understand Vietnamese, but he knew what was being said because appellant, who did

not speak Vietnamese, spoke in English as Scrappy translated. (17RT 2429, 2498-2500, 2541, 2553.) They told everyone to get on the floor. (17RT 2430.) Henry, Trinh, and Doan were in the living room. (17RT 2430.) Scrappy brought David, Daniel, and Dennis into the living room from the bedroom. (17RT 2433.) Scrappy asked them where the money was. (17RT 2433-2434.) They were also asked for jewelry. (17RT 2448.) Henry said they did not have any money. (17RT 2424.) Appellant gave his gun to Evans while appellant retrieved a long knife. (17RT 2434, 2530.) Appellant put the knife to Dennis's wrist or neck. (17RT 2436.) Eventually, Henry "gave up the money." (17RT 2431.) Evans was directed to go through the house looking for money and jewelry. (17RT 2542.) Daniel also told them that he had some money in a sock in his room. (17RT 2439.) Evans went towards the room, the same room where the younger boys were found, to collect the money and heard a gunshot. (17RT 2439, 2500.) He returned to the living room and saw the father (Henry) lying facedown on the floor. (17RT 2440-2441.) Appellant was standing about a foot away with a gun in his hand. (17RT 2440-2441, 2444.) Evans did not see where anyone else was. (17RT 2444-2445, 2528.) Evans left the house and returned to the car. (17RT 2442, 2445.) Once he got to the car, he heard a lot of gunshots. (17RT 2442.) Scrappy and appellant then returned to the car. (17RT 2442.) Evans testified that he did not see Scrappy shoot anyone.[10] (17RT 2448.)

The group obtained $2,000 from the robbery. (17RT 2437-2439.) Evans received $100 and did not know how much appellant and Karol received. (17RT 2449, 2452.) Evans, appellant and Scrappy took

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[10] Evans testified that he told Detective Dillon in January 1996 that he saw Scrappy shoot twice before he left the house, but that was a lie. (17RT 2494-2496, 2530-2531.)

necklaces, but he did not remember from whom the necklaces were taken or who kept what necklaces. (17RT 2449-2450.)

Appellant chose the people who were to go inside the house. (17RT 2447.) Karol selected the house, and her function was to go to the door. (17RT 2447.) Evans did not know why Karol chose the Elm Street house. (17RT 2448.) Appellant told Evans that he wanted to commit the robbery because he needed money. (17RT 2447.)

4. Karol's Testimony

At the time of the Elm Street murders, Karol was 19 years old. (25RT 3384.) Her child's father is a member and "OG," or original gangster, of TRG. (16RT 2258; 25RT 3384.) She did not consider herself a member of TRG because she was never jumped in, but Pan made her a shot caller after the Elm Street murders. (25RT 3389, 3393.)

About two weeks before the Elm Street murders, Karol and appellant discussed a possible robbery. (25RT 3390-3391, 3428-3429.) Appellant wanted to rob someone to get money to send to his girlfriend. (25RT 3391-3392.) Karol told appellant about the Elm Street house, where she believed a husband, wife, child, and grandmother lived. (25RT 3392.) She told appellant that there was a $10,000 diamond ring, a luxury car, and cash in the house. (25RT 3404.) Karol thought the family would have cash in the house because she thought the family was on welfare. (25RT 3404.) Karol also told appellant and others that the Elm Street house would be a good place to rob because the people were Vietnamese, whom Karol believed would not call the police. (25RT 3431.)

Nothing happened until August 9. (25RT 3392-3393.) On that day around 8:30 p.m., there was discussion about a robbery. (25RT 3393-3394, 3468-3469.) Karol was there with appellant, Evans, Scrappy and Precious. (25RT 3393.) Precious volunteered to go along, but appellant disagreed because Precious did not speak Vietnamese. (25RT 3394-3395.) Karol

spoke Cambodian and Vietnamese, but she did not want to go because she did not want to disrespect her parents who lived five to six houses away from the Elm Street house. (25RT 3395.) Karol went along because appellant nagged her, but no one forced her to go. (25RT 3395, 3457.) Before they went to the Elm Street house, appellant, Scrappy, Evans, and Karol went to Pan's mother's home to pick up a gun from Pan. (25RT 3395-3397.) Appellant told Pan, "I'm gonna do the house that Karol showed me." (25RT 3398-3399.) After appellant drove away, he handed the gun to Scrappy. (25RT 3399.)

Appellant parked right in front of the Elm Street house. (25RT 3400.) Karol and Scrappy got of the car. (25RT 3400-3401.) Karol knocked on the door while Scrappy hid next to a bush near the door. (25RT 3400-3401.) Two children ran to the door, but the father told them, "No." (25RT 3401.) When the father came to the door, Karol asked for a different location, meaning to discourage the father from opening the door since she was having second thoughts about the robbery. (25RT 3402, 3462, 3473-3474.) Nonetheless, Henry opened the door, and Scrappy rushed in. (25RT 3402, 3450.) Karol ran back to the car and passed appellant and Evans, who were running to the house from the car. (25RT 3402.) Fifteen minutes passed before she heard gunshots. (25RT 3403-3404, 3406.) Karol heard two gunshots, one after another, then four shots, a pause, and finally, a third set of shots. (25RT 3404-3406.) She stared at the car dashboard and did not look at the house after hearing the gunshots. (25RT 3407.) Karol saw appellant came out of the house first, then Scrappy, and lastly, Evans. (25RT 3407, 3452-3453.) They got back in the car, and appellant drove to Karol's house. (25RT 3408.) On the way, appellant gave Scrappy a gun and told Scrappy to unload it, so Scrappy set the gun out of the sunroof of

the car.[11] (25RT 3408-3409, 3449-3450.) Appellant also "balled out" Scrappy on the way back to her house, but Karol did not what it was about.[12] (25RT 3453.) Also on the way back, appellant said, "It must have been the wrong house." (25RT 3410-3411.)

When they arrived back at Karol's house around midnight, Pan was there, and they all went into Karol's room. (25RT 3409-3410, 3421, 3470.) There was a discussion about the robbery. (25RT 3410.) Appellant said five people were killed. (25RT 3411.) Appellant gave a Glock nine-millimeter handgun to Pan. (25RT 3421, 3471.) Appellant also handed out money. (25RT 3412.) He gave $500 to Karol, a hundred dollars to Evans, and a couple hundred to Scrappy. (25RT 3412.) Later on, Scrappy showed Karol two necklaces, one with a cross and another with a jade (the same one that Detective Dillon collected from Keo), that were taken from the house. (25RT 3413-3414.) Karol heard appellant say something about threatening a woman with a knife. (25RT 3416-3417.) Appellant said that the woman must have either loved the money or did not have any because he threatened her with a knife. (25RT 3417.) Appellant also said that he stuck the knife at a little boy to get the woman to tell him where the money was located. (25RT 3417.) Evans said that they followed a little boy to a back room to see if there was any more money. (25RT 3417.)

Before everyone left Karol's room, appellant told everyone to act like nothing happened. (25RT 3418.) To explain why Karol was upset, appellant told Karol to make up a story about getting into a fight with a

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[11] Karol also testified that she did not remember whether appellant gave the gun to Scrappy or Evans to "unload," but she believed that it was Scrappy. (25RT 3480-3481.)

[12] Karol also testified that she did not remember appellant or Evans being mad at Scrappy. (25RT 3453-3454.)

Black girl at Taco Bell. (25RT 3419.) Later that evening, they all went to a pool hall. (25RT 3419-3420.)

5. Gang Evidence

Sergeant Marcus Frank with the Westminster Police Department testified as an expert on southeast Asian gangs. (16RT 22452246, 2251.) He testified that Asian gangs are more loosely organized compared to occidental, meaning cultures from a western background, gangs. (16RT 2253.) A majority of Asian gangs place respect on experience. (16RT 2253.) Thus, leadership within Asian gangs are fluid as it changes based on the persons having the most experience with a particular type of crime. (16RT 2253, 2294-2295.) Further, unlike occidental gangs, Asian gangs are mobile and do not claim a territory or geographic area. (16RT 2256.)

Tiny Rascals Gang is a recognized Asian gang with about 1,000 hard core members nationally. (16RT 2256.) Approximately 800 members are in California. (16RT 2256.) TRG was influenced by a Hispanic gang, the East Side Longos, because some of TRG's earliest members lived in Long Beach, an area claimed by the East Side Longos. (16RT 2257-2258.) As such, TRG members copied some aspects from that gang including flashing gang signs and wearing tattoos. (16RT 2254-2258.) However, TRG did not emulate their form of committing crimes. (16RT 2258.) Instead, TRG members train with other Asian gang members to commit specific types of crimes. (16RT 2258.) Although TRG members use the term "OG," the term does not necessarily refer to its founding members, but rather OGs are those with the greatest amount of experience regardless of age. (16RT 2258-2260.) For instance, a younger member can become an OG based on his experience committing serious crimes. (16RT 2259-2260.) An OG cannot necessarily direct members to commit certain crimes. (16RT 2263.) In contrast, a shot caller is someone who can issue a command to younger members and expect to be obeyed without question. (16RT 2262.) OGs do

not designate shot callers; shot callers are designated by the entire gang based on respect. (16RT 2264.) TRG has female members, but they occupy a support role. (16RT 2264.) For instance, a female TRG member may pick a house to rob, but will not be allowed to hold a gun or personally commit a robbery and they will be able to ride in a stolen car, but will not be allowed to pick locks to steal a car. (16RT 2264-2265.) A female TRG may also take care of younger female members. (16RT 2265.)

The majority of Asian gangs operate on two levels of crimes, one of which is economic crimes such as robbery, extortion, and burglary. (16RT 2254-2255.) Specifically, Vietnamese street gangs developed home invasion robberies in the late 1970s and early 1980s. (16RT 2267.) Occidental gangs did not start committing home invasion robberies until recently. (16RT 2268.) Home invasion robberies, as a concept, started in Orange County and spread. (16RT 2267.) Before that time, it was rare for a group of armed individuals to go into a residence and hold a family hostage unless it was a drug buy turned robbery. (16RT 2267.) Fairly sophisticated crimes such as using shaved keys for large scale auto thefts, extortion of businesses within ethnic communities, and home invasion robberies are unique to southeast Asian gangs. (16RT 2268.) A majority of the home invasion robberies Sergeant Frank has investigated demonstrated an intimate knowledge of the residents indicating surveillance or infiltration beforehand and planning such as transportation, weapons retrieval, and property disposal. (16RT 2268.) In addition, the gangs select Asian families as victims. (16RT 2269.) They believe that they know how to intimidate those families into not reporting the crimes or identifying the suspects. (16RT 2269.) Also, some Asian families distrusted banks and kept money at home, which stemmed from a time when banks had collapsed in their home countries resulting in a loss of money. (16RT 2271.) It is more common for Asian families to keep jewelry in their

homes. (16RT 2271, 2287.) Valuable costly jewelry may be openly displayed in the home in order to showcase the families' wealth. (16RT 2287.) Similarly, children may wear high quality jewelry as a sign of the family's wealth and standing. (16RT 2287-2288.)

It is also common for the gang members to segregate roles. (16RT 2269.) For instance, infiltration may be conduced by one member, transportation by another, weapons by a third, and items sold by a fourth person, none of whom participate in the actual robbery. (16RT 2269-2270.) Also, guns are seen as the lifeblood of the gang. (16RT 2271-2272.) Unlike occidental gangs, guns are not kept stashed as a headquarters or crash pad. (16RT 2272.) They are held by members and used only when needed in a face-to-face altercation or a crime with victims. (16RT 2272-2273.) While murders may occur during home invasion robberies, guns are primarily to intimidate. (16RT 2273.) Asian gang members will go after the children, the younger the better, to intimidate the parents into cooperating. (16RT 2273-2274.) It is not uncommon to go after the youngest child or the oldest person, like a grandparent. (16RT 2274.) Sergeant Frank had heard of a two-year-old being held out of a second story window by his ankles, a one-year-old being picked up and being dunked into the toilet repeatedly, and a pan of boiling water being poured over a 79-year-old grandmother. (16RT 2274-2275.) If displaying a gun with a threat to use it on the children does not work, then a nonfatal shot may be fired at a family member. (16RT 2286.)

6. Sacramento Evidence

On July 27, 1995, Dung Hoang was near a park in Sacramento with his cousin and two friends. (18RT 2275-2576.) It was nighttime when he saw light blue Honda Accord drive up with its headlights turned off. (18RT

2576.) He saw three men[13] get out of the car and head to the apartment complex through a hole in the fence. (18RT 2577, 2580; 22RT 3075-3076.) It was too dark to identify any of the men. (18RT 2577.) Hoang later heard three to four gunshots and he ran with his cousin and friends to his cousin's house. (18RT 2580.) When he emerged from his cousin's house, he overhead someone say in Chinese that they had just been robbed. (18RT 2580.)

In July 1995, Quyen Luu was married to Hung Dieu Le, age 68, and her father was Nghiep Thich Le, age 73. (19RT 2699-2700.) They were living at 7301 Florinwood, Apartment 53 (apartment 53) in Sacramento. (19RT 2700.) On July 27, 1995, around 8:00 p.m., Luu was having dinner with her husband, father, and brother in law. (19RT 2701.) She had finished eating and was standing in the kitchen area when a man suddenly came into the room with a gun. (19RT 2702.) She did not do anything; the man just shot her in her right leg. (19RT 2703.) Luu remembered continuous gunfire of seven to eight shots and only one person. (19RT 2702-2704.) Luu believed that the shooter looked like appellant (as shown in a picture taken in August 1995), but she was unsure. (19RT 2702-2706.)

Mei Tuyet Le, Luu's daughter, was 15 years old in July 1995. (19RT 2709.) Her family ran a candy store out of their apartment. (19RT 2709.) Mei was upstairs in a neighbor's apartment (apartment 52) when she heard her sister Amie Le scream and call out a robbery. (19RT 2710, 2714.) Mei opened the door, Amie came in and told her that someone was robbing their house. (19RT 2714.) Mei looked down to the patio of apartment 53 and saw her mother struggling with a man. (19RT 2714-2716.) Mei heard a

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[13] When Hoang first testified, he stated that there were three men. (18RT 2577.) Later, he testified that he could not tell if the trio were men or women, and he did not recall telling the police that there were three men. (18RT 2582-2583.)

shot and screamed. (19RT 2716.) At the scream, the shooter, whom Mei could not identify, looked up. (19RT 2714, 2716.) Luu also screamed as she was shot and then fell down. (19RT 2716.) Mei was pulled back inside apartment 52 by her neighbor. (19RT 2716-2717.) Mei then heard five to six more gunshots. (19RT 2716.) After a while, Mei went down to apartment 53. (19RT 2717.) She saw her grandfather lying on the dining room floor and her uncle holding her grandfather's head. (19RT 2717.) Mei began to run to her grandfather when she saw her mother. (19RT 2717.) When Mei's mother asked for Mei's father, Mei saw her father lying on the living room floor. (19RT 2717.) There were bullet holes in the kitchen drawers, bottom of the refrigerator and in the wall. (19RT 2711-2713.)

Vincent (Vinh) Le is Mei's brother. (19RT 2723.) After dinner, he sat outside of apartment 52 with his friends. (19RT 2720-2721.) He heard Amie scream, "robbery," in Cantonese. (19RT 2721.) Vincent looked down from apartment 52 into apartment 53's patio. (19RT 2721, 2738.) He could see inside well because the sliding glass door was open. (19RT 2722.) Vincent saw his mother struggling with a gunman who was holding a black nine-millimeter handgun. (19RT 2723, 2733, 2740, 2746.) The gunman was wearing a white T-shirt and black jeans.[14] (19RT 2724.) He heard a shot and saw his mother lying on the ground. (19RT 2723-2724, 2736-2737.) He was pulled back into apartment 52 and heard four to five more gunshots. (19RT 2724, 2738-2739.) After the gunfire stopped, he went downstairs to apartment 53. (19RT 2724.) When he went out, he saw two people running. (19RT 2739-2740.)

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[14] At times, Vincent referred to the color of the jeans as tan, or tan like black. After referencing something in the courtroom, it was clarified that he meant the color black. (19RT 2731.)

Inside the apartment, Vincent saw a black and red chair lying on its side by the door. (19RT 2742-2743.) He saw his grandfather lying by the dining room table and his father sitting by the couch. (19RT 2725.) When he was interviewed by the police, Vincent was unable to identify anyone from any lineups that contained photographs of appellant, Pan, Evans, and Scrappy. (19RT 2725-2726, 2744-2745.) He also did not recognize appellant, Pan, or Evans from their photographs when shown in court. (19RT 2726.)

About an hour before the shooting, Vincent noticed someone who had come by to buy candy. (19RT 2726, 2741.) This person was not the shooter. (19RT 2726.) Vincent followed the person and saw him go to a light blue two-door Honda Accord. (19RT 2726, 2741-2742.) There was another person at the trunk of the car. (19RT 2727.) That person looked like the shooter with a white shirt and black jeans and same size, but Vincent could not see his face. (19RT 2727-2728.) When the car drove away, Vincent saw four people inside. (19RT 2730.) Vincent told the police that the car had damage to the front left or right fender. (19RT 2728-2729, 2745-2746.)

Amie was 17 years old in July 1995. (19RT 2757.) Around 8:00 p.m., she was sitting on the stairs in front of apartment 53. (19RT 2758, 2763.) Three men walked by, one of whom stopped by the stairs. (19RT 2759, 2763.) That man pointed a gun at her and waved his hand in a "follow me" motion. (19RT 2760, 2766.) Amie did not follow him and instead yelled to her mother to close the apartment door. (19RT 2760, 2766.) The man with the gun walked into apartment 53, and Amie ran upstairs to apartment 52. (19RT 2760.) Amie did not see if the other two went inside the apartment because she had ran upstairs. (19RT 2760-2761.) The last man who passed by looked like Evans, but Amie was unsure.

(19RT 2762.) Amie testified that she did not yell anything about a robbery and she did not hear anyone else yell robbery. (19RT 2763.)

Davit Vang is a former TRG member who lives in Sacramento. (18RT 2584.) He heard about the shooting on the news. (18RT 2584.) In mid-July 1995, Vang saw Pan with two other men whom he thought they were speaking Cambodian. (18RT 2587-2588.) Pan was in a light blue two-door Honda Accord with a dent or damage to the front. (18RT 2600.)

Sergeant Earl Risedorph of the Sacramento County Sheriff's Department received some information about TRG members being involved in the shooting. (22RT 3058-3059.) He encountered appellant, Scrappy and Evans at a park in Sacramento on August 16, 1995. (22RT 3061.) They were near a brown Toyota Celica that was registered to appellant's brother. (22RT 3061, 3064-3065; 23RT 3153-3154.) Sergeant Risedorph searched the car and found a bullet casing that was consistent with a Glock nine-millimeter pistol. (22RT 3065-3067.) After the vehicle was moved to a secure location, it was searched further and two live bullets were found in the trunk area. (22RT 3068-3069.)

Detective Darrell Edwards, then with the Sacramento County Sheriff's Department, interviewed appellant on August 16. (22RT 3080, 3091-3092.) Appellant stated that he was Cambodian and lived in San Bernardino. (22RT 3094.) He initially said that he was in Sacramento for the first time and had been there for two days. (22RT 3095-3097.) Appellant said that he was not involved in the robbery/homicide that Detective Edwards was investigating. (22RT 3098.) Appellant said that he would tell them if he had been involved but he also stated that he would not be a snitch and wondered how a person could snitch on one's self. (22RT 3099-3100.) When confronted with a paper that he filled out at a motel, appellant admitted that he was in Sacramento when the robbery/homicide occurred. (22RT 3101-3102.) Appellant admitted that while he was at a

park near Puppet's house, he agreed to go along with a robbery of a store. (22RT 3103.) Appellant also admitted that he went by the stairway near apartment 53, saw a girl sitting on the steps, and told her to shut up. (22RT 3103-3104.) He further stated that the door to apartment 53 was open, and he stood near the door of apartment 53 when the robbery occurred. (22RT 3102.) He heard a gunshot and a woman scream. (22RT 3103.) Appellant ran away and went back to the park. (22RT 3103.)

Detective Edwards also interviewed Pan on September 4 in San Bernardino.[15] (22RT 3117.)

Karol heard a conversation about a robbery that occurred in Sacramento. (25RT 3422.) She heard appellant say, "Stupid motherfucker tried to protect himself with a chair." (25RT 3424.)

On August 23, 1995, police searched a 1989 two door blue Honda Accord registered to Terry Anne Hale, Pan's adoptive mother.[16] (19RT 2773-2775, 2784-2785; 23RT 3153.) Police found four nine-millimeter rounds and three .380 caliber rounds in the trunk. (19RT 2775, 2777, 2785-2786.) The right front quarter panel of the car's fender was primered or

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[15] Pan's statements were admitted against Pan and not appellant. (22RT 3118.) After initially stating that he had been in Sacramento six months prior, Pan admitted being present at the time of the robbery. (22RT 3119-3120, 3123.) Pan said that he was standing near the door when he heard shots and screams. (22RT 3123-3124.) After hearing the gunshots and screams, he ran back to his car and left. (22RT 3123-3124.)

[16] Detective Dennis L. Evans of the San Bernardino Police Department helped with the Elm Street investigation. (19RT 2782.) He received a call from Detective Reisendorf from Sacramento and was given the name "Rusty." (19RT 2783.) Eventually, Detective Evans discovered that Rusty was Pan and was living with a woman named Terry Hale. (19RT 2784.) He was present when the vehicle registered to Hale was searched. (19RT 2784.)

damaged and was a different color than the rest of the car. (19RT 2774, 2777; 20RT 2843; 23RT 3209.)

Dr. Sheridan reviewed the autopsy protocols for Hung Dieu Le and Nghiep Thich Le concerning the postmortem examinations performed by Robert M. Anthony, forensic pathologist of Sacramento County.[17] (24RT 3326.) Dr. Sheridan agreed with Dr. Anthony's conclusion that Nghiep's cause of death was a gunshot wound to the head. (24RT 3341.) He also agreed that Hung's cause of death was a gunshot wound to the chest. (24RT 3341.)

a. Puppet's testimony

Bunjun Chinkhathork, also know as "Puppet," testified he is a member of TRG and was currently in state prison after pleading guilty to first-degree murder concerning the Sacramento murders. (12RT 1619.)

Before the murders, he was at a park with his fellow TRG members Pan, appellant, Evans, and Scrappy. (12RT 1620.) Puppet told Evans that he knew a place to rob, and they started talking about committing a robbery at apartment 53. (12RT 1630, 1635.) Around 2:00 or 3:00 p.m., Puppet, Evans, appellant, and Pan went to apartment 53 to buy cigarettes. (12RT 1622, 1624.) Puppet went to the apartment and bought a pack of cigarettes and a soda. (12RT 1624-1625.) He saw two men and one woman in the living room of the apartment. (12RT 1625.) The group then returned to the park. (12RT 1627.)

Later, the group returned to the apartment complex. (12RT 1628.) Appellant, Pan and Evans then went to apartment 53 to commit the robbery

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[17] The parties stipulated that if called to testify, Dr. Anthony would testify that he is a forensic pathologist, that he examined Hung, concluding that the cause of death was a gunshot wound to the chest, and that he examined Nghiep, concluding that his cause of death was a gunshot wound to the head, specifically the face injury. (24RT 3342.)

while Puppet sat in the car in the driver's seat with the car running. (12RT 1631.) Puppet saw appellant, Pan, and Evans walk toward the apartment complex gate. (12RT 1631.) The trio were gone six to seven minutes before Puppet saw them running back to the car. (12RT 1632.) After they returned to the car, Puppet drove off. (12RT 1632.) They returned to the park they were at earlier, and they then went their separate ways. (12RT 1633.)

Puppet gave a statement to Detectives Reed and Edwards, but he testified that it was a false statement. (12RT 1637-1640, 1673-1674.) According to his statement, there had been a plan that included the role each person would play during the robbery. (12RT 1638.) As they discussed shooting the people, Puppet stated, "How could we shoot 'em when we only have one gun?" (12RT 1657, 1660.) Puppet was concerned that the victims would recognize him, and appellant told him that he would shoot them for Puppet. (12RT 1658.) Everyone knew there was going to be a robbery because they had discussed it at the park. (12RT 1644-1645.) During the discussion, Evans or Pan said, "Well, if they recognize you, won't give you the stuff, shoot one, shoot 'em all." (12RT 1653-1654.) Appellant told Puppet to buy cigarettes to determine the number of people inside the apartment. (12RT 1641.) Puppet did not know how they shot five people because he only saw two people inside the apartment. (12RT 1642.)

