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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL CARLOS GARCIA et al., Defendants and Appellants.	E057519 (Super.Ct.No. INF064492) OPINION

APPEAL from the Superior Court of Riverside County. David B. Downing, Judge. Affirmed with directions as to defendant and appellant Daniel Carlos Garcia; affirmed with directions as to defendant and appellant Kaushal Niroula; affirmed as to defendant and appellant Craig Anthony McCarthy.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Daniel Carlos Garcia.

Diane Nichols, under appointment by the Court of Appeal, for Defendant and Appellant Kaushal Niroula.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant Craig Anthony McCarthy.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

There are three defendants and appellants in this appeal: (1) Daniel Carlos Garcia; (2) Kaushal Niroula; and (3) Craig Anthony McCarthy. A jury found Garcia and Niroula guilty of various crimes.[1] McCarthy entered a guilty plea.

The jury found Garcia and Niroula guilty of (1) premeditated murder (Pen. Code, § 187, subd. (a));[2] (2) conspiracy to commit a variety of crimes, such as grand theft and murder (§ 182, subd. (a)(1)); (3) three counts of burglary (§ 459); (4) two counts of grand theft (§ 487, subd. (a)); (5) unauthorized use of personal identifying information (§ 530.5, subd. (a)); (6) procuring or offering a false or forged instrument (§ 115); and (7) receiving stolen property (§ 496, subd. (a)). The jury, as to both defendants, found true the allegations that (1) the murder was intentional and carried out for financial gain (§ 190.2, subd. (a)(1)); and (2) the pattern of felony conduct resulted in the loss of more than $200,000 (§§ 186.11, subd. (a)(3), 12022.6, subd. (a)(2)). As to Niroula, the jury

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[1] Two other codefendants, David Replogle and Miguel Bustamante, were charged along with Garcia, Niroula, and McCarthy, but had a trial that was separate from Garcia and Niroula. Replogle and Bustamante were found guilty of various crimes, and this court affirmed the judgments against them with directions related to fines and fees. (*People v. Replogle* (Feb. 25, 2014, E053711) [nonpub. opn] [2014 Cal.App.Unpub LEXIS 1339, *1-4].)

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

found true the allegations that (1) he intentionally killed the victim by means of lying in wait (§ 190.2, subd. (a)(15)); and (2) he committed the crimes in the instant case while released from custody in another case (§ 12022.1). The trial court sentenced Garcia and Niroula to prison for six years, plus life without the possibility of parole.

McCarthy pled guilty to (1) voluntary manslaughter (§ 192); (2) attempted murder (§§ 187, subd. (a), 664); (3) first degree robbery (§ 212.5, subd. (a)); (4) carjacking (§ 215, subd. (a)); (5) two counts of residential burglary (§ 459); (6) assault with a deadly weapon (§ 245, subd. (a)(1)); (7) being an accessory-after-the-fact (§ 32); (8) grand theft from the person of another (§ 487, subd. (c)); and (9) conspiracy to commit identity theft (§§ 182, 530.5). McCarthy admitted as true the following allegations: (1) he personally used a deadly weapon (a knife) during the voluntary manslaughter (§ 12022, subd. (b)(1)); and (2) he personally inflicted great bodily injury on a person 70 years old or older during the robbery (§ 12022.7, subd. (c)). Pursuant to the terms of McCarthy's plea bargain, the trial court sentenced McCarthy to prison for a term of 25 years four months.

Garcia raises six arguments on appeal. First, Garcia contends there is a lack of substantial evidence supporting his conviction for conspiracy to commit murder. Second, Garcia asserts the trial court erred by denying his right to confront a witness against him. Third, Garcia contends his abstract of judgment should be amended to reflect that the enhancement for causing the loss of more than $200,000 (§§ 186.11, subd. (a)(3), 12022.6, subd. (a)(2)) is not attached to the receiving stolen property conviction (Count 10). Fourth, Garcia asserts the case should be remanded for a hearing

on victim restitution so the trial court can impose joint and several liability for the restitution among all five codefendants. Fifth, in the event Garcia's murder conviction is not reversed by this court, he contends his parole revocation fine must be stricken. Sixth, Garcia joins in the appellate arguments raised by Niroula. We affirm the judgment against Garcia with directions.

Niroula raises four issues on appeal. First, Niroula contends the trial judge was biased against him and the matter should be remanded for a hearing concerning the judge's bias. Second, Niroula asserts the trial court erred by denying his motions to (a) sever his trial from Garcia's trial, and (b) reconsider its ruling on the severance motion. Third, Niroula contends the trial court erred by not imposing joint and several liability among all five codefendants for the victim restitution. Fourth, Niroula joins in the appellate arguments raised by Garcia. We affirm the judgment against Niroula with directions.