Puppet told police that he heard gunshots. (12RT 1643.) When they got back to the park following the shooting, Puppet saw appellant put the gun in the trunk of the car. (12RT 1652-1653.) Appellant said, "We got to get out of here. We just did a robbery." (12RT 1644.) Appellant said, "I shot half the clip." (12RT 1644-1645.)

At some point, appellant told Puppet what happened inside the apartment. (12RT 1650.) Appellant said that he was the only one able to

get inside the apartment because he went in first. (12RT 1647.) Appellant had a gun. (12RT 1647.) A woman ran out and started throwing things at him, and he started shooting. (12RT 1647.) Appellant also said that the woman grabbed him by the shirt and he shot at her. (12RT 1648.) Appellant said that he shot her in the lower body or leg because she was still coming toward him. (12RT 1649-1650.) Appellant also said he shot around the house while the people were eating. (12RT 1649-1650.) Appellant told Puppet that he did not get anything out of the robbery. (12RT 1650.)

b. Evans's Testimony

On July 27, 1995, Evans was with appellant, Pan, Scrappy, Lazy, and Puppet in Sacramento, and they met other TRG members at a park. (17RT 2456-2457.) Appellant and Puppet discussed pulling a robbery at an apartment. (17RT 2458-2459.) Appellant drove himself, Pan, and Puppet in Pan's car to the apartment complex. (17RT 2463, 2474, 2547.) They decided to rob the apartment because Puppet said that the residents sold items out of the apartment. (17RT 2462-2463.)

Appellant parked at a park next to the apartment complex. (17RT 2464.) Appellant, Evans and Pan got out of the car. (17RT 2474.) Puppet stayed in the car and appellant told him to drive when they got back to the car. (17RT 2474.) Appellant, Evans, and Pan entered the apartment complex through a hole in the chain link fence. (17RT 2460, 2475.) As they walked to the apartment, they saw a woman sitting on the steps. (17RT 2476.) Appellant tried to grab the woman, but she got away. (17RT 2477-2478.) Appellant went inside the apartment. (17RT 2478.) Evans and Pan walked to the door but did not go in. (17RT 2478.) Evans heard yelling and then gunshots. (17RT 2478.) When he heard the shots, he ran back to car. (17RT 2478.) Evans slipped on his shoe and returned to the car at the same time as Pan and appellant. (17RT 2479-2480.) Puppet had

the car running and drove them back to the original park. (17RT 2479-2470.) On the way back to the park, appellant said that a woman tried to grab him and another person tried to hit him with a chair. (17RT 2481.) Appellant said that he shot the man who had the chair. (17RT 2481.) Also, Pan said that he might have left his fingerprints on the door frame. (17RT 2484.)

Evans, Pan, Scrappy, Lazy and appellant later returned to San Bernardino. (17RT 2480.) Two weeks later, Evans, Scrappy, and appellant returned to Sacramento. (17RT 2482-2483.) The day after they returned to Sacramento, they were arrested in appellant's car. (17RT 2461-2462, 2483.)

B. Defense Evidence

Appellant did not present any affirmative evidence. (27RT 3557, 3662.)

PENALTY PHASE

A. Prosecution Evidence

1. Spokane Murders

On July 10, 1995, the bodies of Hong Pham and Johnny Hagan, Jr. were found inside their Spokane apartment. (31RT 4132.) Both Pham and Hagan died from multiple gunshot wounds. (31RT 4098-4126.) Pham's hands and Hagan's wrist were tied with phone cord. (31RT 4140-4141, 4156-4157.) In addition, speaker wire was found around Pham's neck. (31RT 4155.) Pham's wedding and engagement rings were hidden inside her mouth. (31RT 4116-4117, 4153.)

a. Appellant's Visit to Spokane

Appellant visited his girlfriend Champa Onkhamdy in Portland, Washington in early July 1995. (32RT 4197.) They drove to Spokane with Gaio Ly, also known as "Sandman," and Precious. (32RT 4197-4198; 34RT 4614-4615.) They were at Ly's apartment in Spokane when appellant and Ly left. (32RT 4198, 4200; 34RT 4616.) Champa fell asleep on the couch and by the time she woke up, appellant and Ly had returned. (32RT 4200-4201.) When they got back, Ly and appellant had money and jewelry. (32RT 4201-4202; 34RT 4616.) Champa saw twenty- and hundred-dollar bills and jewelry on the table. (32RT 4202; 34RT 4616-4617.) Appellant offered some of the jewelry to Champa and Precious. (34RT 4620.) Precious took a small ring. (34RT 4620.) Champa also took some jewelry, which she later turned over to police. (32RT 4215-4216.)

While on the couch, Champa heard appellant and others speaking, but they were speaking in Cambodian, which Champa testified that she did not understand. (32RT 4203.) She also heard them dividing the money. (32RT 4203-4204.) In addition, Champa told Detective Dillon that she was lying down facing away from appellant, Ly, and "Dennis" and heard the topic of a murder during the conversation. (32RT 4238-4239.) She told Detective Dillon that the conversation made her nauseous. (32RT 4240, 4242.)

b. Investigation

By stipulation, Hagan and Pham's son Joe Hagan, Jr. told Detective James Peterson of the Spokane Police Department, through an interpreter, that his mother opened the door to their home when two assailants came inside with a gun and knife. One man grabbed his mother, while the other man grabbed his father when his father tried to help his mother. One of the men left the living room and returned with a large knife. The men took

jewelry off him and his sister. The men discussed cutting his mother on the neck and did cut his father on the neck. Joe heard gunshots and covered his head with a pillow. The men ran out as Joe went to his father and tried to wake him. Joe then went to the couch, held his sister, and fell asleep. In the morning, he went to one of his neighbor's house. (31RT 4064-66, 4165.)

Joe identified appellant from a photo line-up as the man who shot his father. (31RT 4147-4148.) He also identified Ly from another photo line-up as the other assailant. (31RT 4152.) At trial, through a stipulation, Joe remembered the photo line-up involving appellant but did not remember who he identified and had no present ability to make an identification. (31RT 4062-4063.) Joe did not remember the photo line-up that included Ly, did not remember who he selected at the time, and had no present ability to identify anyone from the line-up. (31RT 4063-4064.)

Detective Peterson collected five rings and a bracelet from appellant's girlfriend Champa. (31RT 4157-4158.) Hagan's mother identified one of the rings as belonging to Hagan and the bracelet as belonging to her grandson Joe. (31RT 4069-4071.) Joe also identified the bracelet as the one he had on the night of the murders. (31RT 4072-4073.) Precious recognized five of the jewelry items presented to her in court, including Joe's bracelet. (34RT 4617-4618.)

Appellant's left thumb print was found inside the door of the apartment. (31RT 4077, 4080-4081, 4519-4520.) Ly's prints were found inside the door near the chain/latch combination lock and on wall by a kitchen cupboard. (31RT 4086-4088, 4520-4521.)

When interviewed by Detective Peterson, appellant stated that he had only been to Spokane once, had gone to his friend's house (which was located four-and-a-half miles away from the Hagan residence) and a lake before returning home. (31RT 4161.) Despite repeated opportunities to

volunteer that he had been to Hagan residence, appellant maintained that he had only been to his friend's house, the lake, and no other locations in Spokane. (31RT 4161-4162.) When confronted with the discovery of his thumbprint inside the home, appellant said that he did not know how it got there and maintained that he had never been there. (31RT 4162-4163.)

2. Bunlort Bun Drive-by

On August 6, 1995, appellant, Evans, Pan, Sparky, Thavy Pay, also known as "Grumpy," and others were at Karol's house. (33RT 4349-4350, 4438, 4463; 34RT 4681.) Appellant, Evans, Pan, and Sparky or Pay[18] left in a blue Honda and drove around looking for members of the Oriental Boys gang, a rival gang. (33RT 4350-4352, 4464.) Before they left, appellant handed a Glock nine-millimeter handgun to Evans. (33RT 4363-4364.)

As it was getting dark, they saw two people in a red car, and they started following them. (33RT 4352-4353.) The red car stopped at a house, and the passenger got out and ran inside. (33RT 4354.) Appellant, the driver, continued following the red car and started chasing it. (33RT 4351, 4354.) Evans and Pan took turns leaning out of the passenger side window and shooting at the red car until they were both out of bullets. (33RT 4354-4357.) The red car swerved and stopped at a curve in the road. (33RT 4357.) Appellant pulled up alongside the red car. (33RT 4357.) The driver was slumped over. (33RT 4358.) Appellant said to make sure he was dead, but Pan and Evans told him that they did not have any more

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[18] Evans testified that it was Baby Sparky or Grumpy that went with he, Pan, and appellant. (33RT 4351.) Karol testified that appellant, Pan, Scrappy, Evans, and Sparky left her house before the shooting. (33RT 4460.) Giggles testified that it was appellant, Pan, and Scrappy that left and returned. (33RT 4439.) Precious testified that appellant, Pan, and Evans left and returned that night. (34RT 4607.)

bullets and that the man was dead. (33RT 4358-4359.) Appellant handed another clip of ammunition to Pan, and Pan shot the driver three more times. (33RT 4359.)

When they got back to Karol's house, appellant told Karol that they were driving around and came across Bones, a member of the Oriental Boys who had been involved in an incident with TRG. (33RT 4360, 4459, 4461-4462.) Precious also heard appellant say that they shot an "OB." (34RT 4607-4608.) Appellant told Karol that they followed Bones and shot him. (33RT 4442.) Karol told them that they had better not drove straight to her house from the scene, and appellant responded that he was not stupid and drove around before coming back to her house. (33RT 4468, 4512.) Precious heard a conversation among Evans, appellant, and Pan about shooting someone in a car that they thought was an "OB." (34RT 4610, 4612, 4614.)

Karol was interested in seeing the scene because she had never seen a crime scene before. (33RT 4467-4468; 34RT 4632-4633.) Appellant told Karol to go see the scene, which was down the street from Pay's house.[19] (33RT 4360-4361, 4439-4440, 4463, 4501; 34RT 4608.) Karol left with Precious and Diep Tran, also known as "Giggles."[20] (33RT 4361, 4440-4441, 4501; 34RT 4608.) They did not find anything and returned. (33RT 4362, 4441-4442, 4464.) They thought they went to the wrong location. (33RT 4362, 4442, 4465.) Either appellant or Pan said, "There must be something, at least shattered glass" because they "drained a whole magazine." (33RT 4467.) Karol, Precious, and Giggles left again, but this

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[19] Detective Dillon testified that Pay's residence and the Bun crime scene were one-quarter mile away from each other. (34RT 4581-4582.)

[20] Karol testified that she left with Pay, Precious, and Giggles both of times she went to look for the scene. (33RT 4463, 4465.)

time with Pay. (33RT 4362, 4442; 34RT 4609.) When they returned, they told Pan and appellant that they saw several police cars. (33RT 4362, 4442-4446; 34RT 4609-4610.) There were cheers. (33RT 4466; 34RT 4610, 4613.) Precious saw appellant cleaning a gun afterwards. (34RT 4614.)

Karol told police the Oriental Boys shot up Pan's mother's house and that that shooting might have been the reason for the drive-by. (33RT 4470-4471.) According to Karol's statement, Pan said that they thought the person was a different "OB," but it turned out to be Bones. (33RT 4475-4476.) Pan also said that they shot him enough times. (3RT 4500-4501.) Pan was doing most of the talking and was patting himself on the back and laughing and smiling. (33RT 4473, 4510-4511.) Appellant had a big smile on his face. (33RT 4502, 4511.) Precious told the police appellant was bragging and excited and Pan was giggling. (34RT 4610, 4613.)

Officer John Munoz of the San Bernardino Police Department investigated the homicide. (32RT 4221.) When he arrived at the scene, he saw a parked red Toyota Celica on the 2300 block of Donald Street. (32RT 4221.) The engine was still running. (32RT 4231.) Bunlort Bun was seat belted in the driver's seat. (32RT 4222.) On the vehicle, there were bullet strikes on the front windshield, bullet holes in the back of the car (on the hatchback, back window, back bumper, and rear taillights), right passenger side door, left rear window, and lower left quarter panel of the door. (32RT 4227-4229.)

Officer Munoz found and collected 24 expended nine-millimeter bullet casings and one bullet fragment. (32RT 4226-4227.) He also collected casings from inside the vehicle and from a nearby street. (32RT 4229-4230.)

Several residents of the 2300 block of Donald saw one car chasing another and heard the sounds of multiple gunshots. (32RT 4234-4237.)

Oriental Boys member Mylay Kama had been in the car with Bun, who was not an "OB" and was not Bones, that evening. (33RT 4416-4417.) A car was following them. (33RT 4422-4423.) After Kama got out of the car and went into a house, he heard a lot of gunshots. (33RT 4420-4421.)

Dr. Sheridan did not perform the autopsy on Bun, but he received the autopsy protocol and photographs prepared by a colleague. (34RT 4681.) Bun had five gunshot wounds, three of which were fatal. (34RT 4681-4682, 4685.) Of the fatal gunshot wounds, one shot went through Bun's right lung and abdomen, one shot went though the middle of his chest, heart, abdomen, and liver, and a third shot went through his left lung and abdomen. (34RT 4682.) The two non-fatal shots were in Bun's left shoulder area – one was a graze, and the other went though his left shoulder and exited near his armpit area. (34RT 4682.) All of the shots had a downward trajectory. (34RT 4683-4684.) The wounds were consistent with someone shooting from a standing position outside of the car or with a scenario whereby Bun was shot from the left side, then slumped over, and was shot from the right side. (34RT 4684.)

3. Pomona Drive-by

Appellant, Pan, Giggles, and Precious were in Pomona to take Precious to her home. (33RT 4444; 34RT 4621-4622.) Appellant was driving around with Pan, Giggles, and Precious in appellant's brown car. (33RT 4444-4445; 34RT 4621.) They had picked up someone in Pomona, but Giggles did not remember whom. (33RT 4445, 4450.) As they were driving around, Precious saw a parked white truck. (34RT 4623.) Giggles also saw a white truck. (33RT 4446.) Precious saw someone sitting in the white truck with a rifle. (34RT 4623.) They passed the truck, but doubled

back. (34RT 4623.) As they neared it, Precious saw appellant hold up a black handgun. (34RT 4642-4643.) Giggles heard Pan tell them to duck.[21] (33RT 4448.) Giggles and Precious then heard gunshots fired from the front of the car. (33RT 4446-4447; 34RT 4624.) Precious heard Pan ask for the gun and she then heard gunshots from the passenger side of the car. (34RT 4643.) After the shots ended, Precious looked up and saw the white truck at a stop. (34RT 4625.) After the shooting, they dropped off Crow, another TRG member, at his nearby apartment.[22] (33RT 4450-4451; 34RT 4625.) They left the area and drove back to Karol's house. (33RT 4448-4449; 34RT 4626.)

According to Karol, there was a day when appellant, Precious, Evans, and Scrappy went to Pomona. (33RT 4508-4509.) When they got back, Precious said, "Oh, man, we just shot up a Mexican for throwing up a sign." (33RT 4503.) Appellant said, "[He] don't think he's bad now." (33RT 4508-4509.)

On August 8, 1995 in the late afternoon, while mowing his lawn, Royen Bon heard gunshots. (33RT 4409-4410.) He looked up and saw a hand sticking out of the window of a brown Corolla shooting in the direction of a white truck. (33RT 4410-4411.) The hand shot both sides of the truck. (33RT 4411-4414.) The white truck jumped the curb and stopped. (33RT 4411-4412.)

Miguel Avina Vargas was the victim in the drive-by. (34RT 4584.) Avina was a passenger in the vehicle, and Rudolfo Huerta was the driver.

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[21] Precious did not remember whether it was Pan or appellant who told them to duck. (34RT 4624.)

[22] Giggles testified that they dropped off Crow after the shooting. (33RT 4451.) Precious testified that they picked up Crow from his apartment, which was not even around the corner, but "right there" at the scene of the shooting. (34RT 4625.)

(34RT 4584.) Avina was taken to the hospital and Huerta left the scene before the police arrived. (34RT 4584.) Detective Michael Dossey of the Pomona Police Department identified the suspect vehicle in that drive-by as the same one that police seized when appellant was arrested in Sacramento, and it was registered to Paula Chhoun. (34RT 4590-4593.)

Dr. Sheridan did not perform the autopsy on Avina, but he reviewed the autopsy protocol and photographs from Avina's autopsy. (34RT 4676.) Avina was shot from more than three feet away. (34RT 4679.) Avina died from a gunshot wound caused by a bullet that entered his right shoulder area and passed through his aorta, left lung, and became lodged in his ribcage area. (34RT 4678-4679.)

4. Firearms Evidence

Firearms examiner Matty analyzed all of the casings from the Elm Street murders, the Sacramento murders, and the Bun and Pomona drive-by shootings. (33RT 4525, 4527-4528.) There were two guns used among the crimes. (33RT 4527-4528.) Fifteen casings from gun one and one casing from gun two were connected to the Elm Street shooting. (33RT 4529.) The casings from the Sacramento crime scene matched gun two, and the casing found in the car that appellant was arrested in matched gun one. (33RT 4529-4531.) Eighteen casings from the Bun drive-by matched gun one, and fourteen matched gun two. (33RT 4532-4533.) Only one gun was used in the Pomona drive-by and its casings matched gun one. (33RT 4533-4535.) In all, gun one matched fifteen Elm Street casings, the vehicle casing, eighteen Bun casings, and all ten Pomona casings. (33RT 4535.) Gun two matched one Elm Street casing, all Sacramento crime scene casings, and fourteen Bun casings. (33RT 4536.) In addition, since the guilt phase trial, Matty found one casing from the Elm Street scene that was fired by a different weapon. (33RT 4537-4538.) It did not match gun one

or two, nor any of the four guns he had been given for comparison. (33RT 4539.)

In contrast to the other casings, which came from nine-millimeter handguns, all of the casings from the Spokane murder were fired from .45 caliber firearm manufactured by Astro Star, Llama, Smith and Wesson, or Wyoming Arms. (33RT 4540, 4543-4544.)

In 1995, on a couple of occasions, appellant's neighbor saw appellant with a .45 caliber pistol with a brand name that started with "L." (31RT 4062.) He was unsure whether the name was Llama. (31RT 4062.)

The casings from the Pomona drive-by were consistent with nine-millimeter handguns manufactured by Glock and Smith and Wesson Sigma. (34RT 4542-4543.)

5. In-Custody Behavior

Deputy Kristie Smith is a custody officer at the West Valley Detention Center. (32RT 4256-4257.) In December 1998, she overheard appellant mention someone named Carolyn or Karol. (32RT 4258.) Appellant stated that Carolyn/Karol was possibly out of protective custody and being moved around. (32RT 4258.) He stated that he needed to find her and that he had other inmates trying to track her down. (32RT 4259-4260.) He stated that without her, there was no case and that if she were not around, appellant would be able to get off. (32RT 4259-4260.)

Deputy Brice Allen Jury is a housing deputy at the West Valley Detention Center. (32RT 4268-4269.) On May 6, 1996, around 11:00 p.m., appellant asked him for tier time.[23] (32RT 4269.) As it was lights out at 10:00 p.m. and Deputy Jury's understanding that appellant already had his tier time, Deputy Jury told appellant that he could not have tier time.

[23] Tier time is a thirty-minute period where inmates are allowed to walk around, use the telephone, and shower. (32RT 4286-4287.)

(32RT 4270.) Appellant got upset and yelled at Deputy Jury through the intercom and kicked his cell door. (32RT 4270.) Deputy Jury went to appellant's cell and told appellant to stop. (32RT 4270.) Appellant responded, "Fuck you, Deputy Jury. I'm going to kill you. I want my motherfuckin' tier time. You don't know who you're fuckin' with." (32RT 4270.) Appellant continued to yell and threatened to kill Deputy Jury's family as well. (32RT 4270-4271.) Appellant stopped kicking and yelling by 11:20 p.m. (32RT 4271-4272.)

Around 1:00 a.m., Deputy Jury performed a safety check by walking around and looking inside each cell. (32RT 4272.) Appellant was standing at his cell door. (32RT 4272.) Appellant resumed threatening to kill the deputy and his family. (32RT 4272-4273.) Appellant also stated that he hoped that the door cracked so appellant could get to Deputy Jury. (32RT 4272-4273.)

When they had "court call" at 4:50 a.m., Deputy Jury saw pieces of glass at appellant's cell door. (32RT 4273-4274.) Deputy Jury asked appellant what had happened, and appellant told him that he did not receive his tier time. (32RT 4274.) When asked to put his hands through a door slot for handcuffing, appellant said, "Fuck it. Come in and get me." (32RT 4275.) Deputy Jury left to give appellant time to cool down. (32RT 4275.)

Deputy Jury, roving supervisor Deputy Daniel Braun, and a cell extraction team returned around 7:00 a.m. (32RT 4275, 4278, 4328.) When appellant told them to come in and get him, appellant poured shampoo and toilet water onto the floor, took off his sock and shoes, and rolled up his pant legs. (32RT 4277-4278, 4331.) He then grabbed a homemade shank and said he wanted to kill Deputy Jury and whoever came in his cell. (32RT 4277, 4331-4332.) When asked if he had any more shanks, appellant said that maybe he did or maybe he did not. (32RT 4279, 4308.) Deputy Braun dropped a sting ball grenade into appellant's cell but

it had no apparent effect. (32RT 4280-4281, 4338-4339.) When Deputy Braun dropped a second sting ball grenade into appellant's cell, the cell extraction team entered and subdued appellant. (32RT 4281-4283, 4332-4333.) After appellant was removed and taken to the nurse, Deputy Jury searched his cell and found a six-inch long stainless steel shank held together with window putty and a playing card; a piece of sharpened stainless steel that appeared to have come from a food tray; and a braided cord made out of elastic with paper handles. (32RT 4276-4277, 4319-4320, 4333.)

B. Defense Evidence

Appellant was born in Cambodia in 1972 and lived there until 1981 when his family came to the United States as refugees. (36RT 4845-4846, 4863-4864; 37RT 5000.) In 1975, the Khmer Rouge took over Cambodia. (36RT 4782.) At that time, appellant's father was a rice farmer, but he had previously been conscripted to be a police officer and a member of the military. (36RT 4847; 45RT 5850-5852.) When the Khmer Rouge came to their small village, appellant's father and others fought the Khmer Rouge. (45RT 5858-5859.) Appellant's father built an underground barricade that the family stayed in for a week while mortar fire reigned overhead. (36RT 4866-4867; 45RT 5859-5860.) The Khmer Rouge eventually took over the village and put everyone to work in the rice fields. (45RT 5861, 5863.)

At some point, appellant and his brother Chhum Bili Chhoun were forcibly taken away from their village and sent to a children's work camp. (36RT 4846-4847, 4849; 45RT 5894.) While there, appellant and his brother were fed rice water. (36RT 4851.) They supplemented the rice water with plants that grew in the ground. (36RT 4851.)

While in camp, the brothers saw people die from lack of food, the cold, and lack of proper medical care. (36RT 4856.) They were also

indoctrinated to reject parental authority and told to consider the state as their family. (36RT 4824, 4850; 37RT 4893.)

Appellant and his brother tried to escape at least two times. (36RT 4851, 4854.) On one such occasion, they made it back to their home, but the Khmer Rouge found them and took them and their father. (36RT 4854.) The boys were separated from their father. (36RT 4854.) The Khmer Rouge found out appellant's father had been part of the military and imprisoned him in a series of camps. (45RT 5861-5862, 5868.) Appellant, his brother, and father all stayed in their respective work camps until the Khmer Rouge fled following the Vietnamese invasion of Cambodia in 1979. (36RT 4802-4803, 4856; 45RT 5869.) The brothers returned home and were then reunited with their mother, father, and younger sister Phalla. (36RT 4856; 45RT 5870, 5894.) Appellant and his brother had wounds and bruises all over their bodies. (36RT 4870; 45RT 5870-5871, 5895-5896.) They were also emaciated. (45RT 5895.) Appellant said that he had been beaten and complained that his head hurt on one side, which caused him to scream out. (45RT 5895.)