McCarthy raises one issue on appeal. McCarthy contends the trial court erred by denying his motion to suppress statements he made following an allegedly untimely and ineffective *Miranda*[3] warning. We affirm the judgment against McCarthy.

FACTUAL AND PROCEDURAL HISTORY

A. BACKGROUND

In 2003, Niroula briefly met Garcia; the two reconnected in 2006. In 2005, Garcia resided in San Francisco. Garcia moved to Sacramento in the summer of 2008.

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

In 2007, Niroula met Replogle; Replogle served as Niroula's attorney. Replogle lived and worked in San Francisco.

In December 2008, McCarthy and Bustamante were living in San Francisco. McCarthy resided with Bustamante and Bustamante's girlfriend, Michelle McCollum. McCarthy, who was a former Marine, met Bustamante when they attended Heald College together. Bustamante introduced McCarthy to Niroula and Replogle.

The victim, Cliff Lambert, was 75 years old and homosexual. The victim appeared to be wealthy: he had two luxury cars, a Rolls Royce Corniche and a Mercedes CLK; he owned a 5,000 square foot home in Palm Springs; and he wore designer clothing. The victim had personal photographs in his home of celebrities such as Patty Guggenheim, Lucille Ball, and one of the Gabor sisters. The victim had a Pekingese dog named Alex. The victim was an orphan and had divorced his husband/domestic partner, Travis, in approximately 2006. The victim was lonely; he was looking for a romantic relationship. The victim used dating websites and preferred men in their 20s.

B. SPRING 2008

The victim met Garcia online. In April 2008, the victim paid for Garcia to fly from San Francisco to Palm Springs. Garcia flew to Palm Springs on April 2 and returned to San Francisco on April 8. For the return flight to San Francisco, Garcia upgraded his ticket from coach to first class. Garcia charged the upgrade cost to the victim's credit card without the victim's knowledge. When the victim discovered the

upgrade charge, the victim was upset by Garcia's use of his credit card; the victim chose not to see Garcia again.

C. MURDER

In November 2008, Garcia and Niroula sent many text messages to one another.[4] On November 11, 2008, Niroula texted, "Let there be 12 mill okay please." Garcia responded, "Yeah like let there be $185,000 in an offshore account in the Bahamas?[5] LOL [laugh out loud]. That's what [redacted text] is probably thinking right now." Garcia texted Niroula, "Every time I felt I got to know you and care about you . . . I found out you lied to me. That hurt me deeply. I wanted to love you and be your friend but you wouldn't let me in."

On November 13, Garcia texted, "Call me." Garcia then texted Niroula the address of the victim's house and a telephone number: 760-325-8220. The victim's home telephone number was 760-325-8200—one digit off. The following text message exchange occurred.

"[Niroula]: Is this cell or house? [¶] Send me both.

"[Garcia]: Thats the only one I have [¶] If they are so good they can find his number themselves

"[Niroula]: Is that cell or land they asked me. That's what I said.

"[Garcia]: Land line . . . I have access to his cell records.

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[4] Any misspellings in the presentation of the text messages, throughout this opinion, are original to the messages.

[5] The victim owned land in the Bahamas.

"[Niroula]: U have access to his cell records but not number that sounds like crap to me lol

"[Garcia]: I am reading his cell records right now . . . 119 minutes out of 450 used this month. Bill due on 11/24. For $51.53

"[Niroula]: So what's the number?

"[Garcia]: Like I said if they are so good they should know . . . I'm not [giving] out more of his info to people I don't know when I have a huge risk [¶] When you come here I'll show you everything I have on him [¶] His phone book, emails, phone logs, etc [¶] I trust you but not people I don't know. And people like [redacted text] are major fuck ups that we don't need right now. [¶] Call me asap! 911 [¶] CALL ME!!!!!!!!!!!! [¶] I got into schwab and now you aren't answering!"

On November 25, Niroula texted, "One hour would be 7 in new York no lawyer calls from NY at 7 LOL." Garcia responded, "You are already on the west coast . . . And you can say you have been trying to reach him for the past 2 weeks. [¶] Trust me when tens of millions of dollars are at stake people call at all hours."

In late November, the victim received a telephone call from a person that was supposedly a lawyer from New Jersey. The lawyer said Florene May, an owner of the May Company, who had been a friend of the victim, left the victim "some artwork" in her will. The victim supposedly needed to sign paperwork for the bequest. The victim made plans to meet the attorney for dinner at a restaurant named Dink's, in Palm Springs. The dinner meeting was scheduled to take place during the first week of December.

On December 2, Niroula texted Garcia, "We can't do it today txt me his number and I am cancelling until tomorrow." Garcia responded, "This is a mess fuck it the whole things off. You should have asked me for that info on Friday when you were here not wait till the day of. Why do you need a map of the house anyway I thought these guys were pros. This is a joke." Niroula replied, "Dude I need it for me thad why to check no one is in You were supposssdd to give me on email a non disclosure as well as layout and questions when I came to sac and u never gave anything. [¶] Okay fine it's off have a nice life I am not going in without a layout."

In a computer seized during Garcia's arrest there was a folder titled "Kaushal Niroula." The computer also contained a document titled "questions," which was created on December 2. The document was formatted as legal pleading paper. The document read, "Law Offices of Samuel Orin" with a New York address. The document was entitled "Superior Court of New York [¶] Morton D. May Family Trust [¶] Confidential Questionnaire of Clifford Lambert." The document then had several questions about Morton May.

The following day, December 3, Garcia texted, "Hey we should meet for 10 minutes and bring the questions I have a bunch of additions that make it VERY believable. [¶] I found out what happened with the trust and the wife and the art." Niroula responded, "Okay I am at home depot buying picks and shovel and a. Drum and cement when done will call you."

On December 4, Niroula changed his telephone number from a 209 area code to a 347 area code; 347 is a Brooklyn, New York area code. A cell phone customer can

obtain a phone number for any city, even if the customer does not reside in the city associated with the area code. On December 4, Niroula called the victim multiple times. The victim's voicemail contained several messages from a person named Samuel Orin who was calling to confirm a 5:30 p.m. meeting. In one message, Orin said, "Well, let's please not try to change this date because on Friday morning, New York time, I have to uh, we have to finalize the decision of handing it over either to the Met or handing it over to you."

On December 4 at approximately 1:30 p.m., Garcia texted, "I'm going to go buy us plane tickets home just in case this goes haywire." At approximately 6:30 p.m., Garcia texted, "Remember margi may died in 2001, she was well respected for starting oasis a non profit for fine arts. Morton may the second and the met museum contested the will." Niroula and the victim went to Dink's for dinner. Shortly before 8:00 p.m., Garcia texted, "Are you still at dinner? Is he happy? [¶] Does he believe you?" Niroula responded, "Honey everyone believes me until they have been conned. [¶] Some even after that." Niroula explained, "Besides half his friends the fags danny and everyone from the owner of the bar know me as Orin Now."

On the evening of December 4, while Niroula was with the victim, McCarthy and Bustamante went to the victim's house. McCarthy and Bustamante climbed over a gate and entered the victim's garage through an open window. The plan was for McCarthy and Bustamante to wait for the victim to exit his vehicle and then kill the victim. Bustamante instructed McCarthy to arm himself with an object from the garage, find a place to hide, and then jump out and attack the victim. McCarthy armed himself

with a screwdriver. Bustamante armed himself with broken hedge clippers. McCarthy hid in a crawl space, while Bustamante hid in the Rolls Royce.

Niroula contacted Bustamante and informed him that the victim was on his way home. Bustamante then told McCarthy the victim was on his way home. McCarthy responded that he "didn't like where this [is] going" and suggested "we should pull out . . . we should stop." Bustamante also began having second thoughts. The victim arrived home and entered the garage. Bustamante and McCarthy did not attack the victim. After the victim entered his house, Bustamante and McCarthy left their respective hiding places. Bustamante asked why he did not attack the victim, and McCarthy explained, "It didn't feel right." McCarthy and Bustamante left the victim's home.

McCarthy and Bustamante returned to the hotel where they were staying and saw Niroula in the lobby. Niroula questioned why McCarthy and Bustamante "didn't go through it, with the plan to kill [the victim]." McCarthy explained that he "didn't have a good feeling about it, that it wasn't right." Niroula was "quite upset" that the victim was still alive. Niroula said McCarthy and Bustamante "had to go through . . . with it," and they would have to try again the next day. Niroula said he would arrange for McCarthy and Bustamante to enter the victim's house, and that Niroula would be present for the killing.

Garcia texted Niroula, "I'm going to bed this whole thing is a bust. Time to call it quits. [¶] You can tell [redacted text] the bad news." Niroula responded, "No we can't I can't danny. [¶] I am gonna do this myself." Garcia replied, "Ok more power to

you. I already knew this wasn't going to happen. [¶] I knew not to have faith in people I never met and who I doubt ever existed. At least when I am in charge I know what I am capable of." Niroula responded, "Okay I am gonna go in at 5 tomorrow so chill your panties okay."

The next evening, December 5, McCarthy and Bustamante returned to the victim's house. Niroula was already at the victim's house with the victim. Niroula and Bustamante communicated with one another via their cell phones. Niroula instructed the two men to go to a side door. McCarthy and Bustamante entered the property through an open gate, and proceeded to the side door. Bustamante tapped on the door. Niroula took the victim into the living room, and then returned to unlock the door, which was in or near the kitchen.