The family fled to the border with Thailand. (36RT 4857; 45RT 5871-5872.) It took three days and two nights for the family to reach the border. (45RT 5872.) The way to the Thai border was littered with the dead bodies from exploded landmines and other bombs. (36RT 4858; 37RT 4898-4899; 45RT 5873.) Once they got to the refugee camp, they were given food rations, but appellant would run away and search for more food. (36RT 4860-4861, 4875; 45RT 5874-5875, 5896.) The children also attended school for the first time while in the refugee camp. (36RT 4864-4865.) Because appellant's father had tuberculosis, the family was quarantined and did not immigrate to the United States until 1981, when they settled in Mobile, Alabama. (36RT 4863; 45RT 5876-5878.)

When they arrived in Mobile, the family was placed in a predominately Black neighborhood and had trouble adjusting to life in the United States. (36RT 4831.) Specifically, the schools were not equipped to handle Cambodian refugees and offered no language support for the children, who did not speak English. (36RT 4826-4830, 4864-4865, 4833; 44RT 5710.) Appellant did not stay at home and often slept in dumpsters. (45RT 5881, 5883.) He also went out hunting for food as he did in Cambodia and Thailand. (36RT 4875; 45RT 5883.) Appellant continued to complain of hunger, headaches, and fevers. (45RT 5882, 5902.) Appellant would hit his head against the wall when his head was hurting. (45RT 5882.) While appellant's parents went to work outside the house, the children were left in their own care or the care of neighbors. (45RT 5881, 5897.) The family lived in Alabama for four years before moving to Stockton and then Long Beach. (36RT 4834-4835, 4865; 45RT 5881.)

When they were in California, appellant and his brother took care of their younger sisters. (44RT 5711.) However, appellant was rarely at home and often got into trouble. (44RT 5712, 5758; 45RT 5884.) Appellant did not get along with his older brother Bili and would beat him up as appellant was bigger. (36RT 4868, 4872.) Appellant told Bili that he was struggling with evil spirits inside of him. (36RT 4877.)

Traumatologist William Foreman performed a forensic evaluation on appellant. (37RT 4925, 4927.) Foreman did not conduct any written or oral tests on appellant due to appellant's lack of English skills. (37RT 4974-4975.) Nonetheless, Foreman concluded that appellant had Reactive Attachment Disorder and Post Traumatic Stress Disorder, chronic type. (42RT 5075-5076.) Further, Foreman concluded that appellant may have Antisocial Personality Disorder based on his crimes, but that diagnosis was not appropriate because appellant had never shifted from the survival

strategy that existed from his time in Cambodia. (42RT 5399, 5403-5404, 5505.)

Psychiatrist Paul K. Leung is the Director of the Indochinese Psychiatric Program at the Oregon Health Sciences University. (39RT 5081-5082, 5085.) Ninety percent of his Cambodian patients suffer from PTSD. (39RT 5108.) He did not, however, diagnose appellant with PTSD despite finding several criteria present. (39RT 5145.) Dr. Leung did not diagnose appellant with PTSD because appellant did not recall a specific traumatic event. (39RT 5147.)

Psychiatrist William E. Sack is a child and adolescent psychiatrist. (40RT 5160.) He found that appellant was unable to form and continue a strong attachment to his family during his preschool time. (40RT 5199.) He also found that appellant had a sense of abandonment and learned early on that he could not rely on his family. (40RT 5209.) Further, since children develop their internal value system from their parents, appellant was unable to adopt an internal value system due to the lack of attachment with his parents. (40RT 5224.) Instead, appellant bonded with his fellow gang members. (40RT 5224.) Dr. Sack concluded that a Reactive Attachment Disorder diagnosis is helpful to understand appellant's behavior of going off on his own and scavenging for food. (40RT 5243.) Dr. Sack also diagnosed appellant with PTSD in his written report, but testified that he needed to bend the rules to make that diagnosis. (40RT 5236-5237, 5247.)

Consultant James Esten, retired from the California Department of Corrections, concluded that appellant would likely be classified as a Level Four inmate within the corrections department. (40RT 5510, 5539.) Appellant would also likely be placed in the Security Housing Unit at Pelican Bay State Prison for six years. (40RT 5542.)

Psychiatrist and brain imaging specialist Joseph Chong-Sang Wu analyzed appellant's Positron Emission Topography (PET) scan. (40RT 5582-5583.) Dr. Wu observed an unusual pattern of activity in the back of appellant's brain, which is typically seen in traumatic brain injury cases. (40RT 5602.) Dr. Wu also observed a lack of symmetry in the right parietal lobe area, which is consistent with PTSD and traumatic brain injury. (50RT 5604, 5607.)

C. Rebuttal

On July 20, 1999, in the High Security Unit of the West Valley Detention Center, Deputy Jesse Venegas searched appellant's cell and found a working homemade handcuff key wrapped in cellophane and adhered under appellant's desk with window paste. (46RT 5906-5910.)

ARGUMENT

I. THE TRIAL COURT'S ADMISSION OF EVIDENCE PERTAINING TO THE SACRAMENTO MURDERS AND APPELLANT'S GANG MEMBERSHIP WAS NOT ERRONEOUS AND DID NOT VIOLATE APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL AND RELIABLE DETERMINATIONS OF GUILT AND PENALTY

Appellant contends that the trial court improperly admitted evidence of the Sacramento murders and his TRG membership under Evidence Code section 1101, subdivision (b). (AOB 74-140.) He further contends that the erroneous admission violated his state and federal constitutional rights to a fair trial and a reliable jury determination that he was guilty of a capital offense. (AOB 74.) Appellant's claim is without merit as the trial court properly admitted evidence concerning the Sacramento murders and appellant's gang membership.

A. Sacramento Evidence

1. Relevant Trial Court Proceedings

a. Motion to Sever

On April 12, 1996, Pan filed a motion to sever his trial from the other defendants based on *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] (*Bruton*). (1SuppCT 56-63.) At a pre-trial hearing held on May 7, 1996, the prosecutor agreed to sever Karol, Evans, and Tran's cases from each other and from appellant's and Pan's trial. (1PT-RT 35-38, 41.) The prosecutor also indicated that there would be no *Aranda/Bruton* issue because he would not seek to introduce statements made by Pan or appellant that incriminated the other. (1PT-RT 36, 42.) At the conclusion of the hearing, the trial court severed Karol, Evans, and Tran's cases from each other and from appellant and Pan's trial, but denied Pan's motion to sever his trial from appellant's trial as premature.[24] (1PT-RT 48.)

b. Evidence Presented at the Hearing

On April 21, 1999, the court held a hearing pursuant to section 402 of the Evidence Code on the admissibility of evidence concerning the Sacramento murders and received the following evidence.

(1) Puppet's testimony

Bunjun Chinkhathork, also know as Puppet, testified he is a member of TRG and was currently in state prison after pleading guilty to first-degree murder concerning the Sacramento murders. (12RT 1619.) The murders occurred at 7301 Florinwood Drive in Sacramento on July 27,

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[24] In addition, Pan also moved for separate penalty phases, and in the alternative, separate juries. (1PT-RT 42.) The court likewise denied this motion as premature. (1PT-RT 52.)

1995 when he was 16 years old, and the victims were Hung Dieu Le and Nghiep Thich Le. (12RT 1619.) Before the murders, he was at a park with Pan, Appellant, Evans, and Scrappy, all of whom were fellow TRG members. (12RT 1620.) Puppet thought of Pan as his cousin, but there were not related. (12RT 1620.) While at the park, someone said something about needing money to fix a car. (12RT 1635.) Puppet told Evans that he knew a place to rob. (12RT 1635.) The plan was to use a weapon that someone had. Puppet had seen a black nine-millimeter Glock handgun earlier that perhaps Appellant had. (12RT 1636.) Puppet testified that Pan and appellant were not present during this discussion. (12RT 1636-1637.) They were there, however, when there was a discussion about going to an apartment to buy cigarettes. (12RT 1621.) Around 2 or 3pm, he, Evans, appellant, and Pan went to apartment 53 to buy cigarettes. (12RT 1622, 1624.) Puppet went to the apartment and bought a pack of cigarettes and a soda. (12RT 1624-1625.) He saw two men and one woman in the living room of the apartment. (12RT 1625.) The group returned to the park. (12RT 1627.) Later, the group returned to the apartment complex. (12RT 1628.) They got out of the car and went near a group of trees. (12RT 1629.) They started talking about money and a robbery at apartment 53. (12RT 1630.) Puppet only recalled that it was Evans and himself having the conversation.[25] (12RT 1630.) Appellant, Pan and Evans then went to apartment 53 to commit the robbery while Puppet sat in the car in the driver's seat with the car running. (12RT 1631.) Puppet saw appellant,

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[25] Specifically, Puppet testified, "We talked about the robbery at Apartment 53 on Florinwood." (12RT 1630.) When asked about the people involved in the conversation, Puppet did not remember. (12RT 1630.) He then said that Evans was involved in the discussion and that it was "at the moment just me and him." (12RT 1630.) When asked if Pan or Appellant were involved in the conversation later on, Puppet said that they were not. (12RT 1635-1636.)

Pan, and Evans walk toward the apartment complex gate. (12RT 1631.) The trio were gone six to seven minutes before Puppet saw them running back to the car. (12RT 1632.) After they returned to the car, Puppet drove off. (12RT 1632.) They returned to the park they were at earlier and they then went their separate ways. (12RT 1633.) Puppet did not hear any gunshots while he was waiting. (12RT 1632.) In addition, he did not see a gun nor did he hear appellant or Pan say anything about shooting or killing anyone. (12RT 1633.) No one said what happened at the apartment. (12RT 1633.)

Puppet gave a statement to Detectives Reed and Edwards, but he testified that it was a false statement. (12RT 1637-1640, 1673-1674.) According to his statement, there was a plan that included the role each person would play during the robbery. (12RT 1638.) As they discussed shooting the people, Puppet stated, "How could we shoot 'em when we only have one gun?" (12RT 1657, 1660.) Puppet was concerned that the victims would recognize him, and appellant told him that he would shoot them for Puppet. (12RT 1658.) Everyone knew there was going to be a robbery because they discussed it at the park. (12RT 1644-1645.) During the discussion, Evans or Pan[26] said, "Well, if they recognize you, won't give you the stuff, shoot one, shoot 'em all." (12RT 1653-1654.) Puppet did not expect to receive anything from appellant from the proceeds of the robbery because appellant was stingy. (12RT 1651-1652.) Puppet told Pan might give him something because he is Puppet's cousin. (12RT 1652.) Appellant told Puppet to buy cigarettes to determine the number of people inside the apartment. (12RT 1641.) Puppet did not know how they got five

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[26] Puppet said that someone in the backseat said it and noted that appellant was playing with the stereo (in the front seat). (12RT 1656.) He said that it was either Evans or Pan, and he believed that it was Pan but he was unsure. (12RT 1656.)

people because he only saw two people inside the apartment. (12RT 1642.) Puppet stayed in the car while Evans, Pan, and appellant went back to the apartment to commit the robbery. (12RT 1643.) They were gone for five minutes. (12RT 1656.) During that time, Puppet heard gunshots. (12RT 1643.) Puppet then saw them running back to the car. (12RT 1656.) They returned to the park. (12RT 1643.) While at the park, Puppet saw appellant put the gun in the trunk of the car. (12RT 1652-1653.) Appellant said, "We got to get out of here. We just did a robbery." (12RT 1644.) Someone asked who shot, and someone said, "I shot." (12RT 1644.) Puppet did not remember who said, "I shot," but he believed that appellant shot the people because he had a gun on him. (12RT 1644.) Appellant said, "I shot half the clip." (12RT 1644-1645.)

At some point, appellant told Puppet what happened inside the apartment. (12RT 1650.) Appellant said that he was the only one able to get inside the apartment because he went in first. (12RT 1647.) Appellant had a gun and a woman ran out. (12RT 1647.) She started also throwing things at him and he started shooting. (12RT 1647.) Appellant also said that the woman grabbed him by the shirt and he shot at her. (12RT 1648.) Appellant said that he shot her in the lower body or leg because he was not aiming at her. (12RT 1649.) Appellant also said that he pointed the gun at the woman and he aimed at her leg because she was still coming toward him. (12RT 1649-1650.) Appellant said he shot around the house while the people were eating and then they ran out. (12RT 1649-1650.) Appellant told Puppet that he did not get anything out of the robbery. (12RT 1650.)

Later, Puppet spoke to Pan on the phone. (12RT 1646.) Pan wondered what happened to appellant and Evans, and Puppet told him that he heard that they had got caught. (12RT 1646.) Puppet believed that Pan did not say who shot who over the phone because Pan believed that the

phone was tapped. (12RT 1646.) Puppet also told the detectives that there had been a plan to commit another robbery, where they talked about killing the people if they did not cooperate. (12RT 1646-1647.)

(2) Evans's Testimony

Evans testified that he was charged in the Sacramento murders. (13RT 1696.) He was in Sacramento on July 27, 1995 with appellant, Rusty, Scrappy, Puppet, and other TRG members. (13RT 1700-1701.) The day before the robbery was ultimately committed, Evans and Puppet went to the apartment to buy cigarettes and returned to the park. (13RT 1703-1704.) On the day of the robbery, Appellant, Puppet, Pan and others discussed committing a robbery at the apartment. (13RT 1702, 1705, 1748.) The robbery was planned primarily by appellant and Puppet. (13RT 1705.) Pan was not actively involved in the planning. (13RT 1705.) After the planning, they went to the apartment in Pan's blue Honda Accord. (13RT 1705-1706.)

Appellant was driving. (13RT 1708.) Puppet was seated in the front passenger seat and Pan and Evans were seated in the back. (13RT 1708.) Appellant parked at a park near the apartment complex. (13RT 1708.) Puppet got into the driver's seat and he was instructed to wait in the car. (13RT 1709.) Evans, appellant, and Pan walked to the apartment complex and went through a hole in the fence. (13RT 1708-1709.) Appellant had a nine-millimeter Glock. (13RT 1710.) They passed by the apartment and then doubled back. (13RT 1709-1710.) Appellant then tried to grab a woman who was sitting on the stairway. (13RT 1710.) The woman ran away. (13RT 1710.) Appellant then went into the apartment. (13RT 1711.) Pan and Evans stayed outside. (13RT 1711.) Evans heard a commotion and then an undetermined number of gunshots. (13RT 1711.) After he heard the gunshots, Evans ran back to the car. (13RT 1711.) Evans returned to the car first, followed by Pan, and lastly, appellant.

(13RT 1711-1712.) Puppet drove them back to the original park. (13RT 1713.) In the car, Appellant told them that a woman came out of a room and tried to hit him with a chair and he "just shot 'em." (13RT 1713-1714.) Pan was concerned that he may have left his fingerprints on the door. (13RT 1714.) When they got back to the park, appellant, Evans, Scrappy, and Pan got into Pan's blue Honda and returned to San Bernardino. (13RT 1715.)

(3) Other Evidence

Quyen Tu Luu was Hung Dieu Le's wife and Nghiep Thich Le was her father. (13RT 1766.) She was living at 7301 Florinwood apartment 52 in Sacramento on July 27, 1995. (13RT 1766-1767.) About 8:00 p.m., she was having dinner with her uncle, Hung Ngo, inside the apartment. (13RT 1767-1768.) Her husband was standing at a counter and her father was about to get his dinner. (13RT 1768.) She had just finished her dinner when a man entered the apartment with a gun. (13RT 1768.) She thought a photograph of appellant was the one. (13RT 1768-69.) She did not recall seeing Pan or Evans that night, but appellant looked like the shooter. (13RT 1768-1769.) The shooter put a black handgun to her right thigh and shot her leg. (13RT 1769-1770.) She fell down. (13RT 1770.) She heard several more shots. (13RT 1771.)

Hoa Dieu Le is Hung Dieu Le's brother. (13RT 1775.) His father is Nghiep. (13RT 1775-1776.) He was eating dinner at their apartment when heard someone say, "robbery." (13RT 1776.) He then heard his sister-in-law yell, "There's a gun." (13RT 1776-1777.) Le saw the gun. (13RT 1778.) He moved a chair out of way and ran to the patio to hide. (13RT 1778-1779.) His sister-in-law was shot in the leg when she tried to run to the patio. (13RT 1778.) He saw his father lying on the ground surrounded by a lot of blood. (13RT 1777.) After the shooting, he went back inside the apartment and held his father. (13RT 1780.)

Hung Ngo was having dinner at his friend Hung Le's apartment. (13RT 1782, 1784.) An Asian man walked in the front door with a gun. (13RT 1785-1786.) Ngo heard gunshots and saw the father on the ground. (13RT 1784-1785.)

Mei Tuyet Le testified that her father was Hung Dieu Le and her grandfather was Nghiep Thich Le. (13RT 1794.) She lived at apartment 53. (13RT 1795.) Her family was having dinner, and she was at a neighbor's apartment upstairs in apartment 52. (13RT 1795.) She heard her sister Amie Le scream. (13RT 1796.) Amie screamed, "robbery." (13RT 1796.) Mei opened the door and Amie ran inside with two children. (13RT 1796.) She looked to her apartment and saw a man push her mother. (13RT 1796.) Mei heard a gunshot and saw her mother fall down. (13RT 1796-1797.) Her neighbor pulled her inside the apartment, and she heard five or six more gunshots. (13RT 1797.) When Mei went to her apartment, she saw her grandfather lying on the floor. (13RT 1797.) Her uncle was holding her grandfather's head telling him to wake up. (13RT 1797-1798.) Mei also saw her father had been shot. (13RT 1798-1799.) She did recognize the shooter among appellant's, Evans', or Pan's photographs. (13RT 1799-1800.)

Vincent (Vinh) Le had dinner and then went upstairs to a neighbor's apartment. (13RT 1802.) He heard his sister Amy say, "robbery," in Cantonese. (13RT 1802-1803.) He looked into the patio and through the window into the apartment. (13RT 1803-1804.) He saw a man with a white T-shirt and black/tan jeans. (13RT 1804.) He did not recognize the man from among appellant's, Evans,' or Pan's photographs. (13RT 1805.) He then heard one gunshot. (13RT 1804.) He went back into his neighbor's apartment, and he then heard more shots for a total of five or six. (13RT 1804.) After the gunshots ended, he went to the apartment.

(13RT 1805.) He saw his father and grandfather lying on the floor. (13RT 1805.)

About an hour before the robbery, Vincent sold candy to a man. (13RT 1807.) He saw the man go to a light blue Honda Accord with a faded left front fender that looked black. (13RT 1807-1808, 1810.) He saw another person get out of the car, open the trunk, and then get into the driver's seat and drive away. (13RT 1808-1809.) This person was the same person as the one that was inside his apartment when the shooting occurred. (13RT 1808-1809.) When the car drove past him, he saw three people in the car, all of whom appeared to be Cambodian based on their darker skin color. (13RT 1810-1811, 1816.)

Amie Le was sitting on the stairs in front of the apartments. (13RT 1821.) Three men walked up to her. (13RT 1821.) The first one was the tallest, the second one was chubby, and the third man looked like Evans. (13RT 1821-1822, 1824-1825, 1834, 1836.) The first man stopped, pointed a black gun at her, and waved his hands for her to follow him into the apartment. (13RT 1821, 1823, 1828.) Amie screamed to her mother to close the door because she thought the man was going to go inside the apartment. (13RT 1823.) The man walked halfway towards the apartment and Amie ran upstairs with two children who were next to her. (13RT 1825.) She was trying to call 911 when she heard gunshots. (13RT 1825.) Her brother Vincent had gone outside of the apartment, he came back and said that their father had been shot and to call 911. (13RT 1827.) Amie believed the men were Cambodian because their complexion was darker than Chinese and Vietnamese people. (13RT 1831-1832.)

The parties also entered into a stipulation that appellant told Detective Edwards that he went to the apartment, saw a girl on the stairs, and told her to shut up. (13RT 1838-1839.)

c. Superior Court's Ruling

The court explained that the issues of knowledge and intent were highly contested issues for Pan, and thus, the Sacramento evidence was admissible for at least those purposes. (13RT 1860-1861.) The court also remarked that as to appellant, the issue is "more troublesome and closer." (13RT 1861.) The court indicated that it wanted to avoid a severance, but that he would sever theirs trials if necessary. (13RT 1861.) The court initially believed that the evidence showed that the same gun was used in both the Sacramento and Elm Street murders. (13RT 1861.) "More importantly," however, the court believed that since appellant was charged with first-degree murder, the Sacramento evidence would be relevant to appellant's state of mind, specifically that a robbery was intended, as well as to show premeditation and malice aforethought. (13RT 1861-1862.) Since the evidence was admissible against appellant, a severance was not necessary. (13RT 1863.)

The court revisited its ruling upon noting that he was mistaken about the evidence tending to show that the same gun was used. (15RT 2228-2232.) After reading its original ruling and rationale, the court noted, "[T]he comments regarding the same gun being used were almost an aside." (15RT 2232.) The court reiterated that the evidence was relevant to evaluate appellant's state of mind and as to the required nexus between the killings and the robbery/burglary, and thus it would not change its ruling. (15RT 2232-2233.)

When evidence of the Sacramento murders was first received (during Evans's testimony), the trial court gave the following instruction:

> Ladies and gentlemen, previously I gave you an admonition regarding the admission of certain evidence for a limited purpose. I did not go into detail regarding what that limited purpose was, but I will at some later date give you that further instruction. I am going to read another instruction at this

time regarding the same type of evidence, limited evidence for a very limited purpose. And at this time I am going to go into detail as to what that limitation is. So I will try to read this slowly and distinctly and I ask you, please, to give us your attention.

Certain evidence is admitted for a limited purpose. Such evidence is going to be received at this time.

You are instructed that you are not to consider it for any purpose other than the limited purpose for which it is admitted. The fact that it is being admitted at this point in the trial has no significance as to its relative importance.

This trial concerns charges by the people that the defendants allegedly committed a home-invasion robbery/murder -which occurred on August 9, 1995, on Elm Street in the City of San Bernardino.

I remind you that the defendants have entered pleas of not guilty and it will be up to the jury to determine whether or not they are guilty of the charges which the People must prove to you beyond a reasonable doubt.

The law permits under certain circumstances that evidence of similar crimes or criminal acts to those charged in this case may be presented to the jury. This evidence concerns an uncharged crime in this trial that occurred in the city of Sacramento on July 27, 1995. That crime involved a home-invasion robbery/murder.

This evidence is being admitted for the limited purpose as evidence in the Elm Street crimes of premeditation and malice aforethought as required in the crime of first degree murder, the necessary intent as required in the crimes of murder, robbery, and burglary. It may be used as evidence of a common scheme, motive, or knowledge. You will be completely instructed as to the elements of all crimes charged in the Elm Street incident.

Before you may consider this evidence for any purpose, you must be satisfied by a preponderance of the evidence that the Sacramento crimes took place and that the defendants were participants in committing them. You are not to consider any of this limited evidence as proof of a propensity of the defendants

to commit the crimes charged in the Elm Street offenses and you are reminded you may not find either or both of the defendants guilty of the Elm Street crimes solely on this evidence, but must determine the truth of those charges beyond a reasonable doubt. And you may consider this evidence of the Sacramento crimes only for the limited purpose for which it is being admitted.

Further, you may not and you are not to consider this evidence of the Sacramento offenses as corroboration of-the testimony of any co-participant that may testify in this trial concerning the Elm Street killings.

(17RT 2454-56.) The court repeated this instruction periodically. (*See* 19RT 2696-98 [prior to Luu's testimony], 22RT 3056-57 [prior to Sergeant Risedorph's testimony].)

At the end of the guilt phase, the jury was instructed that the Sacramento evidence was admitted:

. . . for the limited purpose as evidence in the Elm Street crimes of premeditation and malice aforethought as required in the crime of First Degree Murder, the necessary intent as required in the crimes of Murder, Robbery, and Burglary; it may be used as evidence of a common scheme, motive, or knowledge.

(3CT 842.) The jury was also generally instructed that evidence showing that appellant had committed other crimes could be considered:

. . . only for the limited purpose of determining if it tends to show:

A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged;

The existence of the intent which is a necessary element of the crime charged;

A motive for the commission of the crime charged; . . .

(3CT 845.)

2. The Trial Court Did Not Err by Admitting Evidence Concerning the Sacramento Murders

a. Applicable Law

Evidence Code section 1101, subdivision (a), generally prohibits the admission of a prior criminal act offered against a criminal defendant to prove his or her conduct on a specified occasion. However, subdivision (b) of the same section allows admission of such evidence for other purposes:

> Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(Evid. Code, § 1101, subd. (b).)

The admissibility of uncharged conduct offered for one of the above purposes "depends upon three principal factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence." (*People v. Thompson* (1980) 27 Cal.3d 303, 315.) The degree of similarity between the prior act and the charged offense also affects the purpose for which the former is admissible under Evidence Code section 1101, subdivision (b). For example, if the prior act is admitted to prove intent in the charged offense, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "probably harbored" the same intent in each instance. (*People v. Soper* (2009) 45 Cal.4th 759, 776; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt.*) A greater degree of similarity is required if the prior act is admitted in order to prove the existence of a common design or plan, such that evidence of the uncharged misconduct

must demonstrate not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. (*People v. Soper*, *supra*, 45 Cal.4th at p. 776, fn.8; *Ewoldt*, *supra*, 7 Cal.4th at pp. 402-403.) In sum, because all other crimes evidence in a sense may be viewed as "inherently prejudicial," uncharged offenses are admissible only if they have substantial probative value. (*People v. Rogers* (2013) 57 Cal.4th 296, 331.)

Evidence admitted under Evidence Code section 1101, subdivision (b), also must not contravene other evidentiary policies, such as Evidence Code section 352. (Evid. Code, § 352; *People v. Cole* (2004) 33 Cal.4th 1158, 1194; *Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Trial court rulings pursuant to both Evidence Code sections 352 and 1101, subdivision (b), are reviewed for abuse of discretion. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1194.)

(1) Evidence of the Sacramento Murders Was Relevant to Show Appellant's Premeditation and Deliberation

Appellant was charged with five counts of first-degree murder on the theory of deliberation and premeditation and one count of attempted murder. (3CT 869-870, 882-883.) "'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) In *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, the California Supreme Court identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. Whenever motive or intent is relevant, or whenever the knowledge a person may have had is material to an issue, a wide range of proof is allowed, and such state of mind or knowledge may

be evidenced by his conduct. (*Larson v. Solbakken* (1963) 221 Cal.App.2d 410, 418.)

A defendant's plea of not guilty puts in issue all the elements of the charged offense and thus the perpetrator's identity, intent and motive are all material facts. (*People v. Roldan* (2005) 35 Cal.4th 656, 705-706; *People v. Balcom* (1994) 7 Cal.4th 414, 422-423.)

The trial court did not err by concluding that the similarities between the Sacrament and Elm Street murders rendered the Sacramento evidence relevant as to premeditation and deliberation. For instance in both cases: 1) appellant and his cohorts gathered information about a specific robbery target, such as the number of people in the home and the presence of large amounts of cash and/or jewelry; 2) the targeted victims were Asian; 3) a plan was developed whereby each participant was given a specific role in the robbery; 4) the intel-gatherer was left in the car to reduce the chances of recognition; 5) the group executed the plan; and 6) the victims were shot when they put up resistance. Based on that evidence, a reasonable fact finder could conclude that if appellant committed or participated in the Elm Street murders, another home invasion robbery where all five residents were shot and four of whom were killed, that the killings were contemplated beforehand, if not outright planned, and that the killings were not spontaneous or based upon a rash impulse. Thus, the Sacramento murders evidence was probative on the issue of premeditation and deliberation. (*See People v. Rogers, supra,* 57 Cal.4th at pp. 327-328; *People v. Cummings* (1993) 4 Cal. 4th 1233, 1289.)

(2) Evidence of the Sacramento Murders Was Relevant to Show Appellant's Intent to Kill and His Motive and Intent As It Pertained to the Robbery and Burglary Counts and Special Circumstances

The prosecution also had to prove that appellant had the intent to kill. Intent to kill was an element of malice aforethought in the murder counts (CT 866), the attempted murder of Dennis (CT 867), and the robbery/burglary special circumstances if the jury did not find that appellant was the actual killer (CT 898). Thus, it was important to demonstrate that appellant had the intent to kill well beyond showing that appellant had the intent to kill the father, as appellant suggests. Indeed, appellant never conceded that he was the one who shot the father in the chest and head, and it was not apparent who shot the father, mother, and three children from among appellant, Evans, and Scrappy, who were all present in the house and armed with nine-millimeter handguns.

Moreover, appellant was charged with first-degree murder under the felony-murder theory, several counts of first-degree residential robbery and one count of first-degree residential burglary. (3CT 871, 884, 888, 897.) Lastly, appellant was charged with robbery and burglary special-circumstances. (4CT 901.) Thus, appellant's intent to rob and intent to commit a theft, and that the felonies were not merely incidental to the murders, were all material issues that the prosecution was charged with proving.

Contrary to appellant's argument, the robbery or theft motive was not wholly clear. Further, like the other elements to be proven, it was both necessary and persuasive to introduce evidence of the robbery or theft motive notwithstanding Evans and Karol's accomplice testimony that they intended to rob the Elm Street residents. Indeed, the prosecution has the right to present all available evidence to meet its burden of proving the requisite *mens rea* for first degree murder beyond a reasonable doubt. (See

Mullaney v. Wilbur (1975) 421 U.S. 684, 704 [95 S.Ct. 1881, 44 L.Ed.2d 508]; *People v. Rios* (2000) 23 Cal.4th 450, 462.)

The similarity between the two cases tended to show that appellant had the same intent – the intent to rob or commit a theft – in the Elm Street case, as he had in the Sacramento case. Specifically, in the Sacramento case, appellant and his cohorts were informed that the target home was likely to have cash, the residents were Asian, appellant was armed with a Glock nine-millimeter handgun, appellant entered the apartment under a false pretense with the intent to rob the occupants, the occupants did not cooperate, and appellant shot and killed two of the residents. Two weeks later, appellant and his cohorts were again informed of a home that was likely to have cash and jewelry, the residents were Asian, appellant was armed with a Glock nine-millimeter handgun, appellant and his cohorts entered the home under a false pretense, took some jewelry off the victims, and obtained some money, but were dissatisfied by the amount of valuables obtained, and thereafter, four of the residents were shot and killed.

Based on the foregoing, the Sacramento evidence was relevant to show that appellant's primary intent was to rob the residents and that he intended to kill the victims if they did not fully cooperate or the fruits of the robbery were not fully realized. Thus, the Sacramento evidence was admissible on the issues of appellant's intent to kill, his motive, and his intent to rob or commit a theft as it pertained to robbery and burglary counts and the robbery and burglary special circumstances. *See People v. Rogers*, *supra,* 57 Cal.4th at p. 327-328; *People v. Lindberg* (2008) 45 Cal.4th 1, 23-24; *People v. Brandon* (1995) 42 Cal.App.4th 1033, 1049.). Further, contrary to appellant's contention (AOB 94-95), this is true even where the intent to kill was conditional. (See *People v. Lang* (1989) 49 Cal.3d 991, 1013-1016.)

(3) Evidence of the Sacramento Murders Was Admissible to Show a Common Plan or Scheme

"Evidence of a common design or plan . . . is not used to prove the defendant's intent or identity but rather to prove that the defendant engaged in the conduct alleged to constitute the charged offense." (*Ewoldt, supra,* 7 Cal.4th at p. 394, fn. omitted.) "[I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.]" (*Id.* at p. 402.)

> To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . .. [E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]

(*Id.* at p. 403.)

As discussed above, there were many similarities between the Sacramento and Elm Street robbery/murders. In each instance, the selected victims were Asian and were believed to have cash on hand in their homes; one member of the group obtained information about the home and the number of occupants; three members of the group, which included appellant, who was armed with a nine-millimeter handgun, were sent to commit the robbery; and appellant shot the victims when they resisted the robbery. Thus, there was sufficient similarity between the offenses to demonstrate the existence of a common design or plan, and as such, this

evidence was admissible to show that appellant engaged in conduct charged in the instant case. (See *People v. Johnson* (2013) 221 Cal.App.4th 623, 635-636; *People v. Balcom, supra,* 7 Cal.4th at p. 426.)

While appellant quotes a portion of *Ewoldt* for the proposition that evidence that the defendant committed other crimes would be inadmissible where the primary contested issue is identity (AOB 97), this Court concluded that such evidence would be relevant to demonstrate a common design or plan, but would be cumulative and unduly prejudicial "if it is beyond dispute that the alleged crime occurred." (*Ewoldt, supra,* 7 Cal.4th at p. 406.) Accordingly, in such an instance, the evidence would be inadmissible under Section 352 of the Evidence Code, as it would be cumulative. Again, here, as discussed above, it was not beyond dispute that appellant took a lead role in the crime by demanding money and jewelry from the Elm Street victims and personally shooting or threatening any of the victims. Thus, evidence that appellant engaged in that conduct would not be cumulative, like the hypothetical discussed in *Ewoldt.*

(4) Admission of the Sacramento Murders Did Not Contravene Section 352 of the Evidence Code

Appellant contends that the Sacramento evidence was more prejudicial than probative and should have been excluded under section 352 of the Evidence Code. (AOB 99-107.) As discussed above, the Sacramento evidence was highly probative to show appellant's intent to kill especially in the event that the jury was not convinced that he was the shooter. Moreover, the evidence showed appellant's motive and intent to rob, the relevance of which went beyond the murder and attempted murder counts. In contrast, the evidence was not unduly 'prejudicial' as the Sacramento murders were relatively benign compared to the killing of a mother, father, and their three children and the shooting of a three-year-old that occurred in the Elm Street murders. (*People v. Callahan* (1999) 74

Cal.App.4th 356, 371 ["There was not a substantial danger of undue prejudice because the circumstances of the [Foulk] incident were no more inflammatory [actually much less inflammatory] than the circumstances of the current incident involving [Davis]."]; *People v. Lindberg, supra,* 45 Cal.4th at pp. 25-26 [probative value of other-crimes evidence showing intent to rob at the time of the killing was not excludable under section 352 where the evidence was not cumulative or excessive and was not particularly inflammatory in light of the charged offenses].) Thus, the trial court did not abuse its discretion by concluding that the probative value of the evidence outweighed any undue prejudice.

B. Gang Evidence

1. Relevant Trial Court Proceedings

Appellant Pan filed a motion to exclude gang evidence, to which the prosecution filed a response. (2SuppACT 199-205; 1SuppACT 56-82.) In a written order, the court allowed the use of gang evidence to prove conspiracy, Pan's knowledge and intent when he furnished the gun, and the intent of both Pan and appellant to commit the murders in the course of the robbery/burglary and as to the motive. The evidence was further admissible to show the relationship between the defendants, the conduct of Pan, and the intent and motive of both defendants. The court, however, limited the gang evidence to evidence concerning the gang itself, the defendants' membership in the gang, and the activity surrounding the commission of the charged crimes. Further, the court found that the evidence was not unduly prejudicial under section 352 of the Evidence Code. (3CT 668-669.)

At a later hearing, the court clarified its written ruling:

> What I intended to say, if I didn't clearly saw it by that, is I think this evidence is admissible to show that because of a gang relationship to these two defendants, that that gang relationship

> could result in one gang member carrying out one aspect of this crime, another gang member carrying out another aspect of the crime.

(15RT 2101-2102.)

Sergeant Frank testified at the section 402 hearing. (15RT 2106.) After briefing discussing his qualifications, Sergeant Frank testified about the differences between Asian gangs and occidental gangs. (15RT 2106-2111.) Specifically, he testified that leadership within Asian gangs is fluid and the gang members are "extraordinarily mobile," and are not bound by a geographic area or territory. (15RT 2112-2113.) Sergeant Frank testified that TRG was such a gang. (15RT 2113.) He further testified about the number of TRG members nationwide, the role of an OG generally and within Asian gangs specifically, the meaning of the term "dai lo" as it related to Asian gangs, the role of a shot caller within Asian gangs, and the role of women within Asian gangs. (15RT 2113-2117.) Specifically, Sergeant Frank testified that the role of an OG was related to the concept of "dai lo" and could be someone who gained enough experience and respect to be looked up to by other gang members. (15RT 2113-2114.) An OG would not necessarily be able to direct other gang members to commit crimes, but a shot caller could. (15RT 2114-2116.) He further testified that it was common in Asian gangs for different members to be involved in different aspects of committing a crime and he explained how that might occur during a home invasion robbery. (15RT 2117-2118.) He also talked about how the gun is more protected in Asian gangs as opposed to occidental gangs because of its role in economic crimes and because it enhances the "face" of the gang. (15RT 2118-2119.) According to Sergeant Frank, a gun would be used as a tool in a home invasion robbery, to achieve a specific goal, such as to intimidate the victims or overcome their resistance. (15RT 2119.) Based on investigating over 400 home

invasion robberies across the nation, Sergeant Frank testified that children are usually the first ones to be attacked by the suspects in order to gain compliance from the adults. (15RT 2121-2122.) As during his trial testimony, Sergeant Frank testified about instances involving dangling a child out a second-story window and having a baby's head dunked repeatedly in the toilet. (15RT 2122.) As to whether killing was a preplanned intent during a home invasion, Sergeant Frank explained that the purpose is to obtain money or jewelry and that harming family members is a means to that end. (15RT 2122-2123.) After being given a hypothetical involving both the Sacramento and Elm Street murders, Sergeant Frank testified that an OG giving the gun to another OG knows that the contemplated crime will involve coming face-to-face with victims because a gun is too valuable to use unless it is a necessary tool which would occur when coming face-to-face with victims. (15RT 2123-2126.) Sergeant Frank testified that that would be the case even if the first OG did not tell him what the gun would be used for because the second OG would only hand over the gun if he knew that it would be used in a crime involving coming face to face with a victim. (15RT 2126-2127.)

Sergeant Frank also discussed how witness intimidation is used by Asian gangs to prevent witnesses from testifying. (15RT 2127-2128.)

The court further inquired as to whether the division of responsibilities was unique to Asian gangs or whether it was also seen in occidental gangs. (15RT 2154-2155.) Sergeant Frank indicated that it was very common in Asian gangs because of the planning and preparation that goes into crimes such as home invasion robberies. (15RT 2155.) He explained that he had not seen that type of preparation with occidental gangs. (15RT 2155-2156.) As to the status of a gun, he explained that in occidental gangs, they will bring a gun to a restaurant or pool hall and they would not be overly concerned if they were stopped and the gun was

confiscated. (15RT 2156.) In contrast, members of Asian gangs do not arbitrarily carry firearms. They will only carry it to achieve a specific need when coming face to face with victims or rival gang members. (15RT 2156.) As to using a gun against children in home invasion robberies, Sergeant Frank testified that he had not seen occidental gangs involved in home invasion robberies, but that Asian gangs have refined home invasion robberies, which include committing torturous acts against young family members to gain compliance. (15RT 2157.) As to the choice of victims, Sergeant Frank testified that they always pick Asian victims because they feel like they understand the buttons to push to intimidate those victims. (15RT 2157-2158.) In addition, they feel like they do not know what to do to prevent occidental victims from reporting the crimes. Lastly, Asian households tend to have cash or high valued jewelry kept in the home. (15RT 2158.)

Pan's attorney argued that the evidence concerning attacking or brutalizing children was not relevant and that the expert's testimony about Pan's state of mind was improper. (15RT 2161-2163.) Appellant's attorney argued that the only relevance of the gang evidence as to appellant was as propensity evidence. (15RT 2163-2164.) For the same reason, he argued that the evidence was unduly prejudicial under section 352 of the Evidence Code. (15RT 2164.) Further, he argued that the descriptions about gangs was within the common knowledge of the jury. (15RT 2165.) Appellant's attorney reiterated that the evidence should be excluded under sections 1101(a) and 352 and in the alternative, appellant's case should be severed from Pan's case. (15RT 2165.) The court deferred its ruling and also indicated that it would revisit the Sacramento evidence ruling. (15RT 2166-2167.)

Ultimately, the court found the gang expert to be qualified. (15RT 2224.) The court specified that Sergeant Frank would be allowed to testify

as to the distinction between Asian gangs and occidental gangs (15RT 2225), his knowledge of TRG, including the organization of TRG, the role of "OG's" or "dai lo" and "shot callers" (15RT 2225-2226), the division of activity among gang members in carrying out a crime (15RT 2226), attitude of Asian gangs toward the possession of firearms, the particular victims chosen by Asian gangs, and the use of guns to intimidate the parents. (15RT 2226.) The court did not allow evidence using hypotheticals such as what was used during the 402 hearing about the "attitude" of the participants of either the Sacramento or Elm Street crimes. (15RT 2226-2227.) As to witness intimidation, the court indicated that it would not be allowed unless there was some evidence before the jury about witnesses being intimidated. (15RT 2227.)

Prior to Sergeant Frank's testimony, the court instructed the jury as follows:

> Ladies and gentlemen, you're going to hear some testimony now from this particular witness. This witness, I understand, is being called for a specific purpose and a very limited purpose. The law allows that some evidence occasionally may be admitted for limited purposes only, and you will be admonished to consider this evidence only for those limited purposes. This is such evidence. You're going to hear testimony concerning activities which at first may sound strange to you and not relevant to the case, but at some subsequent time I will admonish you and explain to you why the evidence is relevant, if it is, and why it has been admitted and the limited purpose for which you may consider it.

(16RT 2245.)

In the final jury instructions, the jury was instructed:

> Evidence has also been introduced that the defendants are members of the Tiny Rascal[s] Gang. Such evidence, if believed, was not received and may not be considered by you to prove that they are persons of bad character or that they have a disposition to commit crime.

(3CT 847.)

2. The Trial Court Did Not Err by Admitting Evidence Concerning the Tiny Rascals Gang

Gang evidence is admissible when relevant to prove some fact other than the defendant's criminal propensity. (Evid. Code, § 1101, subd. (b); *People v. Williams* (1997) 16 Cal.4th 153, 193.) Moreover, because gang membership, activities, dynamics and motivations are beyond the common experience and knowledge of jurors, gang evidence is a proper subject for expert testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*); *People v. Champion* (1995) 9 Cal.4th 879, 919-922, disapproved on another point in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2 (conc. opn. of George, C.J., joined by a majority of the court); *People v. Valdez* (1997) 58 Cal.App.4th 494; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965-966, disapproved on another point in *Gardeley*, at p. 624, fn. 10; *People v. McDaniels* (1980) 107 Cal.App.3d 898, 904-905.)

Evidence related to gang membership is not insulated from the general rule that all relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192; see also *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; Evid. Code, §§ 210, 351.)

Here, evidence that appellant, his co-defendants, and others were members of Tiny Rascals Gang, how appellant and Pan were shot callers within TRG, and how TRG, as an Asian gang, committed home invasion robberies, by scouting out or investigating the victims, dividing responsibilities among different members, using a gun as intimidation, by threatening and harming a families' children or older persons as a means to ensure cooperation, and targeting Asian families was relevant for purposes

other than as propensity evidence. Specifically, this information showed the modus operandi of the crimes and helped explain why each person took a specific role in the crime; why Scrappy and appellant were the only two armed with handguns, and helped explain the non-fatal injuries on the victims, such as the gunshot to Dennis' hand, the cuts on the father's neck, and the gunshot to the mother's leg, and why the group's crimes were not confined to a specific territory. (See *People v. Parrish* (2007) 152 Cal.App.4th 263, 279 [gang evidence admissible to show how gang organization and hierarchy governed the defendants' actions and the types of crimes committed by the gang was relevant background information].)

Further, as to the relationship between appellant and his co-defendants, both Evans and Karol indicated that they did not want to participate in the Elm Street crime, but they both felt inclined to participate. Further, appellant directed Evans and Karol to commit the robbery and directed their actions during the robbery/murders. The gang expert testified that a shot caller would have the authority to issue commands and orders, such as "to commit a certain crime, to do a certain act," (15RT 2115-2116) as appellant did in this case. Appellant's status as an OG and shot caller, and specifically what that meant in TRG, helped to explain his role as a leader in the commission of the crime and why the others followed his instruction despite their own misgivings. (See *People v. Montes* (2014) 58 Cal.4th 809, 859.)

a. Admission of the Gang Evidence Did Not Contravene Evidence Code Section 352

"Even where gang membership is relevant, because it may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it. [Citation.]" (*People v. Williams*, *supra*, 16 Cal.4th at p. 193.) Because it may prejudice a jury, this Court has warned against the introduction of "evidence of gang

membership if only tangentially relevant, given its highly inflammatory impact." (*People v. Cox* (1991) 53 Cal.3d 618, 660.)

Evidence Code section 352 provides the trial court with discretion to exclude evidence if the probability that its admission will create substantial danger of undue prejudice substantially outweighs its probative value. The trial court has broad discretion in ruling on whether evidence is substantially more prejudicial than probative. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) An appellate court reviews the trial court's ruling on the admissibility of evidence for abuse of discretion. (*Ibid.*) "The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court's decision exceeds the bounds of reason. [Citation.]" (*People v. Olguin*, *supra,* 31 Cal.App.4th at p. 1369.)

Here, the gang evidence was not unduly prejudicial under section 352 of the Evidence Code. Appellant argues that evidence concerning the torture or threatening of children and elderly family members was particularly inflammatory. (AOB 124-128.) However, evidence regarding the use of intimidation to gain compliance from the adult victims was part of the modus operandi of home invasion robberies planned and committed by Asian gangs and was admissible for that purpose. The prejudice contemplated by section 352 flows from "'. . . evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'"'" (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 394, citing *People v. Karis* (1988) 46 Cal.3d 612, 638.) Here, the evidence of the specific instances of torture by Asian gangs was no more inflammatory that the evidence indicative of torture in the Elm Street murders itself (shooting Trinh in the leg, cutting Henry's neck, shooting Doan in the hand and leg, shooting Daniel in the leg, and shooting at and injuring Dennis in the hand). Thus, the trial court reasonably

concluded that the probative value of the gang evidence outweighed any undue prejudice. (See *People v. Montes, supra,* 58 Cal.4th at p. 859-860.) Further, as evidenced by appellant's acquittal on the attempted murder charge against Dennis, the jury did not, contrary to appellant's contention (AOB 128-129), convict appellant simply because he was associated with TRG. (See *People v. Garcia* (2008) 168 Cal.App.4th 261, 278.)

C. Because the Sacramento and Gang Evidence Was Properly Admitted, Its Admission Did Not Have the Additional Legal Consequence of Violating Appellants' Rights to Due Process and a Fair Trial

Appellants also argue that the admission of the gang and Sacramento evidence violated his federal constitutional rights to due process and a fair trial. (AOB 134-140.) This argument appears to be a constitutional "gloss" on their state-law claim. As such, their failure to object in the trial court on any federal basis does not forfeit their argument. (See *People v. Tully* (2012) 54 Cal.4th 952, 979-980.)[27]

While the Court's rejection of appellants' state-law claim necessarily implies a rejection of the similar federal constitutional claim (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17 [42 Cal.Rptr.3d 677, 133 P.3d 581]), respondent respectfully requests that this Court expressly reject the federal constitutional claim to make clear, for possible review on federal habeas corpus, that the Court did entertain and reject the claim. (See *Johnson v. Williams* (2013) __ U.S. __ [133 S.Ct. 1088, 185 L.Ed.2d 105] [examining whether presumption that state court of appeal adjudicated

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[27] To the extent that the claim is not a constitutional "gloss" on his state law claims, appellant's federal constitutional claims are forfeited as he failed to raise any federal constitutional arguments to the gang and Sacramento evidence at trial. Further, while appellant's motion to federalize his objections was granted by the trial court, it does not relieve him of identifying the specific ground for his objection to the challenged evidence. (See *People v. Thomas* (2012) 54 Cal.4th 908, 938-939.)

federal constitutional claim on the merits had been rebutted where "California Court of Appeal never expressly acknowledged that it was deciding a Sixth Amendment issue"].)

As discussed above, the gang and Sacramento evidence was properly admitted. "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) Further, the California Supreme Court has long observed that, "[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights." (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.)

Here, the Sacramento evidence was admissible under section 1101 of the Evidence Code on the issues of intent, motive, and common scheme or plan, and the probative value of the evidence was not outweighed by the prejudicial effect of the evidence under section 352 of the Evidence Code. Likewise, evidence about TRG was admissible to show the relationship/loyalty between appellant and his co-defendants and helped explain the manner in which the instant robbery-murder was carried out, and its probative value was not outweighed by the prejudicial effect of the evidence. Thus, because the gang and Sacramento evidence was properly admitted under the Evidence Code and the jury was empowered to assess the credibility of the testimony, its admission was not so fundamentally unfair that it violated appellant's rights to due process, a fair trial, and a reliable determination of guilt and penalty.

D. Even If the Admission of the Gang and Sacramento Evidence Was Erroneous, It Was Harmless

Even if the trial court should have excluded the gang and Sacramento evidence, the error would be harmless under the relevant standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Clark* (2011) 52 Cal.4th

856, 940-941 [error in admission of prosecution's expert witness testimony subject to *Watson* standard of harmless error].) That is, it is not reasonably probable the verdict would have been more favorable to appellant absent the evidentiary error. (*People v. Watson* (2008) 43 Cal.4th 652, 686.)

Here, the trial court instructed the jury regarding the proper use of evidence concerning the Sacramento murders in each instance when that evidence was admitted. The jury was likewise instructed on the proper use of the gang evidence. Further, the jury instructions also informed the jury on the purposes for which the evidence was used and directed the jury to consider the evidence only for its limited purpose. (*People v. Mendoza* (2007) 42 Cal.4th 686, 699 [jury presumed to have faithfully followed limiting instructions].) The jury's acquittal of appellant on the attempted murder charge concerning Dennis and its not-true finding on the personal-use firearm allegations indicated that the jury followed the court's instructions and convicted appellant of the charges and allegations that the evidence supported and not because appellant had been involved in the Sacramento murders or because of his association with TRG. (See *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1312, disapproved on other grounds by *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12 [noting, when affirming the denial of a motion for mistrial, that "[the fact] that defendant was acquitted of any of the offenses suggests the lack of prejudice and the jury's clear ability to consider each count on the evidence presented and nothing else].) In addition, in the absence of evidence concerning TRG and the Sacramento murders, there was overwhelming evidence of appellant's guilt, including Evans' and Karol's testimony, appellant's admissions to the Marshall brothers and cellmate Milazo, and appellant's possession of the stolen jewelry following the robbery-murders.

For the same reasons, any error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824,

17 L.Ed.2d 705] [requiring reversal for federal constitutional violations unless the error is harmless beyond a reasonable doubt].)

II. THE TRIAL COURT DID NOT ERR OR VIOLATE APPELLANT'S DUE PROCESS AND CONFRONTATION RIGHTS BY ALLOWING THE PRESENCE OF WITNESS SUPPORT PERSONS

Appellant contends that the use of victim advocates (witness support persons) violated his due process and confrontation rights. (AOB 141-161.) Specifically, appellant argues that his rights were violated because the prosecution did not provide notice, the trial court did not conduct a hearing or admonish the support persons, and there was no showing of necessity for them. The trial court did not err by allowing the presence of support persons, as there was no indication that the support persons exerted an improper influence or otherwise interfered in the proceedings. Thus, appellant's issue is without merit.

A. Relevant Trial Court Proceedings

A witness support person was present during Lilah Garcia's testimony. (14RT 1988-1993.) Garcia was the person who first entered the Elm Street home on the morning following the murders. (14RT 1996.) She saw the bodies of the Nguyen family as she coaxed three-year-old Dennis from the back bedroom. (14RT 1996-2001.) Before she testified, appellant's attorney asked for a hearing outside the presence of the jury. (14RT 1988.) Appellant's attorney noted that a victim advocate from the District Attorney's office went to the witness stand with Garcia and that the prosecution did not submit an application for their presence. (14RT 1988.) The prosecutor then stated, "This witness has demonstrated that she's terrified to be here. She's very afraid of these defendants, doesn't want to be here. She asked that someone sit with her, and that's what I'm asking the Court to permit." (14RT 1989.) Pan's attorney noted for the record that the victim advocate was standing behind the witness's right shoulder

between the witness and juror number one. (14RT 1989.) It was also noted that she wore a badge from the District Attorney's office. (14RT 1989.) After noting that it intended to find out who the person was, the court stated that the victim advocate would be seated behind the witness so that she would not interfere with the jury's viewing of the witness. (14RT 1989-1990.) Also, the court ordered that her badge be removed, that the jury not be told why she was present, and that she not be allowed to consult with the witness at any time during the witness's testimony. (14RT 1989-1990.) Appellant's attorney further argued that he believed that a hearing was necessary and that the prosecutor's offer of proof concerning the witness's fear was inadequate. (14RT 1990.) The prosecutor stated that he wanted to complete the witness's testimony and have a hearing later if it was necessary. (14RT 1991.) Pan's attorney then indicated that he was willing to waive the showing and hearing for Garcia but that it needed to be done with other witnesses. (14RT 1991.) Pan's attorney clarified his objection as being directed toward the presence of a person in front of the jury without an explanation. (14RT 1991.) The court then indicated that it accepted the prosecutor's offer of proof and found that the advocate's presence was necessary. (14RT 1991-1992.) The court again ordered that the advocate sit to the rear of the witness "very unobtrusively." (14RT 1991.) Appellant's attorney reiterated that the cumulative effect of seemingly insignificant issues was leaving a prejudicial impression before the jury before the in-chambers proceeding was concluded. (14RT 1992.)

The following day, the parties revisited the issue briefly. (15RT 2237.) Appellant's attorney noted that the court was required to admonish the victim advocate and also noted that there were two witnesses who had victim advocates the previous day. (15RT 2237-2238.) Appellant's attorney further described one of the victim advocates as standing behind the witness (presumably Garcia) and another victim advocate sitting in the

front row of the audience for a witness who testified after lunch. (15RT 2238.) No one identified the second witness for whom the victim advocate was present.[28] Appellant's attorney renewed his request that the trial court enforce the requirements of section 868.5 of the Penal Code, which governs witness support persons. (15RT 2238.)

At the end of the next day, the prosecutor informed the court that Mei Tuyet Le and Amie Le requested that a victim advocate be present in court. (18RT 2688-2689.) The court noted that the statute required an admonition to the support person that the support person may not prompt, sway, or influence the witness in any way. (18RT 2689.) Appellant's attorney wanted a different admonishment if the victim advocate was going to be seated behind the witness. (18RT 2689.) The court then stated that it would not issue an admonishment unless there was some evidence that the person was "supporting, or prompting, swaying, or influencing." (18RT 2689.) Pan's attorney then requested that the witnesses express their desire for a victim advocate on the record. (18RT 2689.) Appellant's attorney again expressed concern about the jury not knowing why a person would be seated behind a witness. (18RT 2690.) The court stated, "Well, I have no problem explaining to the jury why the person is there or what she is, if you want that." (18RT 2690.) Appellant's attorney requested that the jury be informed that the person was an employee of the District Attorney's office

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[28] The following persons testified after lunch: Graciela Elias, a neighbor who heard gunshots the night of the murders, who spoke to police on the phone, and who saw Dennis outside of the Elm Street house the morning after the murders; David Alvarado, a neighbor who also heard gunshots the night of the murders and had told the police that he saw a red car turn onto Elm after he heard the gunshots; Officer Pritchard, one of the first officers who responded to the scene; Officer Holcombe, who responded to the scene and met Dennis at the hospital; and Detective Cartony, who relieved Officer Holcombe at the hospital and spoke to Dennis about what happened.

and a witness advocate. (18RT 2690.) The court stated, "I will simply tell the jury that this individual, the witness, has requested that there be a person in the courtroom pending her testimony to act as liaison support and that this individual is in that capacity." (18RT 2690.) The discussion ended with appellant's attorney responding, "Uh-huh." (18RT 2690.)

The following day when Mei Le was called as a witness, the trial court stated,

> Ladies and gentlemen, you will notice that there is a young lady sitting behind the witness. The law allows that a witness under certain circumstances can request the presence of someone to merely be there for moral support. That individual is not to in any way confer with, attempt to influence, or be involved at all in the testimony. Just the mere presence is allowed and for the assurance that the witness may have by that individual being here. So please understand that is why this other person is seated behind the witness.

(19RT 2708.)

Later in the trial during Karol's testimony, there was an in-camera discussion regarding Shirley Amador's presence in the courtroom. (25RT 3386-3388.) Appellant's attorney stated for the record that Mrs. Amador, the wife of Karol's attorney, was seated behind the prosecutor inside the railing, and that the prosecutor stated that she was a support person for Karol. (25RT 3386-3387.) Appellant's attorney objected to Mrs. Amador serving as a support person and to her presence in the courtroom during Karol's testimony because the prosecutor had not made an application to the court requesting a support person for Karol, and because Mrs. Amador was a potential witness because she wrote letters of support to the District Attorney's office in an effort to get Karol a better deal. (25RT 3386-3387.) The prosecutor responded that Mrs. Amador was not a prosecution witness and that the defense indicated that they would not be calling any witnesses. (25RT 3386-3387.) The prosecutor also noted that Karol had a right to

have her attorney present, that her attorney was in trial on another case, and that they could "let him come back in two hours and sit with her or we could proceed with Shirley." (25RT 3386-3387.) The court overruled the objection.[29] (25RT 3387.)

[29] In his brief, appellant states that Mrs. Amador was a defense investigator and potential witness who participated in a series of conferences with Mr. Amador, the district attorney, and law enforcement, provided discovery including reports and interviews of Karol, and who wrote a letter to the District Attorney supporting the reduction of Karol's convictions to second degree murder. (AOB 145-146.) In support of these assertions, appellant cites one of his attorney's questions to Detective Dillon (that the court asked to be rephrased) that referenced a log that indicated conferences he participated in with several people including "Miss Amador, the investigator." (23RT 3195-96.) Then, during a discussion about discovery, one of appellant's attorneys again referred to Mrs. Amador as one of Karol's investigators. (23RT 3220.) During a discovery hearing, the prosecutor asked Evans's defense investigator about an entry concerning "conferences with Amador, Dave Dillon, D.A. Whitney and Alan, follow-up with informant." Gregoire explained that the entry indicated a series of individual conferences. (23RT 3229-3230.) There is nothing referencing Mrs. Amador, Mr. Amador, or Tran on 24RT 3372-73. Lastly, there was the instant discussion where one of appellant's attorneys referred to Mrs. Amador as a potential witness who wrote letters in support of Karol. (25RT 3386-87.) During the penalty phase, Karol testified that Mrs. Amador was present during one of her interviews with Detectives Dillon and Kilbride and that she remembered that Detective Dillon told her that she could speak to Mrs. Amador for a few minutes if she needed to. Thus, the record reflects that Mrs. Amador was a member of Karol's defense team and stood very little chance of being a witness in the case, despite appellant's insistence to the contrary.

B. The Trial Court Did Not Err by Allowing Witness Support Persons to Be Sit Behind the Witnesses or by Allowing Their Presence in the Courtroom

Pursuant to section 868.5, prosecuting witnesses in cases involving specified criminal offenses are entitled to have a support person with them while testifying. The statute specifically provides that the support person may accompany the witness to the witness stand. (§ 865.5, subd. (a).) The trial court does have "discretion to remove a person from the courtroom whom it believes is prompting, swaying, or influencing the witness." (§ 865.5, subd. (b).)

"Absent improper interference by the support person," the support person's mere presence does not infringe a defendant's rights. (*People v. Myles* (2012) 53 Cal.4th 1181, 1214; *see also People v. Adams* (1993) 19 Cal.App.4th 412, 437.) Although one court noted that the risks of improper influence can be higher with physical contact with the victim-witness, that court also noted that the list of possibilities that might generate an improper influence is limitless and might include crying, nodding the head, and hand motions. (*People v. Patten* (1992) 9 Cal.App.4th 1718, 1732.)

In *People v. Myles,* the California Supreme Court found that the trial court properly exercised its discretion and emphasized that the trial judge, "[h]aving observed the courtroom proceedings firsthand," "was in the best position to evaluate the impact of [the support person]'s conduct in front of the jury." (*People v. Myles, supra,* 53 Cal.4th at pp. 1215-1216, citation omitted.) In *Myles*, the conduct included allegations that the support person was "nodding her head in agreement with a prosecution witness," but the trial court had agreed to monitor the support person's demeanor and had concluded that there was no impropriety. (*Id.* at p. 1215.)

Here, the trial court did not err by allowing witness support persons to sit behind the witnesses or by allowing their presence in the courtroom.

The prosecutor stated that Garcia, Amie Le, and Mei Le requested the attendance of a support person. (14RT 1989; 18RT 2688-2689.) In addition, the record indicated that Karol wanted the support of Shirley Amador in lieu of her attorney. (25RT 3386-3387.) Upon that showing, the court properly allowed the presence of support persons for Garcia, Amie Le, Mei Le, and Karol. (§ 868.5(b) [upon a showing that the person's attendance is desired and would be helpful to the witness, the court "shall" grant the request].)

If a support person is present at the witness stand, as was the case with Garcia, and Amie Le, and Mei Le, the court is required to admonish the support person. (§ 868.5(b).) Here, there is nothing in the record indicating that the trial court gave the required admonishment to Garcia's support person. However, the court included an admonishment to Mei Le's support person, as it informed the jury regarding the support person's presence.[30] (19RT 2708.) Nonetheless, appellant did not request that Garcia's support person be admonished and did not object to the court's admonishment concerning Mei Le's support person. Thus, appellant has forfeited his right to complain that the trial court failed to give the admonishment. (See *People v. Kipp*, 26 Cal.4th at p. 1124.) Further, as there was no evidence of improper conduct by the witness-stand support persons and appellant makes no claim of improper interference, any error in failing to give the admonishment was harmless. (See *People v. Spence* (2012) 212 Cal.App.4th 478, 517-518 (no prejudice flowed from court's failure to admonish support person, in part, because support person was from the District Attorney's office and knew the courtroom decorum rules, and there was no evidence of improper conduct].)

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[30] It is not apparent whether the same support person served Garcia, Mei Le, and Amie Le.

C. The Presence of Support Persons Did Not Violate Appellant's Confrontation Rights

1. The Claim Is Forfeited

The failure to raise a claim of federal constitutional error in the trial court forfeits the issue on appeal unless "'it appears that (1) the appellate claim is the kind that required no trial court action to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution.'" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809, quoting *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17; *People v. Riccardi* (2012) 54 Cal.4th 758, 801; *People v. Redd* (2010) 48 Cal.4th 691, 730 [failure to raise objection based on confrontation clause forfeited claim on appeal].) Moreover, in order to avoid forfeiture, the defendant must have objected on the "specific grounds" asserted as error on appeal. (*People v. Fuiava* (2012) 53 Cal.4th 622, 689.)

Here, appellant did not object to the presence of support persons on confrontation grounds, nor did he argue that there was a constitutionally-required showing of heightened need beyond what was required by section 865.5. Instead, appellant's and Pan's attorneys challenged the prosecutor's showing that the witnesses desired a support person and asked for a hearing where the witnesses themselves could state their desire for a support person. (14RT 1990-1991; 15RT 2237-2238; 18RT 2689-2690.) The defense attorneys also requested a jury admonishment regarding the presence of the support person at the witness stand, which the trial court gave. (18RT 2690; 19RT 2708.) Thus, appellant has forfeited his contention that the presence of a support person at the witness stand violated his Sixth Amendment confrontation rights. (See *People v. McCoy*

(2013) 215 Cal.App.4th 1510, 1524-1527 [contention that camera did not allow testifying witness to see the defendant violated the confrontation clause was forfeited by a failure to object on those grounds].)

2. There Was No Confrontation Violation

In *People v. Adams,* the Sixth District Court of Appeal held that the presence of a support person at the witness stand infringes on a defendant's confrontation rights and must be justified by a showing of individualized need beyond a showing that the witness desired the support person. (*People v. Adams, supra,* 19 Cal.App.4th at p. 437-444.) However, the Fourth District Court of Appeal and First District Court of Appeal have rejected *Adams*'s holding that the use of support persons requires the same showing that it is required when there is a denial of face-to-face confrontation. (See *People v. Chenault* (2014) 227 Cal.App.4th 1503, 1516; *People v. Johns* (1997) 56 Cal.App.4th 550, 553-556; *People v. Lord* (1994) 30 Cal.App.4th 1718, 1722.) Even if *Adams* is a proper statement of the law, appellant has not shown error.

First, Karol did not have a support person with her at the witness stand. Thus, *Adams*'s holding requiring additional evidence of need does not apply to Karol's use of Mrs. Amador as a support person.

Second, as to Garcia, the prosecutor stated, "This witness has demonstrated that she's terrified to be here. She's very afraid of these defendants, doesn't want to be here. She asked that someone sit with her, and that's what I'm asking the Court to permit." (14RT 1989.) The court accepted the prosecutor's offer of proof and made an express finding that the support person's presence was needed. (14RT 1991-1992.) Thus, since the showing was more than an expression of a mere desire for a support person and the court made express findings on the necessity of the support person, there was no error under *Adams.*

Third, appellant was not prejudiced by the presence of support persons at the witness stand, in the case of Garcia, Mei Le, and Amie Le, or in the audience, as with Karol. Specifically, when appellant's attorney informed the court that the support person was standing between Garcia and the jury, the court ordered that the support person be seated behind the witness. (14RT 1991-1992.) Further, the jury was later admonished that the support person was present upon the witness's request for support and could not in anyway interfere with, attempt to influence, or be involved at all in the testimony. (19RT 2708.) In addition, there was no indication that the support persons interacted with the witnesses or acted improper in any way. Thus, as in *People v. Myles, supra,* 53 Cal.4th at p. 1214-1216, appellant was not prejudiced by the presence of support persons at the witness stand.

Likewise, Shirley Amador's presence in the courtroom did not prejudice appellant. During Karol's testimony, appellant's attorney suggested that Mrs. Amador was coaching Karol. (25RT 3436.) As the matter was discussed, Karol's attorney indicated that Karol was motioning to him during her testimony. (25RT 3437.) Pan's attorney agreed that Karol was motioning to her attorney and was not trying to communicate with Mrs. Amador. (25RT 3437.) Appellant's attorney also noted that he had previously seen Mrs. Amador mouthing words while she was reading the preliminary-hearing transcript, which he termed as "inadvertent," and asked the prosecutor to speak to Mrs. Amador. (25RT 3437.) The situation was resolved once Karol conferred with her attorney. (25RT 3438.) In *People v. Myles, supra,* 53 Cal.4th at p. 1215, this Court found that the support person's presence in that case did not prejudice the defendant where the support person nodded along with the witness's testimony and comforted the witness during her testimony. Likewise, here, appellant was not prejudiced by Mrs. Amador's presence during Karol's testimony nor by

Mrs. Amador's conduct in this "single isolated" incident. (See *People v. Myles, supra,* 53 Cal.4th at p. 1216.)

3. The Error, If Any, Was Harmless

In assessing whether a confrontation violation based on a denial of face-to-face confrontation is harmless, courts do not speculate on whether the witness' testimony would have been unchanged, or the court's assessment unaltered, had there been confrontation. Instead, whether an error is harmless must be determined based on the remaining evidence. (*Coy v. Iowa* (1988) 487 U.S. 1012, 1021-1022 [108 S.Ct. 2798, 101 L.Ed.2d 857].) Further, under *Chapman*, the question is "whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error." (*People v. Loy* (2011) 52 Cal.4th 46, 69-70.)

Without considering Garcia's testimony, other witnesses were among the first to arrive and described the placement of the bodies and Dennis's demeanor and his injuries, including Karol's mother and Officer Pritchett. Additionally, Karol's testimony was also largely cumulative of Evans's testimony. Lastly, Vincent Le testified about the Sacramento shooting and identified appellant as looking like the shooter, and appellant admitted to police that he agreed to assist in the robbery and was present during the shooting in Sacramento. Appellant also described the Sacramento shooting to Puppet, during which he admitted shooting one of the victims. Since the testimony of Garcia, Karol, Amie Le, and Mei Le was cumulative of the testimony of other witnesses, including appellant's admissions, any error in allowing the presence of support persons during their testimony was harmless beyond a reasonable doubt. (See *People v. Livingston* (2012) 53 Cal.4th 1145.)

III. THE TRIAL COURT DID NOT ERR OR VIOLATE APPELLANT'S RIGHTS TO DUE PROCESS AND TRIAL BY JURY BY INSTRUCTING THE JURY ON FIRST DEGREE MURDER

Appellant next contends the trial court erred and violated his rights to due process and trial by jury by instructing the jury on first-degree murder because the language in the information only charged him with second degree malice-murder. He claims that the trial court lacked jurisdiction to try him for first degree murder under a theory of either premeditation and deliberation or felony murder. (AOB 162-168.) This Court has repeatedly rejected the same argument. Thus, appellant's claim lacks merit.

A. Relevant Trial Court Proceedings

In the instant case, appellant was charged in count one of the information as follows:

> On or about August 9, 1995, in the County of San Bernardino, State of California, the crime of MURDER, in violation of PENAL CODE SECTION 187(a), a Felony, was committed by SAMRETH PAN, NHUNG THI TRAN, VINH QUANG TRAN; RUN PETER CHHOUN and WILLIAM MARSELLUS EVANS, who did willfully, unlawfully, and with malice aforethought kill HENRY NGUYEN, a human being.

(2CT 507.) The information similarly charged appellant with murder in counts two, three, four, and five. (2CT 508-511.)

With respect to these counts, the court instructed the jury on first degree premeditated murder with CALJIC No. 8.20 and first-degree felony murder with CALJIC No. 8.21. (2CT 869-871.) The jury returned a first-degree murder verdict. (2CT 932-936.)

B. There Was No Error in Submitting First-Degree Murder to the Jury

In *People v. Jones* (2013) 57 Cal.4th 899, 967-969, the defendant was charged with murder in essentially the same language as the murder counts in the instant case and raised the same claim that appellant now raises. This

Court explained why the legal basis of the contention was flawed. This Court first addressed the contention that the failure of the information to include any mention of willfulness, premeditation or deliberation meant that the defendant was charged with only second-degree murder. (See AOB 162-163.) Rejecting this contention, this Court explained:

> "[I]t has long been the law in this state that an accusatory pleading charging murder need not specify degree or the manner in which the murder was committed. [Citations.] Neither is it necessary to specifically plead the charged murder was wilful, deliberate, and premeditated. [Citation.] So long as the information adequately alleges murder, the evidence adduced at the preliminary hearing will adequately inform the defendant of the prosecution's theory regarding the manner and degree of killing."

(*People v. Jones*, *supra*, 57 Cal.4th at p. 968, *quoting People v. Thomas* (1987) 43 Cal.3d 818, 829, fn. 5; *see also People v. Contreras* (2013) 58 Cal. 4th 123, 147 ["Similar claims—whether framed in terms of a lack of jurisdiction, inadequate notice, erroneous instruction, insufficient proof, or the absence of jury unanimity—have been rejected before. As defendant recognizes, our cases have long made clear that an accusatory pleading charging malice murder supports conviction of first degree murder on a felony-murder theory. . . . Thus, a charge of murder not specifying the degree is sufficient to charge murder in any degree. The information also need not specify the theory of murder on which the prosecution relies at trial."].)

Next, this Court found that, "[t]o the extent defendant argues the information was faulty for mentioning section 187 and not section 189, we disagree." (*People v. Jones*, *supra*, 57 Cal.4th at p. 968; see AOB 193.) This Court explained:

> "[A] valid accusatory pleading need not specify by number the statute under which the accused is being charged. [Citations.] Section 952, which governs how an offense should be stated in

> an accusatory pleading, merely provides in pertinent part that '[i]n charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused."

(*People v. Jones*, *supra*, 57 Cal.4th at p. 968, *quoting People v. Thomas*, *supra*, 43 Cal.3d at p. 826.)

This Court further rejected appellant's argument that by referencing section 187 but not section 189, the information failed to adequately charge first degree murder on a felony murder theory. (*People v. Jones*, *supra*, 57 Cal.4th at pp. 968-969; see AOB 162-163.) This Court explained:

> Although he concedes *People v. Witt* (1915) 170 Cal. 104, 148 P. 928 held that "it is sufficient to charge the offense of murder in the language of the statute defining it," and that such charging language "includes both degrees of murder" (*id.*, at pp. 107-108, 148 P. 928), he argues *Witt*'s rationale has been "completely undermined" by this court's reasoning in *People v. Dillon* (1983) 34 Cal.3d 441, 194 Cal.Rptr. 390, 668 P.3d 697, that section 189 is the "statutory enactment of the first degree felony-murder rule in California." (*Dillon*, *supra*, at p. 472 [].) But as defendant concedes, "subsequent to *Dillon*, *supra*, 34 Cal.3d 441 [194 Cal.Rptr. 390, 668 P.2d 697], we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, 148 P. 928, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely. Thus we implicitly have rejected the argument that felony murder and murder with malice are separate crimes that must be pleaded separately." (*People v. Hughes* (2002) 27 Cal.4th 287, 369, 116 Cal.Rptr.2d 401, 39 P.3d 432.) Although defendant further contends that *Hughes* "never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*," he is mistaken, for we explained that[,] "'generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing or

at the indictment proceedings.'" (*Hughes*, *supra*, at pp. 369-370, 116 Cal.Rptr.2d 401, 30 P.3d 432.)

(*People v. Jones*, *supra*, 57 Cal.4th at pp. 968-969; *see also People v. Contreras*, *supra*, 58 Cal. 4th at p. 148; *People v. Harris*, *supra*, 43 Cal. 4th at pp. 1294-1295.)

Finally, this Court rejected the defendant's argument that it "should reexamine [its] precedents," finding the defendant presented "no persuasive reason to do so." (*People v. Jones*, *supra*, 57 Cal.4th at p. 969.) Likewise, here, appellant presents no persuasive reasons why this Court should not follow its prior precedent, particularly its recent rejection of these same arguments in *Jones*.

Appellant also erroneously asserts that by instructing the jury on the supposedly "uncharged crime" of first-degree murder, the trial court violated his constitutional right to due process. (AOB 167.) As previously discussed, appellant was not convicted of an "uncharged crime." (*See People v. Whisenhunt* (2008) 44 Cal. 4th 174, 222.)

Moreover, appellant's reliance on *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] is misplaced. (AOB 166-167.) In *Apprendi*, the court held that "the Fourteenth Amendment's due process clause requires the state to submit to a jury, and prove beyond a reasonable doubt to the jury's unanimous satisfaction, every fact, other than a prior conviction, that increases the punishment for a crime beyond the maximum otherwise prescribed under state law." (*People v. Griffin* (2004) 33 Cal.4th 536, 594-595.) As this Court recently concluded, *Apprendi* does not change pleading requirements and thus, applying California's rule that a murder charge under section 187 allows trial and conviction on all degrees and theories of murder does not violate *Apprendi*. (*People v. Contreras*, *supra*, 58 Cal. 4th at pp. 148-149.)

This Court explained:

> In particular, *Apprendi*'s core reasoning is that every factual finding (other than the fact of a prior conviction) required by law in order to increase the penalty beyond the prescribed statutory maximum for the offense is the "functional equivalent" for constitutional purposes of an element of a greater offense. (*Apprendi*, *supra*, 530 U.S. at p. 494, fn. 19, 120 S.Ct. 2348.) Hence, consistent with due process and jury trial guarantees, sentencing factors having such an "'elemental' nature" must be submitted to a jury and proved by the State beyond a reasonable doubt. [Citations]
>
> In light of the high court's "narrow" holding (*Apprendi*, *supra*, 530 U.S. 466, 474, 120 S.Ct. 2348, 147 L.Ed.2d 435), which focuses on facts that must be proved to, and found by, a jury, "[i]t is highly doubtful that *Apprendi* has any effect whatever on pleading requirements" [Citation.]. In other words, *Apprendi's* requirements for how element-like sentencing factors must be proved and found create no "new notice requirements for alternative theories of a substantive offense such as a theory of first degree murder." [Citations.]
>
> Thus, this court does not violate *Apprendi* by continuing to apply the traditional California rule that a murder charge under section 187 places the defense on notice of, and allows trial and conviction on, all degrees and theories of murder . . . . Defendant's opposing view is unfounded. We reject it here.

(*People v. Contreras*, *supra*, 58 Cal.4th at pp. 148-149.) Appellant's claim should likewise be rejected.

IV. THE TRIAL COURT DID NOT ERR OR VIOLATE APPELLANT'S RIGHTS TO DUE PROCESS AND TRIAL BY JURY BY NOT REQUIRING UNANIMITY ON THE THEORY OF FIRST DEGREE MURDER

Appellant next contends the trial court should have instructed jurors that they must unanimously agree on which theory supported the first-degree murder charge in order to convict. (AOB 169-179.) The trial court was under no obligation to give a unanimity instruction in this case.

A. The Claim Is Forfeited

"A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503; accord, *People v. Farley* (1996) 45 Cal.App.4th 1697, 1711.) By failing to request clarification or amplification of the standard instruction on the theories of murder, appellant has forfeited the claim of error on appeal. (27RT 3644-57; *People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.) This claim is reviewable only to the extent that appellant can show error that affected his substantial rights. (*People v. Hudson* (2009) 175 Cal.App.4th 1025, 1028.) In this case, appellant's substantial rights were not affected because the trial court properly instructed the jury on first degree murder.

B. There Is No Requirement That Jurors Have to Unanimously Agree on the Theory of First-Degree Murder

The court instructed the jury on two possible theories of first-degree murder, deliberate and premeditated murder and felony murder. (2CT 869-871; CALJIC Nos. 8.20, 8.21.) This Court has consistently rejected the claim that the jury must unanimously agree on the theory of murder supporting a first-degree murder conviction. (*See, e.g., People v. Manibusan* (2013) 58 Cal. 4th 40, 99; *People v. Tully, supra,* 54 Cal.4th at p. 1023; *People v. Nakahara* (2003) 30 Cal.4th 705, 712; *People v. Silva* (2001) 25 Cal.4th 345, 367; *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride* (1992) 3 Cal.4th 195, 249-250.)

In *Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555] (*Schad*), the Supreme Court held that a state may determine that "certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime." (*Id.* at 637.) In *Schad*, Arizona law provided that "[a] murder which is perpetrated . . . by

any other kind of wilful, deliberate or premeditated killing, or which is committed . . . in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree." (*Id.* at p. 629, fn. 1.) In light of Arizona law, the court rejected the defendant's contention that he could be convicted of first-degree murder only if the jury unanimously agreed either that he committed the murder with premeditation or that he committed the crime while in the course of committing a robbery. (*Id.* at p. 639.) According to the court, "a first-degree murder conviction under jury instructions that did not require agreement on whether the defendant was guilty of premeditated murder or felony murder" was constitutional. (*Id.* at p. 627.) This Court has repeatedly cited *Schad* in support of the principle that a defendant is not entitled to a unanimity instruction when the jury could convict him of murder based on different theories. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1025 [no entitlement to unanimity instruction where evidence shows defendant could have been the perpetrator or an aider and abettor]; *People v. Millwee* (1998) 18 Cal.4th 96, 160 [no entitlement to unanimity instruction on theories of first degree murder].)

Appellant attempts to distinguish *Schad* on the ground that Arizona courts have not deemed premeditation and the commission of a felony to be independent elements of murder, whereas California courts have sometimes employed the "element" terminology. (AOB 172-179.) This Court has previously rejected this argument, finding, that "[t]he distinction is merely semantic." (*People v. Harris*, *supra*, 43 Cal. 4th at p. 1296.) As this Court has noted:

> The Arizona murder statute at issue in *Schad* was substantially similar to section 189, and to the common law definition of murder in existence since "at least the early 16th century." [Citation] Whether the mental states required for a

> conviction of first degree murder are described as "elements" [citations], "theories"[citation], or "alternative means of satisfying the element of mens rea " [citations], the rule remains the same: the jury need only unanimously agree that the defendant committed first degree murder.

(*People v. Harris*, *supra*, 43 Cal. 4th at p. 1296; see *also Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 668 ["The issue of whether a state may constitutionally submit both theories to a jury without requiring unanimity on either of them has been resolved in the affirmative. [citing *Schad*] There are no relevant differences between California and Arizona law that could require the application of a different rule to this case. Both states penalize a single crime of murder and both allow a conviction of that crime to be reached by different routes"].)

This Court has also rejected the argument that *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, requires the jury to unanimously agree on a theory of first-degree murder. (*See* AOB 177.) As this Court recently explained:

> '. . . As for defendant's claim that a unanimity instruction should have been given, our cases have repeatedly rejected this contention, holding that the jurors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation. [Citations.] [¶] We are not persuaded otherwise by *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]. There, the United States Supreme Court found a constitutional requirement that any fact that increases the maximum penalty for a crime, other than a prior conviction, must be formally charged, submitted to the fact finder, treated as a criminal element, and proved beyond a reasonable doubt. [Citation.] We see nothing in *Apprendi* that would require a unanimous jury verdict as to the particular theory justifying a finding of first degree murder. (*See also Ring v. Arizona* (2002) 536 U.S. 584, 610 [122 S.Ct. 2428, 2443-2444, 153 L.Ed.2d 556] [requiring jury finding beyond reasonable doubt as to facts essential to punishment].)' [Citations.]

(*People v. Tully*, *supra*, 54 Cal.4th at pp. 1023-1024; *see also People v. Taylor* (2010) 48 Cal.4th 574, 626; *People v. Nakahara*, *supra*, 30 Cal.4th at pp. 712-713 ["We see nothing in *Apprendi* that would require a unanimous jury verdict as to the particular theory justifying a finding of first degree murder."].)

Appellant offers nothing unique to his case that would justify overturning this Court's long-established precedent. Thus, this claim is without merit and should be rejected.

V. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS AND TO A FAIR AND IMPARTIAL JURY BY INSTRUCTING THE JURY WITH CALJIC NO. 17.41.1

Appellant contends the trial court's instructions to the guilt phase jury in the language of CALJIC No. 17.41.1 violated his rights to jury trial and due process under the Sixth and Fourteenth Amendments to the federal Constitution. (AOB 180-188, 193-195.) He makes an identical claim related to the same instruction given at the penalty phase. (AOB 189-195.) Appellant forfeited this issue, and even if it were not forfeited, the issue has been consistently rejected by this Court.

Initially, appellant forfeited his right to raise this claim on appeal because he failed to object at trial and the instruction did not affect his substantial rights. (See *People v. Elam* (2001) 91 Cal.App.4th 298, 311 [failure to object to CALJIC No. 17.41.1 forfeited the issue on appeal].) However, even assuming there was no forfeiture, the claim should be rejected on its merits.

The validity of CALJIC No. 17.41.1 was definitively resolved by this Court in *People v. Engelman* (2002) 28 Cal.4th 436, which held the instruction does not infringe upon a defendant's federal or state constitutional right to trial by jury or his or her state constitutional right to a

unanimous verdict. (*People v. Engelman*, *supra*, 28 Cal.4th at pp. 441-445.) And, as the instruction of the jury with CALJIC No. 17.41.1 did not affect appellant's substantial rights, he has therefore forfeited any claim of error by failing to object below. (27RT 3649-3657; *People v. Elam, supra*, 91 Cal.App.4th at p. 310 ["His failure to do so waives any claim of error on appeal unless CALJIC No. 17.41.1 affected his substantial rights. In our view, it did not."]; § 1259 ["The appellate court may . . . review any instruction given, . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].)

The arguments set forth by appellant are not new, nor are the concerns appellant raises concerning CALJIC No. 17.41.1 unique or necessarily implicated by reference to the facts or particular circumstances of the instant case. Appellant has offered no legal or factual basis that would dictate that the opinion in *Engelman* does not resolve this claim against him, nor has appellant set forth facts or an argument that would dictate or suggest the issue should be revisited and reconsidered. This claim is forfeited, and in any event, instruction of the jury with CALJIC No. 17.41.1 was not error. Respondent adopts herein by reference the reasoning expressed by this Court in *People v. Engelman*, *supra*, 28 Cal.4th at pages 441 through 445. Accordingly, appellant's challenge to CALJIC No. 17.41.1 must be rejected.

VI. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS AND TRIAL BY JURY BY INSTRUCTING THE JURY WITH CALJIC NOS. 2.01, 2.02, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, 8.20, 8.83, AND 8.83.1

Appellant further contends that several instructions given by the court undermined the requirement of proof beyond a reasonable doubt in violation of his right to due process. (AOB 196-208.) Appellant's claim is without merit as the trial court properly instructed the jury on the prosecution's burden of proof and this instruction was not undermined by the instructions on circumstantial evidence, discrepancies in testimony, a willfully false witness, weighing conflicting evidence or the sufficiency of one witness.

A. Appellant's Claim Is Forfeited

Appellant did not object or request any modifications to any of these instructions in the trial court. (24RT 3371-3372; 26RT 3552-3553; 27RT 3564-3565, 3582-3594, 3632-3635, 3644-3657.) As a result, he forfeited this issue on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260 [defendant forfeited claim regarding CALJIC No. 2.51]; but see *People v. Stitely* (2005) 35 Cal.4th 514, 556 [section 1259 "seems to preserve" all challenges to circumstantial evidence instructions].)

B. Standard of Review

Instructional error claims are reviewed *de novo*. (*See People v. Cole*, *supra*, 33 Cal.4th at p. 1210; *People v. Guiuan*, *supra*, 18 Cal.4th at p. 569; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.) A claim that an erroneous instruction was given is "examined based on a review of the instructions as a whole in light of the entire record." (*People v. Lucas* (2014) 60 Cal.4th 153, 282, *citing Estelle v. McGuire* (1991) 502 U.S. 62, 72, and *People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

C. CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1 Did Not Undermine the Proof Beyond a Reasonable Doubt Standard

Appellant first contends CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1, the instructions on circumstantial evidence, undermined the requirement of proof beyond a reasonable doubt. (AOB 197-200.) Specifically, appellant argues that, by informing the jurors of their duty to accept an interpretation of the evidence establishing his guilt as long as that interpretation appears to be reasonable, the instructions permitted the jury to determine guilt based upon a degree of proof less than that mandated by the reasonable doubt standard. (AOB 198, citing *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 1072, 25 L.Ed.2d 368].) This Court has previously rejected appellant's arguments and analogous claims that these instructions, alone or in combination, dilute or undermine the reasonable doubt standard, depriving defendants of due process. (*See People v. Contreras* (2013) 58 Cal.4th 123, 161-162 [CALJIC Nos. 2.01 and 8.83 "did not permit, induce, or compel jurors to convict defendant or to sustain the special circumstance merely because he reasonably appeared to have committed the charged crimes"]; *People v. Jones* (2013) 57 Cal.4th 899, 972 ["Examination of the full instructions shows defendant's concern to be groundless. . . . [CALJIC Nos. 2.01 and 8.83] told the jurors they must accept a reasonable inference pointing to guilt only where any other inference that could be drawn from the evidence was unreasonable. That direction is entirely consistent with the rule of proof beyond a reasonable doubt, because an unreasonable inference pointing to innocence is, by definition, not grounds for a reasonable doubt. The circumstantial evidence instructions are thus correct."], *quoting People v. Brasure* (2008) 42 Cal.4th 1037, 1058; *People v. Watkins* (2012) 55 Cal.4th 999, 1030 ["Although defendant asks us to reconsider [our prior rulings upholding the propriety of CALJIC Nos. 2.01 and 8.83], he advances no persuasive reason to do so."]; *People v.*

McKinzie (2012) 54 Cal.4th 1302, 1355 [rejecting defendant's argument that CALJIC Nos. 2.01 and 8.83 reduced the burden of proof because no reasonable jury "would have interpreted these instructions to permit a criminal conviction where the evidence shows defendant was 'apparently' guilty, yet not guilty beyond a reasonable doubt"], *quoting People v. Jennings* (1991) 53 Cal.3d 334, 386, and citing *People v. Vines* (2011) 51 Cal.4th 830, 885; *People v. Streeter* (2012) 54 Cal.4th 205, 253 [CALJIC Nos. 2.01 and 8.83 are both "unobjectionable when, as here, [each] is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof"], quoting *People v. Kelly* (2007) 42 Cal.4th 763, 792.)

In rejecting the argument that these circumstantial evidence instructions lessen the prosecution's burden of proof, this Court has explained:

> these instructions properly direct the jury to accept an interpretation of the evidence favorable to the prosecution and unfavorable to the defense only if no other "reasonable" interpretation can be drawn. Particularly when viewed in conjunction with other instructions giving defendant the benefit of any "reasonable doubt," the circumstantial evidence instructions did not impermissibly diminish the prosecution's burden of proof. [Citations.] No due process violation . . . occurred.

(*People v. Millwee*, *supra*, 18 Cal.4th at p. 160.) The same is true here.

D. CALJIC Nos. 2.21.1, 2.21.2, 2.22, 2.27, and 8.20 Did Not Vitiate the Reasonable Doubt Standard

Appellant further contends that four other jury instructions "magnified the harm" from the erroneous circumstantial evidence instructions. Specifically, appellant argues CALJIC Nos. 2.21.1 [discrepancies in testimony], 2.21.2 [witness willfully false], 2.22 [weighing conflicting testimony] and 2.27 [sufficiency of testimony of one witness], individually

and collectively undermined the proof beyond a reasonable doubt requirement. (AOB 201-204.) This Court has previously rejected appellant's arguments with respect to each of these instructions. (*People v. Carey* (2007) 41 Cal.4th 109, 130-131 (*Carey*).) This Court has likewise rejected the argument that CALJIC No. 8.20 misleads the jury about the prosecution's burden of proof. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 677; *People v. Friend* (2009) 47 Cal.4th 1, 53; *People v. Nakahara* (2003) 30 Cal.4th 705, 715.)

E. CALJIC Nos. 2.51 Did Not Undermine the Proof Beyond a Reasonable Doubt Standard

Lastly, appellant contends that CALJIC No. 2.51, the instruction related to motive, "shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof." (AOB 204.) He also contends the same instruction "informed the jurors that the presence of motive could be used to establish guilt." (AOB 121-122.) Similar challenges to this instruction have been "repeatedly rejected" by this Court. (*People v. Streeter*, *supra*, 54 Cal.4th at p. 253; *see People v. Jones*, *supra*, 57 Cal.4th at pp. 972-973; *People v. McKinzie*, *supra*, 54 Cal.4th at p. 1356.)

F. This Court Should Reaffirm Its Holdings That None of the Challenged Instructions Lessened the Prosecution's Burden

As discussed above, none of the challenged instructions lessened the prosecution's burden of proof. Indeed, the instructions viewed as a whole in light of the entire record adequately informed the jury of the prosecution's burden to prove appellant guilty beyond a reasonable doubt, and did not suggest or imply that appellant had to produce evidence of innocence or that he could be convicted without proof of guilt beyond a reasonable doubt. Appellant has provided no basis for this Court to reconsider its prior decisions upholding the validity of these pattern jury

instructions. (AOB 206-207.) Thus, this Court should decline that invitation, as those holdings were legally sound and established a well-reasoned line of unbroken authority on which litigants have a right to rely. Appellant's claim should be rejected.

VII. THE TRIAL COURT'S ADMISSION OF STATEMENTS OVERHEARD BY APPELLANT'S GIRLFRIEND WAS NOT ERRONEOUS

Appellant contends that the trial court's admission of statements overheard by his girlfriend, Champa Onkhamdy, was erroneous as the statements were hearsay. (AOB -209-221.) The trial court did not abuse its discretion by admitting the statements because they were made by appellant or a co-conspirator. Thus, appellant's issue is without merit.

A. Relevant Trial Court Proceedings

Onkhamdy testified that, after appellant, Ly, and "Dennis" returned to Ly's apartment with money and jewelry, including a bracelet taken by the assailants in the Hagan robbery murder, she overheard them speaking in Cambodian. (32RT 4201-4203.) There were three or possibly four men in the group. (32RT 4203.) Onkhamdy testified that he did not understand Cambodian and did not know who precisely was talking. (32RT 4203, 4219.) She denied hearing a conversation about a murder and becoming nauseous. (32RT 4212.) She also denied telling the police that she was nauseous because she heard a conversation about a murder and testified that she told police that she was nauseous because she was pregnant. (32RT 4214.) During Onkhamdy's testimony, appellant's attorney objected to the admission of Onkhamdy's prior inconsistent statement, claiming it was double hearsay and did not constitute a party admission because Onkhamdy did not hear appellant make the statement. (32RT 4207.) Appellant's attorney also argued that the statement was not an adoptive admission, and it was unclear whether Onkhamdy could understand what was being said if

she did not understand Cambodian. (32RT 4208-4210.) The court overruled the objection as premature. (32RT 4207-4211.)

Detective Dillon's testimony regarding Onkhamdy's prior inconsistent testimony developed as follows:

> Q. In connection with the interview, among the things she said, did she say to Mr. Peterson that as she was laying down facing away from the Chaka and Sandman and another person named Dennis, that she could hear them handing out money?
>
> A. Yes, she did.
>
> Q. Did she further testify that she knew from the conversation that the subjects had committed a murder and upon hearing that, it made her nauseous to know what had occurred?
>
> [APPELLANT'S ATTORNEY]: Objection. Calls for hearsay.
>
> [PROSECUTOR]: Prior inconsistent statement that she denied.
>
> [APPELLANT'S ATTORNEY]: Well, we are dealing with two levels of hearsay, your [*sic*] Honor.
>
> THE COURT: Did you hear her say which or who might have said this regarding this robbery/murder?
>
> THE WITNESS: No, I did not.
>
> THE COURT: Did you hear her say what language she heard it being said in?
>
> THE WITNESS: No, I did not.
>
> THE COURT: We may have a problem, [prosecutor].
>
> [PROSECUTOR]: May I inquire a little further.
>
> Q. Was she relating what she had heard involving a conversation between Mr. Chhoun and other persons in the residence known as Sandman and Dennis?
>
> A. Yes.

Q. Was she talking about overhearing a portion of those conversations between Mr. Chhoun and Sandman and Dennis?

A. Yes.

Q. That is what the Court was asking about.

A. She didn't indicate to me or I didn't understand which person was actually making the comments during the conversation.

Q. I understand that. But the Court was asking you whether you heard who was making the conversation?

A. The conversation was between Sandman, Chaka [appellant], and I believe it was Gaio Ly.

Q. Gaio Ly?

A. That's correct.

Q. G-A-I-O, L-Y?

A. That's correct.

Q. So she related to Mr. Peterson she heard the three of them talking?

A. That's correct.

Q. And in that conversation there was a topic of a murder mentioned by some of them or one or more of them?

A. Yes.

Q. And you heard that?

A. Yes, I did.

Q. And did she tell Detective Peterson that when she heard that conversation about a murder, it made her nauseous to know what had occurred?

A. That's correct.

Q. All right. Thank you. That is all.

(32RT 4238-4240.)

The court overruled appellant's objection, finding that the statement was an adoptive admission and qualified as a statement of a co-conspirator. (32RT 4244-4245, 4249-4251.) After the issue was revisited, the court explained that the statement was admissible under the co-conspirator theory and explicitly found that the conspiracy was ongoing at the time as they were dividing the robbery proceeds. (47RT 6076-6077.)

B. Applicable Law

Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Because an out-of-court statement is not made under oath and cannot be tested by cross-examination, hearsay is not admissible unless it qualifies under an exception to the hearsay rule. (Evid. Code, § 1200, subd. (b); *People v. Davis* (2005) 36 Cal.4th 510, 535; *People v. Cudjo* (1993) 6 Cal.4th 585, 608.) Though hearsay evidence is generally inadmissible, coconspirator statements are admissible if independent evidence establishes a prima facie case that a conspiracy exists. Once the existence of a conspiracy has been shown, three preliminary facts must be established: (1) the declarant was participating in the conspiracy at the time of the declaration; (2) the statements were made in furtherance of that conspiracy; and (3) the defendant was participating or would later be participating in the conspiracy at the time the declaration was made. (Evid. Code, § 1223; *People v. Hardy* (1992) 2 Cal.4th 86, 139.)

"A conspiracy is an agreement between two or more persons, with specific intent, to achieve an unlawful objective, coupled with an overt act by one of the conspirators to further the conspiracy. [Citation.] The conspiracy itself need not be charged in order for Evidence Code section 1223's hearsay exception to apply to statements by coconspirators.

[Citations.]" (*People v. Gann* (2011) 193 Cal.App.4th 994, 1005.) "In order for a declaration to be admissible under the coconspirator exception to the hearsay rule, the proponent must proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence. A prima facie showing of a conspiracy for the purposes of admissibility of a coconspirator's statement under Evidence Code section 1223 simply means that a reasonable jury could find it more likely than not that the conspiracy existed at the time the statement was made." (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61, 63.)

A trial court's admission of evidence under Evidence Code section 1223 is reviewed for abuse of discretion. (See *People v. Waidla* (2000) 22 Cal.4th 690, 725 [abuse of discretion standard applies to evidentiary rulings, including hearsay issues].) Further,"[w]hile a conspiracy is usually deemed to have ended when the substantive crime for which the coconspirators are being tried is either attained or defeated [citation], it is for the trial court to determine precisely when the conspiracy has ended [citation]." (*People v. Gann*, *supra*, 193 Cal.App.4th at p. 1006, *citing People v. Leach* (1975) 15 Cal.3d 419, 431-432; see also *People v. Hardy, supra,* 2 Cal.4th at pp. 139-141 [substantial evidence supported trial court's finding that there was an ongoing conspiracy to commit insurance fraud that continued to exist at the time of trial].) "Particular circumstances may well disclose a situation where the conspiracy will be deemed to have extended beyond the substantive crime to activities contemplated and undertaken by the conspirators in pursuance of the objectives of the conspiracy." (*People v. Saling* (1972) 7 Cal.3d 844, 852.)

C. The Overheard Conversation Was Properly Admitted As Co-Conspirator Statements

Here, the independent evidence showed, at the very least, that there was a conspiracy between appellant and Ly to rob the Hagan residence as both their fingerprints were found in the home without explanation, and Joe identified both appellant and Ly as the perpetrators. Beyond appellant and Ly, Detective Dillon testified that Champa said that "Dennis" was present during the conversation about a murder. Champa testified that there were three people in the conversation and *possibly* a fourth. (32RT 4203.) According to the statement appellant gave to Detective Peterson, he stayed with fellow TRG member Dennis Leauv while in Spokane (31RT 4161), and Champa testified that they were staying at Ly's apartment and did not know if "Dennis" lived there (32RT 4198). Champa also testified that the conversation occurred while the group was dividing money and jewelry, which was linked through other testimony to the Hagan robbery-murder (32RT 4203-4204). With this evidence, it would be reasonable for a fact finder to infer that the declarant was more than likely a member of the robbery conspiracy. Further, it was reasonable for a fact finder to likewise conclude that the conspiracy was ongoing at the time of the statement was made because the statement was made as the co-conspirators were divvying up the loot. (*See People v. Sorrentino* (1956) 146 Cal.App.2d 149, 161 [a robbery conspiracy may extend beyond the commission of the robbery if the proceeds of the robbery needed to be divided].) Thus, there was a sufficient foundation for the trial court to admit the statement under Evidence Code section 1223 as "[t]he court should exclude the proffered [hearsay] evidence only if the 'showing of preliminary facts is too weak to support a favorable determination by the jury.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 466.) Accordingly, appellant's contention is without merit.

D. Even If the Trial Court Erred by Admitting the Statement, the Error Was Harmless

Even if the trial court erred by admitting Detective Dillon's testimony that Champa overheard a conversation involving a murder that made her nauseous, the error was harmless as there was overwhelming evidence connecting appellant to the Spokane murders, including his and Ly's fingerprints at the robbery-murder scene, appellant's possession of several items of jewelry, including Joe Hagan's bracelet, taken during the crime, and Joe Hagan's identification of appellant as the shooter. (See *People v. Leach, supra,* 15 Cal.3d at p. 445-446.) This claim fails.

VIII. THE TRIAL COURT DID NOT ERR BY EXCLUDING SCRAPPY'S STATEMENT EXONERATING APPELLANT FOR FOUR OF THE ELM STREET MURDERS

Appellant contends that the trial court erred by excluding Scrappy's statement that he had killed the mother and children in the Elm Street case. (AOB 224-243.) Specifically, appellant contends that the statement, while hearsay, was admissible as a statement against penal or social interest. (AOB 230-238.) The trial court did not abuse its discretion by excluding the statement as it was not against Scrappy's penal or social interest and was unreliable. Thus, appellant's claim lacks merit.

A. Relevant Trial Court Proceedings

Defense investigator Frank Pancucci, a retired San Bernardino Police Department detective, testified that he interviewed Scrappy at Folsom State Prison in May 1999 during the guilt phase trial.[31] (45RT 5790-5792, 5799-

[31] Scrappy's plea and sentencing are not part of this appellate record. Scrappy pled guilty to counts one through ten and was sentenced to 50 years to life in state prison in December 1996. (17RT 2509; 42RT (continued...)

5780.) Pancucci intended to record the interview. (45RT 5792-5793.) The beginning of the interview was taped. (45RT 5793.) They spoke about other matters before discussing the Elm Street murders. (45RT 5793-5794.) Scrappy told Pancucci that he wanted to get an attorney so he could attempt to withdraw his plea on the Elm Street case. (45RT 5794.) He was concerned that if he testified and made statements about Elm Street, he would not get a new trial. (45RT 5794.) Pancucci told him that he could not give him any advice about that because he was not an attorney. (45RT 5794.) They spoke about other matters before returning to Elm Street. (45RT 5794.) Pancucci turned the tape off and told Scrappy that he wanted to discuss Elm Street. (45RT 5795.) Scrappy told Pancucci that he did not want the tape turned back on. (45RT 5795.) Scrappy agreed to talk about Elm Street but he would not "do that on tape." (45RT 5794.) Pancucci turned the recording off. (45RT 5794.) Scrappy told him that after the man was shot, he lost it, shot the woman and ran into the bedrooms and shot the children. (45RT 5796-5797.) He did not indicate that he shot the man. (45RT 5796.) Scrappy also said that he did not know there was going to be a robbery until he got into the car. (45RT 5798.) They went to someone's house and got a gun. (45RT 5797.) He also stated that he thought he was asked to go because he spoke Vietnamese. (45RT 5798.) He also said that he was willing to testify for appellant because appellant did not kill all of the people. (45RT 5798.) Scrappy stated that he felt responsible for the murders, he had become a Christian, and it was necessary that he tell the

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(...continued)
5421.) In August 1999, during appellant's punishment trial, Scrappy's attorney advised Scrappy to invoke the Fifth Amendment and not testify because testifying might expose him to additional charges (primarily the Trang Vu murder, charged against appellant in count eleven, but also Scrappy's possible participation in the Spokane murders and the Pomona drive-by shooting). (42RT 5419-5441.)

truth and get the truth out. (45RT 5798.) He did not want appellant to be blamed for all of the murders. (45RT 5798.) Scrappy mentioned another person shooting other people. (45RT 5799.) Appellant's defense team made a decision not to present his testimony during the guilt phase. (45RT 5800.) Scrappy had several requests – that there was no media, that the courtroom was closed, he did not want to lose his cell, and he did not want to do time with people who knew he killed a woman and children. (45RT 5800.) His concern was his own self-preservation and getting a new case concerning other matters that they had discussed. (45RT 5800-5801.) Later, Pancucci returned to Folsom State Prison and introduced Scrappy to one of appellant's attorneys, and they spoke for a half hour. (45RT 5801.) Pancucci went back to Folsom for a third time with another defense investigator, David Sandberg. (45RT 5802.) Sandberg interviewed Scrappy. (45RT 5802.) Lastly, Pancucci spoke with Scrappy at the local jail a few days earlier. (45RT 5802.) They did not discuss the case, but simply confirmed that Scrappy was still willing to testify. (45RT 5803.) Pancucci did not take any notes of his conversation with Scrappy. (45RT 5808.) Pancucci did not memorialize the statements in writing until he made a supplemental report three months later, and he only did so because he was told to do a report. (45RT 5810-11.)

Sandberg testified that he interviewed Scrappy in July 1999. (45RT 5825.) The interview was not tape-recorded because Scrappy said that he did not want the interview taped. (45RT 5825.) Scrappy did not say why he did not want it taped. (45RT 5826.) Once Sandberg began to talk about Elm Street, Scrappy said that appellant was "possessed by something, he looked weird." (45RT 5827.) He then focused on appellant's involvement and stated that he, appellant, Evans, and Karol went to Pan's to pick up a gun. (45RT 5827.) Scrappy did not think Pan knew what was going on. Karol directed them to the house. (45RT 5827.) Scrappy and Karol went

to the door. Karol talked to a child, and he let them into the house. (45RT 5827.) Scrappy told the family to get on the ground. Evans and appellant then entered the house. (45RT 5827.) They were in the house for fifteen to twenty minutes. (45RT 5827.) They took jewelry. (45RT 5827.) The father was stubborn and argued with appellant. (45RT 5827.) Scrappy turned away to look at the other family members and talk to Evans. (45RT 5827.) Scrappy heard a shot and turned to see appellant standing over the father "looking weird." (45RT 5827.) Scrappy said he went crazy and started shooting the family. (45RT 5827.) Specifically, Scrappy stated, "I killed the mother and the kids. I don't know why. I just went crazy. It's all fog." Then, they all left and went back to Karol's house. (45RT 5827.) Scrappy did not give any more specifics about what he had done in the house. (45RT 5828.)

In analyzing Scrappy's statements as statements against penal interest, the trial court noted that Scrappy had pled guilty to five counts of first-degree murder, been sentenced, his appeals had been exhausted, and there were no pending habeas petitions. (45RT 5835-5836.) Thus, the court did not believe that Scrappy would bear any penal consequences because of his statements. (45RT 5836.) The court noted that Scrappy had made contrary statements, i.e., denying any involvement, placing Pan at the scene, and was a proven liar. (45RT 5835.) The court then observed that Scrappy was concerned with being labeled a snitch, but would gain favor by somewhat exonerating appellant. (45RT 5837.) The court concluded that the statement was likely false and excluded it. (45RT 5839.)

B. Applicable Law

"Evidence Code section 1230 provides that the out-of-court declaration of an unavailable witness may be admitted for its truth if the statement, when made, was against the declarant's penal interest. The proponent of such evidence must show 'that the declarant is unavailable,

that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.'" (*People v. Lucas*, *supra*, 12 Cal.4th at p. 462.) "The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*People v. Frierson* (1991) 53 Cal.3d 730, 745.) "[E]ven when a hearsay statement runs generally against the declarant's penal interest and redaction has excised exculpatory portions, the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission . . .. [¶] . . . We have recognized that, in this context, assessing trustworthiness '"requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception."'" (*People v. Duarte* (2000) 24 Cal.4th 603, 614.) Finally, such statements, even if admissible are nonetheless subject to Evidence Code section 352 under which "the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption." (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 609.)

A trial court's decision to admit or exclude evidence is a matter committed to its discretion '"and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Brown* (2003) 31 Cal.4th 518, 534.)

Scrappy became unavailable when he invoked the Fifth Amendment. (*People v. Leach* (1975) 15 Cal.3d 419, 438). However, he made the statements after he had been convicted and sentenced and his appeals were exhausted. Although the statements could be used against him if his conviction were reversed on habeas, the remoteness of this possibility, joined with other circumstances, supports the trial court's determination that Scrappy's statements are not sufficiently reliable to warrant admission despite their hearsay character.

To determine whether a statement against penal interest is sufficiently trustworthy to warrant admission, the trial court must consider the totality of the circumstances and may consider (1) not just the words but the circumstances under which they were uttered, (2) the possible motivation of the declarant, and (3) the declarant's relationship to the defendant. (*People v. Duarte*, *supra*, 24 Cal.4th 603, 614.)

First, Scrappy's statement was inadmissible because it was not made against his penal interest. Scrappy made the statement to appellant's investigator and attorney well after being convicted and sentenced on five counts of murder for his involvement in the Elm Street murders. His statement taking personal responsibility for four of those murders, thereby exonerating appellant for all but the father's murder, was made at little risk to his own criminal liability. Scrappy's conviction was final; he had not filed a habeas petition. Thus, there was only a remote and abstract possibility that his conviction could be overturned on habeas and that his statements could be used against him in a new trial.

Second, even if the statement was against his penal interest or against his social interest, i.e., to be known as a killer of women and children, Scrappy's statement was unreliable. As mentioned before, the statement was given years after Scrappy had been convicted and sentenced. Scrappy had been repeatedly questioned by the police and defense investigators and

gave vastly inconsistent accounts concerning the Elm Street murders. Then, during appellant's trial, Scrappy told appellant's defense team that he just went crazy and shot the woman and all the children, but he refused to make a statement "on tape." And when he learned that he could face questioning about other murders for which he could still face charges, he refused to testify. Given these circumstances, the trial court did not abuse its discretion by concluding that Scrappy's statement was unreliable. (See *People v. Frierson* (1991) 53 Cal.3d 730, 745 [trial court did not abuse its discretion in excluding statement of third party that he had killed the victim, where the statement was made 14 years after the murder and before defendant's retrial on special circumstances and penalty, the declarant knew there had been a prior verdict finding that defendant was the killer, and the trial "court could reasonably find [the declarant] wanted to aid his friend at little risk to himself"].)

C. Even If the Trial Court Erred by Excluding Scrappy's Statement, the Error Was Harmless

Even if the trial court erred by excluding Scrappy's statement, the error was harmless. Evans testified that they demanded money from the father and threatened him. (17RT 2433-2434.) When Evans went looking for money in the house, he heard a gunshot, came back, and saw the father lying on the floor with appellant holding a gun nearby. (17RT 2439-2440, 2444.) Thus, Evans's testimony indicated that appellant was the person who shot the father. Further, the firearms evidence indicated that two guns were used in the Elm Street case, with one casing matching one gun and all of the remaining casings matching a second gun. (33RT 4529.) Since Evans testified that only Scrappy and appellant were armed in the house, except for the brief time that appellant had Evans hold appellant's gun while he got a knife (17RT 2434), it was reasonable to infer that Scrappy personally shot the mother and children, while appellant only shot the

father. Moreover, the jury already found that appellant had not personally used a firearm in the murder counts at the guilt phase. Accordingly, as the jury appeared unconvinced that appellant personally shot and killed any of the victims, Scrappy's statement that he killed the woman and children would not have made a difference in the jury's consideration of his role in the Elm Street murders.

In addition, appellant was the group's leader, and he directed each co-defendant's role in the Elm Street robbery, including arming Scrappy. And beyond the Elm Street murders, appellant was the ring leader and instigator in the two Spokane murders, the Pomona and Bun drive-by shootings, and the two Sacramento murders. In all, appellant was a major participant in the group's crime spree that left a total of eleven people dead, not just the five Elm Street murders. Upon this record, any error in excluding Scrappy's statement taking responsibility for four of the Elm Street murders was harmless.

IX. THE TRIAL COURT DID NOT ERR BY REFUSING TO INSTRUCT THE JURY WITH A MODIFIED VERSION OF CALJIC 8.85

Appellant contends that the trial court should have given a modified version of CALJIC No. 8.85. (AOB 244-259.) The court instructed the jury with an unmodified version of CALJIC No. 8.85. (4CT 1167-1168.) Specifically, appellant sought an instruction on lingering doubt stating that the jury may consider appellant's psychological immaturity under factor (i); informing the jury that juveniles are not death-penalty eligible; that appellant would not face the death penalty if he committed the crimes when he was under 18 years old; that appellant's age was only to be considering as a mitigating factor; that the jury could consider the sentences given to accomplices under factor (j); that the fact that appellant was a conspirator or accomplice who did not personally kill all of the victims was a

mitigating factor under factor (k); and that the jury should weigh the aggravating and mitigating factors. (AOB 245-247.) This Court has previously rejected these same contentions. Thus, appellant's claim is without merit.

A. Proposed Lingering Doubt Instruction under Factor (a)

Appellant requested that the court instruct the jury at the end of section 190.3, factor (a), under CALJIC No. 8.85 with:

> A juror who voted for conviction at the guilt phase may still have a lingering or residual doubt as to whether the defendant [insert appropriate element, e.g., was the actual shooter, intended to kill, premeditated and deliberated, etc.]. Such a lingering or residual doubt, although not sufficient to raise a reasonable doubt at the guilt phase, may still be considered as a mitigating factor at the penalty phase. Each individual juror may determine whether any lingering or residual doubt is a mitigating factor and may assign it whatever weight the juror feels is appropriate.

(4CT 1140.)

The court was not required to instruct on lingering doubt. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 325-326; *People v. Howard* (2010) 51 Cal.4th 15, 38.)

B. Modifications to Factor (i) Concerning the Age of the Defendant

Appellant requested that the following language be added at the end of CALJIC No. 8.85 (i), "Under the factor of age, you may consider the defendant's psychological immaturity as a factor in mitigation." (4CT 1134.) However, in *People v. Burney* (2009) 47 Cal.4th 203, 684, this Court rejected a similar argument that the trial court erred by not explicitly instructing the jury concerning the defendant's immaturity.

In addition, appellant requested that the jury be informed juveniles are not subject to the death penalty and that if appellant had been under the age

of 18, he would not be subject to the death penalty. (4CT 1137.) However, the court is not required to instruct the jury that people under the age of 18 years old are not subject to the death penalty. (*People v. Brown* (2003) 31 Cal.4th 518, 564-65.) Moreover, the trial court is not constitutionally required to instruct the jury that age is relevant only to mitigation. (*People v. Panah* (2005) 35 Cal.4th 395, 499-500; *People v. Kraft* (2000) 23 Cal.4th 978, 1078-1079.)

C. Modification to Factor (j) Concerning Accomplices

Appellant requested an instruction stating, "You may consider the fact that defendant's accomplice[s] received a more lenient sentence as a mitigating factor." (4CT 1136.) The court properly declined to tell the jury that it could consider the sentence, or lack of punishment, of a coparticipant in the offenses as a mitigating factor. (*People v. Moore* (2011) 51 Cal.4th 1104, 1141-1142.)

Appellant also requested that the jury be instructed:

> The fact that the defendant was [an accomplice] [a coconspirator] who did not personally commit [the killing] [all of the charged acts] may be considered by you as mitigation. [The fact that the defendant was not the actual killer may be considered as a mitigating factor.]

(4CT 1139.) In his brief, appellant states that this instruction should have added to CALJIC No. 8.85 under factor (j). (AOB 256.)

The court did not err in refusing instructions elaborating on factor (j). It is well-settled that CALJIC No. 8.85 properly instructs the jury on aggravating and mitigating factors, and the court need not give pinpoint instructions on mitigation. (*People v. Howard, supra,* 51 Cal.4th at p. 38-39; *People v. Lomax* (2010) 49 Cal.4th 530, 593; *People v. Butler* (2009) 46 Cal.4th 847, 875.)

D. Addition to CALJIC No. 8.85

Appellant also requested that CALJIC No. 8.85 be supplemented with the following instruction:

> In considering, taking into account, and being guided by the aggravating and mitigating circumstances, you must not decide the evidence of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by the relative number but by their relative convincing force on the ultimate question of punishment.

(4CT 1138.)

Appellant acknowledges that a similar instruction was given in CALJIC No. 8.88, but argues that the instruction should have been given in CALJIC No. 8.85 and not in a separate instruction. (AOB 258-259.) Appellant posits no authority for his proposition that this instruction about weighing the factors should have been placed in CALJIC No. 8.85, or that giving the same instruction later in sequence was ineffective in ensuring his rights were protected. Further, appellant's attorney requested that the court read the instruction concerning weighing the factors (CALJIC No. 8.88) following closing argument. (47RT 6105-6107, 6196-6197.) Thus, to the extent that the trial court erred by failing to read the instruction concerning weighing the factors (CALJIC No. 8.88) immediately following the instruction that listed the factors (CALJIC No. 8.85), appellant invited the error. (*People v. Carpenter* (1997) 15 Cal.4th 312, 420, *abrogated on other grounds by People v. Diaz* (2015) 60 Cal.4th 1176, 1185-1188.)

X. THE TRIAL COURT DID NOT ERR BY REFUSING TO INSTRUCT THE JURY WITH A MODIFIED VERSION OF CALJIC 8.88

Appellant contends that the trial court erred by refusing to add his requested language to CALJIC No. 8.88. (AOB 260-265.) Specifically, Appellant wished to explicitly instruct the jury that it may return a LWOP verdict even where it finds one or more aggravating factors but finds those factors do not outweigh the mitigating factors. (AOB 260.) Like appellant's other instructional claims, this Court has previously rejected this challenge to CALJIC No. 8.88. Thus, appellant's claim lacks merit.

A. Relevant Trial Court Proceedings

The court instructed the jury with CALJIC No. 8.88 as follows:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(4CT 1178-1179.)

B. The Trial Court Did Not Err by Refusing to Instruct the Jury with Appellant's Modified Version of CALJIC No. 8.88

CALJIC No. 8.88 is not unconstitutional because it fails to direct the jury that it must return a verdict of life without possibility of parole if it determines the aggravating circumstances do not outweigh the mitigating circumstances; fails to direct the jury that if the mitigating circumstances outweigh those in aggravation, it must return a sentence of life

imprisonment without the possibility of parole; or fails to advise the jury that it may return a verdict of life imprisonment without possibility of parole even if the mitigating factors outweigh the aggravating factors. (*People v. McKinnon, supra,* 52 Cal.4th at pp. 693-694, citing *People v. Rogers* (2009) 46 Cal.4th 1136, 1179, *People v. Hovarter* (2008) 44 Cal.4th 983, 1028, *People v. Hughes* (2002) 27 Cal.4th 287, 405, *People v. Parson* (2008) 44 Cal.4th 332, 371, and *People v. Geier* (2007) 41 Cal.4th 555, 618-619.)

Appellant next argues that CALJIC No. 8.88 should have instructed the jury to find whether the death penalty was "appropriate," not whether that penalty was "authorized." (AOB 264.) The claim lacks merit because the instruction did refer to whether the death penalty was "appropriate." (4CT 1178.) As such, the instruction properly conveyed to the jury that circumstances warranting the death penalty are when such punishment is appropriate in the eyes of the jury. (See *People v. Breaux* (1991) 1 Cal.4th 281, 316 ["Essentially, the jury was told that it could return a death verdict only if aggravating circumstances predominated and death is the appropriate verdict."]; see also *Mendoza*, *supra*, 52 Cal.4th at p. 1097 [rejecting same claim]; *People v. McKinnon*, *supra*, 52 Cal.4th at p. 693 [same]; *People v. Lee* (2011) 51 Cal.4th 620, 652 [same] (*Lee*).)

XI. THE TRIAL COURT DID NOT ERR BY GIVING A PINPOINT INSTRUCTION CONCERNING THE IMPACT ON THE SURVIVING CHILD

Appellant contends that it was improper for the court to instruct that the jury that it could consider the impact of appellant's crime on Dennis Nguyen as part of factor (a). (AOB 268.)

After giving CALJIC No. 8.85, the court instructed the jury:

> You may consider the impact of defendant's crime on the surviving victim, Dennis Nguyen[,] named in Count 6, as part of "the circumstances of the crime of which defendant was convicted in the present proceeding" in factor (a) of Jury Instruction 8.85.

(4CT 1169.)

"Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case. (*People v. Boyette* (2002) 29 Cal.4th 381, 444; *People v. Edwards* (1991) 54 Cal.3d 787, 835-836; *People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) Further, the jury may be informed regarding the consideration of victim-impact evidence. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835 [§ 190.3, factor (a), allows evidence and argument on specific harm caused by defendant, including impact on family of victim].)

Here, the prosecution did not present any explicit victim impact evidence concerning Dennis. In argument, the prosecutor asked the jury to consider how appellant's crime would affect Dennis, who had been wounded and lived through the murders, but was left in the house alone with his dead family until they were discovered the following morning. (47RT 6120-6121.) It was permissible, even in the absence of specific testimony, for the jury to draw reasonable inferences concerning the probable impact of the crime on . . . the victim's family." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017; accord, *People v. Sanders* (1995) 11 Cal.4th 475, 550.) Thus, the court properly informed the jury to consider victim impact evidence concerning Dennis under factor (a). (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835). Further, this Court has rejected appellant's contention that a pinpoint instruction on victim impact

evidence is improper as it highlights specific evidence (AOB 267-268). (See *People v. Souza* (2012) 54 Cal.4th 90, 138-139.)

XII. THE TRIAL COURT DID NOT ERR BY IMPOSING A $10,000 RESTITUTION FINE

As part of the sentence, the court ordered appellant to pay the maximum restitution fine of $10,000. (48RT 6319.) Appellant contends the court abused its discretion concluding that appellant had the ability to pay and that his right to trial by jury was violated by a judicial factfinding that he had the ability to pay. (AOB 273-276.) Appellant has failed to demonstrate that he has an inability to pay the fine. Further, *Apprendi* is not applicable to restitution fines, and appellant waived his *Apprendi* claim by failing to object to the fine on that ground.

A. The Trial Court Did Not Abuse Its Discretion by Assessing a $10,000 Restitution Fine

"In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (§ 1202.4, subd. (b).) Where the defendant is convicted of a felony, the fine shall be set, at the discretion of the trial court, at between $200 and $10,000, commensurate with the seriousness of the offense. (§ 1202.4, subd. (b)(1).) An appellant's inability to pay the fine is not a compelling and extraordinary reason not to impose the fine, but it shall be considered in setting the fine above the minimum of $200. (§ 1202.4, subds.(c) & (d).) Section 1202.4 presumes a defendant has the ability to pay the fine. (*People v. Romero* (1996) 43 Cal.App.4th 440, 448-449.) "A defendant shall bear the burden of demonstrating his or her inability to pay." (§ 1202.4, subd. (d).)

Here, appellant's attorney argued that the court should not impose a restitution fine because appellant would not have means to pay a fine and it would be imposed indirectly on his family. (48RT 6308.) However, the statute provides that the inability to pay is not a compelling and extraordinary reason not to impose the fine, and to the extent that it is considered, it is in determining the amount of the fine when the defendant sustains his burden of demonstrating that he has an inability to pay the fine. (§ 1202.4, subds.(c) & (d).) Appellant made no such showing here. Thus, the trial court did not err by imposing a restitution fine or by setting $10,000 as the amount of the fine. (See *People v. Gamache* (2010) 48 Cal.4th 347, 409 ["He points to no evidence in the record supporting his inability to pay, beyond the bare fact of his impending incarceration. Nor does he identify anything in the record indicating the trial court breached its duty to consider his ability to pay; as the trial court was not obligated to make express findings concerning his ability to pay, the absence of any findings does not demonstrate it failed to consider this factor. Thus, we cannot say on this record that the trial court abused its discretion"].)

B. Appellant's *Apprendi* Claim Is Without Merit

Generally, to preserve a restitution issue for appellate review, the defendant must raise the specific objection to the trial court. (See *People v. Gonzalez* (2003) 31 Cal.4th 745, 755; *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1395-1396; *In re S.S.* (1995) 37 Cal.App.4th 543, 547-548.) Because appellant failed to raise an objection under *Apprendi*, he is precluded from raising the claim for the first time on appeal.

In any event, his claim is without merit. In *People v. Urbano* (2005) 128 Cal.App.4th 396, 405 (*Urbano*), the court rejected the argument that *Apprendi* applies to restitution fines. Later, in *Southern Union Co. v. United States* (2012) 132 S.Ct. 2344 [183 L.Ed.2d 318], the United States Supreme Court held that *Apprendi* applies to criminal fines. *Southern*

Union Co., supra, 132 S.Ct. at p. 2357. In that case, a company was indicted and found guilty of one count of violation of a federal statute that authorizes a fine of $50,000 for each day of violation. (*Id.* at p. 2349.) The jury did not make any findings as to the number of days of violation. (*Ibid.*) Thus, the court's assessement of a greater fine upon its findings of the number of days of violation violated *Apprendi.* (*Id.* at 2357.) Here, however, the maximum restitution fine is $10,000, without resort to any judicial factfinding. (See *People v. Kramis* (2012) 209 Cal.App.4th 346, 349-352.)

Appellant argues that the court in *Kramis* did not address the argument that the language, "unless it finds compelling and extraordinary reasons," makes the fine discretionary. (AOB 274-275.) However, just as the upper term is the maximum sentence under California's determinate sentencing law that provides that the trial court must "order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime" (§ 1170, subd. (b)), the maximum restitution fine is likewise $10,000. Accordingly, the trial court's decision to impose a fine greater than the statutory minimum was lawful and did not violate the dictates of *Apprendi.*

XIII. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATED THE UNITED STATES CONSTITUTION

A. Section 190.3, Subdivision (a) Is Not Constitutionally Overbroad

Appellant contends that the large number of special circumstances in California's death penalty scheme does not sufficiently narrow the class of murderers eligible for the death penalty. (AOB 278-279) This Court has repeatedly rejected that argument: "[T]he statute is not unconstitutional because the special circumstances it specifies are so numerous or broad that

it fails to genuinely narrow the class of persons eligible for the death penalty . . .." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1111; *People v. Carrasco* (2014) 59 Cal.4th 924, 970 ["We further 'reject the claim that section 190.3, factor (a), on its face or as interpreted and applied, permits arbitrary and capricious imposition of a sentence of death.' [Citations.]"].)

B. The Death Penalty Statute Does Not Allow Arbitrary and Capricious Imposition of Death

Appellant argues that factor (a) of section 190.3 has been applied in "such a wanton and freakish manner" that it violates the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 279-280.) As this Court has repeatedly done in the past, this claim must be rejected. (See *People v. Montes*, *supra*, 58 Cal.4th at p. 899 ["Section 190.3, factor (a), which allows the jury to consider the 'circumstances of the crime' as an aggravating factor, is neither vague nor overbroad, and does not impermissibly permit arbitrary and capricious imposition of the death penalty"], citing *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 333; accord *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Jones* (2012) 54 Cal.4th 1, 85-86; *People v. Manriquez* (2005) 37 Cal.4th 547, 589.)

C. The Death Penalty Statute and Accompanying Jury Instructions Set Forth the Appropriate Burden of Proof

1. The Jury Was Not Required to Find Beyond a Reasonable Doubt That Aggravating Factors Existed, That They Outweighed the Mitigating Factors, or That Death Was the Appropriate Sentence

Appellant contends the jury should have been required to find beyond a reasonable doubt that aggravating factors existed, that the aggravating factors outweighed the mitigating factors, and that death was the appropriate penalty. (AOB 163-164.) But this Court has found that California's death penalty statute "is not invalid for failing to require . . .

proof of all aggravating factors beyond a reasonable doubt, . . . findings that aggravation outweighs mitigation beyond a reasonable doubt, or . . . findings that death is the appropriate penalty beyond a reasonable doubt." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 43, quoting *People v. Snow* (2003) 30 Cal.4th 43, 126; accord *People v. Gamache, supra*, 48 Cal.4th at pp. 406-407; *People v. Davis* (2009) 46 Cal.4th 539, 628; *People v. Bonilla* (2007) 41 Cal.4th 313, 358-359; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Indeed, an instruction regarding the burden of proof is not required during the penalty phase in California. (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43.)

Citing *Apprendi, Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], appellant argues that the aggravating factors must be found true by the jury beyond a reasonable doubt. (AOB 163-164.) Consistent with its prior decisions, this Court should reject this claim.

The Supreme Court of the United States found that Arizona's death penalty statute, which was at issue in *Ring*, was unconstitutional to the extent it allowed a sentencing judge to find true an aggravating circumstance necessary to impose the death penalty. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.) *Ring* is inapplicable to the penalty phase of California's capital murder trials because "once a defendant has been convicted of first degree murder and one or more special circumstances have been found true under California's death penalty statute, the statutory maximum penalty is already set at death." (*People v. Stanley* (2006) 39 Cal.4th 913, 964, quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263.) Thus, *Ring*'s holding does not apply to California's death penalty scheme because any finding of aggravating factors does not increase the penalty for a crime beyond the prescribed statutory maximum. (*People v. Stanley*,

supra, 39 Cal.4th at p. 964; see *People v. Booker* (2011) 51 Cal.4th 141, 195, fn. 31.) This Court has also held that *Apprendi*, *Ring*, and *Blakely* do not warrant reconsideration of its previous decisions regarding California's death penalty law. (*People v. Morrison* (2004) 34 Cal.4th 698, 730-731; accord *People v. Rogers*, *supra*, 39 Cal.4th at p. 893.)

Appellant also argues that the jury must be required to find beyond a reasonable doubt that aggravating factors outweigh the mitigating factors. (AOB 282-283.) As this Court has repeatedly found, a jury is not constitutionally required to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty. (*People v. Morrison*, *supra*, 34 Cal.4th at p. 731; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 510; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779.) Nor does the trial court need to instruct the jury on the burden of proof at the penalty phase. (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43; *People v. Gray* (2005) 37 Cal.4th 168, 236; *People v. Wilson* (2005) 36 Cal.4th 309, 360.) Accordingly, appellant's claim should be rejected.

Indeed, to the extent appellant contends the burden of proof for factual determinations should be beyond a reasonable doubt, "[i]t is settled . . . that California's death penalty law is not unconstitutional in failing to impose a burden of proof – whether beyond a reasonable doubt or by a preponderance of the evidence – as to the existence of aggravating circumstances, the comparative weight of aggravating and mitigating circumstances, or the appropriateness of a sentence of death." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1331, citing *People v. Stanley*, *supra*, 39 Cal.4th at p. 964, *People v. Brown* (2004) 33 Cal.4th 382, 401, *People v. Lenart* (2004) 32 Cal.4th 1107, 1136, and *People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 510-511; accord *People v. Taylor* (2009) 47 Cal.4th 850, 899;

People v. Carrington (2009) 47 Cal.4th 145, 200.) Thus, appellant's claim should be rejected.

2. The Trial Court Was Not Required to Instruct the Jurors That the Prosecution Bore the Burden of Persuasion Regarding the Existence of Aggravating Factors

Appellant contends the jury should have been instructed that "the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence." (AOB 282-283.) However, this Court has found that jury instructions "are not constitutionally defective for failing to require the state to bear the burden of proof beyond a reasonable doubt or even the burden of persuasion that an aggravating factor exists, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 149, citing *People v. Bramit* (2009) 46 Cal.4th 1221, 1249-1250.)

Indeed, this Court has "rejected the claim that the prosecution bears the burden of persuasion at the penalty phase." (*People v. Lenart*, *supra*, 32 Cal.4th at p. 1137; *People v. Sapp* (2003) 31 Cal.4th 240, 317; *People v. Kipp*, *supra*, 18 Cal.4th at p. 381; *People v. Benmore* (2000) 22 Cal.4th 809, 859.) In *People v. Hayes* (1990) 52 Cal.3d 577, this Court found that "[b]ecause the determination of penalty is essentially moral and normative [citation], and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. [Citation.] The jurors cannot escape the responsibility of making the choice by finding the circumstances in aggravation and mitigation to be equally balanced and then relying on a rule of law to decide the penalty issue. The jury itself

must, by determining what weight to give the various relevant factors, decide which penalty is more appropriate." (*Id.* at p. 643.)

3. The Jury's Death Verdict Did Not Need To Be Premised on Unanimous Jury Findings

Appellant contends that his constitutional rights were violated because there were no unanimous jury findings regarding the aggravating circumstances or the unadjudicated criminal activity. (AOB 284-286.) However, this Court has on numerous occasions found that unanimity is required only as to the appropriate penalty, and that there is thus no constitutional requirement for unanimous jury findings as to the existence of aggravating circumstances, including unadjudicated criminal activity. (See *People v. Watkins* (2012) 55 Cal.4th 999, 1036 [noting this Court has rejected claims alleging "failure to require a unanimous jury finding on the unadjudicated acts of violence"]; *People v. Cowan* (2010) 50 Cal.4th 401, 489 ["There is no requirement . . . that penalty phase jurors unanimously agree on the existence of aggravating factors that support the imposition of the death penalty, including the existence of other criminal activity under [section 190.3,] factor (b)"]; *People v. Taylor* (2010) 48 Cal.4th 574, 651 [noting this Court has "found no requirement under the Sixth, Eighth, or Fourteenth Amendment that the jury unanimously agree on the existence of unadjudicated criminal conduct beyond a reasonable doubt"]; *People v. Salcido* (2008) 44 Cal.4th 93. 156, 167; *People v. Rogers*, *supra*, 39 Cal.4th at p. 893, quoting *People v. Blair* (2005) 36 Cal.4th 686, 753 ["'The Eighth and Fourteenth Amendments do not require that a jury unanimously find the existence of aggravating factors . . .'"].)

To the extent appellant contends that the Supreme Court's decisions in *Apprendi*, *Ring*, *Blakely*, and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] compel that the aggravating factors must be found true beyond a reasonable doubt by a unanimous jury, this

Court should, as discussed above, reject this claim, consistent with its prior decisions. Further, this Court has held that *Cunningham* "merely extends the *Apprendi* and *Blakely* analyses to California's determinate sentencing law and has no apparent application to California's capital sentencing scheme." (*People v. Salcido, surpa,* 44 Cal.4th at p. 167, citing *People v. Prince* (2007) 40 Cal.4th 1179, 1297.)

4. Language in CALJIC No. 8.88 Is Not Impermissibly Broad

The trial court instructed the jury with CALJIC No. 8.88 that "[t]o return a judgment of death each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." Appellant contends the phrase "so substantial" is an "impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing." (AOB 286.) However, this Court has determined on numerous occasions that this language is "'not unconstitutionally vague.'" (*People v. Brown* (2014) 59 Cal.4th 86, 119, quoting *People v. Linton* (2013) 56 Cal.4th 1146, 1211; *People v. Lopez* (2013) 56 Cal.4th 1028, 1083; *People v. Whalen* (2013) 56 Cal.4th 1, 85-86; *People v. Lightsey* (2012) 54 Cal.4th 668, 731-732.)

5. Language in CALJIC No. 8.88 Appropriately Advises the Jury How It Should Arrive at Its Penalty Determination

Appellant contends that by instructing the jury that it can reach a death verdict if the aggravating evidence "warrants" the death penalty, CALJIC No. 8.88 "does not make . . . clear to jurors" that the ultimate question in the penalty phase is "whether death is the appropriate penalty." (AOB 287-88.) However, this Court has determined on numerous

occasions that CALJIC No. 8.88 "'adequately advises jurors on the scope of their discretion to reject death and to return a verdict of life without possibility of parole.'" (*People v. Chism* (2014) 58 Cal.4th 1266, 1329, quoting *People v. McKinnon, supra*, 52 Cal.4th at p. 696; *People v. Perry* (2006) 38 Cal.4th 302, 320; *People v. Stitely, supra,* 35 Cal.4th at p. 531.)

6. CALJIC No. 8.88 Was Not Improper for Failing to Instruct the Jury to Impose a Sentence of Life Without Parole if It Found That the Mitigating Circumstances Outweighed the Aggravating Circumstances

Appellant contends that CALJIC No. 8.88 failed to instruct the jury to "impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances." (AOB 288-289.) However, this Court has found on numerous occasions that there is need for the trial court to instruct the jury in this manner, given that the instruction as given "adequately explains the circumstances in which the jury may return a verdict of death." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1315; see *People v. Manibusan, supra*, 58 Cal.4th at p. 100; *People v. Valdez* (2012) 55 Cal.4th 82, 179; *People v. Jones, supra*, 54 Cal.4th at p. 78; *People v. Carrington, supra*, 47 Cal.4th at p. 199.)

7. The Jury Instructions Were Not Improper Because They Failed to Instruct the Jury Regarding the Standard of Proof as to Mitigating Circumstances

Appellant contends the penalty phase jury instructions failed to "set forth a burden of proof" as to mitigating circumstances. (AOB 289-290.) However, as noted above, "California's death penalty law is not unconstitutional in failing to impose a burden of proof – whether beyond a reasonable doubt or by a preponderance of the evidence – as to the existence of . . . the comparative weight of aggravating and mitigating circumstances . . . ." (*People v. Alfaro, supra*, 41 Cal.4th at p. 1331.) Further, this Court has found on numerous occasions that "'[t]he death

penalty statute is not unconstitutional for failing to provide the jury with instructions on the burden of proof and standard of proof for finding aggravating and mitigating circumstances in reaching a penalty determination.'" (*People v. Chism*, *supra*, 58 Cal.4th at p. 1333, quoting *People v. Morrison*, *supra*, 34 Cal.4th at pp. 730-731; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Homick* (2012) 55 Cal.4th 816, 902.)

8. The Trial Court Was Under No Obligation to Instruct the Jury on the Presumption of Life, and the Court Did Not Err By Failing to So Instruct

Appellant contends the trial court's failure to instruct the jury that "the law favors life and presumes life imprisonment without parole to be the appropriate sentence" violated appellant's constitutional rights. (AOB 290-291.) However, this Court has repeatedly found that "[t]he death penalty statute is not deficient because it does not require that the jury be instructed on the presumption of life, nor was there any error because the jury was not so instructed." (*People v. Homick*, *supra*, 55 Cal.4th at p. 904, citing *People v. Young* (2005) 34 Cal.4th 1149, 1233; see also *People v. Russell* (2010) 50 Cal.4th 1228, 1272; *People v. Gamache*, *supra*, 48 Cal.4th at p. 407; *People v. Geier* (2007) 41 Cal.4th 555, 619.)

D. The Jury Was Not Required to Make Written Findings

Appellant contends that the jury must make written findings during the penalty phase. (AOB 291.) This Court has consistently rejected appellant's claim. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1067; *People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1331-1332, citing *People v. Jurado* (2006) 38 Cal.4th 72, 144; *People v. Rogers*, *supra*, 39 Cal.4th at p. 893; *People v. Rodriguez*, *supra*, 42 Cal.3d at pp. 777-778.)

E. The Jury Instructions on Mitigating and Aggravating Factors Were Proper and Did Not Violate Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in Mitigating Factors Was Proper

Appellant challenges the use of the adjectives "extreme" in section 190.3, factors (d) and (g) and "substantial" in factor (g). He argues that these adjectives "acted as barriers to the consideration of mitigation." (AOB 292.) He is mistaken. "The use of certain adjectives such as 'extreme' and 'substantial' in the list of mitigating factors in section 190.3 does not render the statute unconstitutional." (*People v. Montes*, *supra*, 58 Cal.4th at p. 899, citing *People v. Thompson* (2010) 49 Cal.4th 79, 144, and *People v. Prieto*, *supra*, 30 Cal.4th at p. 276; accord *People v. Duff* (2014) 58 Cal.4th 527, 570; *People v. Contreras*, *supra*, 58 Cal.4th at p. 173; *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 42.)

2. No Rule of Constitutional Law Requires the Trial Court to Delete Inapplicable Sentencing Factors

Appellant contends that "[m]any of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable" to his case, and that by failing to omit these factors from the jury instructions, the trial court "likely confus[ed] the jury and prevent[ed] the jurors from making any reliable determination of the appropriate penalty," in violation of appellant's constitutional rights. (AOB 292-293.) However, this Court has found that "[n]o rule of constitutional law requires the jury instructions to delete inapplicable sentencing factors or to state that some factors are mitigating only." (*People v. Jones*, *supra*, 57 Cal.4th at p. 980, citing *People v. Mills* (2010) 48 Cal.4th 158, 210; *People v. Manibusan*, *supra*, 58 Cal.4th at p. 100; *People v. Valdez*, *supra*, 55 Cal.4th at p. 180.)

3. The Trial Court Was Not Required to Instruct That Mitigating Factors Were Relevant Solely As Potential Mitigators

Appellant contends that the trial court erroneously failed to instruct the jury which factors were relevant as mitigating or aggravating circumstances. (AOB 293-294.) No error occurred, however, because the trial court was not required to instruct the jury which factors are relevant as mitigating circumstances and which factors are relevant as aggravating circumstances. (See *People v. Montes*, *supra*, 58 Cal.4th at p. 899, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 862; *People v. Jackson* (2014) 58 Cal.4th 724, 773, quoting *People v. Morrison*, *supra*, 34 Cal.4th at p. 730.) "Nor was the trial court constitutionally required to instruct the jury that section 190.3's mitigating factors could be considered only as mitigating factors and that the absence of evidence supporting any one of them should not be viewed as an aggravating factor." (*People v. Duff*, *supra*, 58 Cal.4th at p. 570, citing *People v. Lightsey*, *supra*, 54 Cal.4th at p. 731, *People v. Jones*, *supra*, 54 Cal.4th at p. 87, and *People v. Gamache*, *supra*, 48 Cal.4th at p. 406.)

F. Intercase Proportionality Review Is Not Required

Appellant contends that California's death penalty statute permits arbitrary, capricious, discriminatory, and disproportionate imposition of the death penalty because it forbids intercase proportionality review. (AOB 294.) On the contrary, "[t]he absence of intercase proportionality review does not violate the Eighth and Fourteenth Amendments to the United States Constitution." (*People v. Montes*, *supra*, 58 Cal.4th at p. 899, citing *People v. Thompson*, *supra*, 49 Cal.4th at p. 143; *People v. Jackson*, *supra*, 58 Cal.4th at p. 774; *People v. Jones*, *supra*, 54 Cal.4th at p. 87; *People v.*

Demetrulias, *supra*, 39 Cal.4th at p. 44; *People v. Snow*, *supra*, 30 Cal.4th at p. 126.)[32]

G. California's Death Penalty Scheme Does Not Violate the Equal Protection Clause

Appellant contends that California's death penalty scheme provides "significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes," thereby depriving those facing a death sentence of the equal protection of the laws. (AOB 294-295.) However, as this Court has consistently held, "California's capital sentencing procedures do not violate principles of equal protection of the law on the ground that they provide safeguards different from those found in noncapital cases." (*People v. Montes*, *supra*, 58 Cal.4th at p. 899, quoting *People v. Williams* (2008) 43 Cal.4th 584, 650; accord *People v. Jackson*, *supra*, 58 Cal.4th at pp. 773-774; *People v. Duff*, *supra*, 58 Cal.4th at p. 570; *People v. Contreras*, *supra*, 58 Cal.4th at p. 173; *People v. Jones*, *supra*, 54 Cal.4th at p. 87.) Because appellant does not provide any new or valid reasons for this Court to revisit its prior holdings, this claim must be rejected once again.

H. California's Use of the Death Penalty Does Not Violate International Law and/or the Constitution

Appellant contends that use of the death penalty as a "regular form of punishment" violates international law and the Eighth and Fourteenth Amendments. (AOB 295.) But as this Court has repeatedly held, "California does not employ the death penalty as a regular punishment for substantial numbers of crimes, and its imposition does not violate international norms of decency or the federal Constitution." (*People v.*

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[32] California does "provide *intracase* proportionality review." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 653, fn. 7, citing *People v. Rountree* (2013) 56 Cal.4th 823, 860.)

Jackson, *supra*, 58 Cal.4th at pp. 773-774, quoting *People v. Clark* (2011) 52 Cal.4th 856, 1008 [quotations omitted]; see *People v. Duff*, *supra*, 58 Cal.4th at pp. 570-571; *People v. Loker* (2008) 44 Cal.4th 691, 756; *People v. Harris*, *supra*, 43 Cal.4th at p. 1323; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.)

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

Finally, appellant contends the cumulative impact of the errors at the guilt and penalty phases prejudiced him. (AOB 296-298.) As explained above, there were no errors in this case and, thus, appellant is not entitled to any relief. Whether considered individually or for their cumulative effect, the claimed errors did not affect the outcome of the trial. (*People v. Jackson*, *supra*, 58 Cal.4th at p. 774; *People v. Contreras*, *supra*, 58 Cal.4th at p. 173; *People v. Maciel* (2013) 57 Cal.4th 482, 554.) Appellant was entitled to a fair trial, not a perfect one. (*Lutwak v. United States* (1953) 344 U.S. 604, 619-620 [73 S.Ct. 481, 97 L.Ed.2d 593]; *People v. Anzalone* (2013) 56 Cal.4th 545, 556; *People v. Cunningham* (2001) 25 Cal.4th 826, 1009.) Because he received a fair trial, this claim must be rejected.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that appellant's judgment of conviction and sentence of death be affirmed.

Dated: June 2, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 39,611 words.

Dated: June 2, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Run Peter Chhoun** No.: **S084996**

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.

On June 3, 2015, I electronically submitted the attached **RESPONDENT'S BRIEF (CAPITAL CASE)** with the Clerk of the Court using the online website provided by the California Supreme Court.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 3, 2015, I served the attached **RESPONDENT'S BRIEF (CAPITAL CASE)** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Alexander Sinton Post
Deputy Public Defender
Office of the Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94607
Counsel for Appellant Run Chhoun
(2 Copies)

The Honorable Bob N. Krug
RETIRED Judge c/o:
San Bernardino County Superior Court
247 West Third Street
San Bernardino, CA 92415-0240

Collette C. Cavalier
Deputy District Attorney
San Diego County District Attorney's Office
110 West "A" Street
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Two copies for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 3, 2015, at Los Angeles, California.

Lisa P. Ng
Declarant

Signature

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