McCarthy and Bustamante armed themselves with knives from the knife block in the kitchen while Niroula spoke to the victim in the living room. The victim entered the kitchen and looked at McCarthy and Bustamante. McCarthy grabbed the victim and put the knife against his chest. The victim asked, "[W]hat are you doing?" Bustamante said, "[Y]ou know what this is about," and repeatedly stabbed the victim. Bustamante stabbed the front of the victim's body, then grabbed a second knife. Bustamante stabbed the victim at the base of his skull. The victim doubled over, and Bustamante repeatedly stabbed the back of the victim's body. The victim fell to the ground and made gurgling sounds as he bled. Bustamante continued stabbing the victim.

McCarthy did not stab the victim. Niroula remained in the living room until the victim had fallen to the floor. Niroula entered the kitchen and told McCarthy and

Bustamante "to clean up the mess" and to check the victim's pockets and take the ring off the victim's finger. Niroula needed the victim's credit cards and identification in order to use the victim's identity. McCarthy located the credit cards, identification, and cash, which Niroula took.

Niroula found blankets in the victim's house. McCarthy and Bustamante rolled the victim's body into the blankets and moved the victim near the front door. McCarthy and Bustamante used towels or rags and 409 cleaning solution to clean the blood. The kitchen was cleaned until no blood was visible. McCarthy and Bustamante moved the victim's body into the trunk of the victim's Mercedes. Niroula exited the house with a bag containing knives, rags, and cleaning products. Niroula also took the victim's dog. The three men left the victim's house, with the victim's body in the trunk of the car.

The men returned to their hotel to check-out. Niroula said he planned to fly back to the Bay Area. Bustamante and McCarthy were supposed to drive back to the Bay Area in the victim's Mercedes. Bustamante and McCarthy drove to a motel in Fontana. Bustamante and McCarthy washed their clothes at the motel.

The following text message exchange took place between Niroula and Garcia on the night of December 5:

"[Niroula]: Answer your phone

"[Niroula]: Answer your damn fuchib phone u fucking idiot ASAP

"[Niroula]: Or call me asap I mean now

"[Niroula]: Answer your godforsaken fucking phone or fucking call me u not answering freaks me out

"[Niroula]: Call me asap

"[Niroula]: Danny call me asap now

"[Niroula]: I love you kiddo and we are going to make this work. Okay?

"[Garcia]: I'm coming as fast as humanly possible. I'll see you shortly. Just try to relax. Don't leave your room and don't tell [redacted text] too much. Don't answer the door for anyone

"[Niroula]: I won't and I am gonna stay wide awake danny I love u and I love andrew okay."

Later that night, Niroula asked about Garcia's estimated time of arrival. Garcia explained that it was foggy, so the drive was progressing slowly. Niroula responded, "You should max be here by like 6 or 7 am which would all[ow] you to go straight in and change the stuff before the houseman arrives which I think is 8 or 9. [¶] And you are simply a houseguest."

At approximately 6:00 a.m. on December 6, McCarthy and Bustamante went to a Home Depot and purchased a shovel. The two men drove to a desolate area on a gravel road, which had bushes and a water tower that could be seen in the distance. Bustamante began digging a hole, and then McCarthy helped dig. When the hole was two or three feet deep, the victim's body was placed in it and covered with dirt.[6] The shovel was cast into the nearby bushes. McCarthy and Bustamante drove back to the Bay Area with the victim's dog.

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[6] The victim's body has not been located by police, despite McCarthy's assistance.

That same morning, Niroula and Garcia exchange text messages:

"[Niroula]: [Redacted text] might blackmail us down the road that's my biggest worry. You and I will have to figure out a way to deal with that as well.

"[Niroula]: Properties in the desert are sold as is condition. According to mark with furnishings and etcetera. So you should simply have the personal belongings shipped. A furnished property in the desert brings higher value.

"[Niroula]: And stay in touch communication between you and me is key okay!???

"[Garcia]: Ok, the alarm is off right?

"[Niroula]: Yes it does beep as u enter but it's off

"[Niroula]: I am gonna fly back with notarized POA [(Power of Attorney)] and cash later this evening and also put all the cash we get on your net spend. From this point u are fully in charge boss.

"[Garcia]: So we are leaving all the furniture?

"[Niroula]: Yes and furnishings as well except personal belongings so get an itemized list of all furniture and furnishings. This will bring around 250 k more in value to the property. Clothes luggage paperwork shoes everything else goes. [¶] Apparently in the desert homes are sold fully furnished.

"[Garcia]: Ok that makes life easier

"[Niroula]: Once the fort is secured and under your control let me know then I can breathe

"[Garcia]: It is."

At 5:31 a.m. on December 6, Niroula's cell phone was in Palm Springs. Between 9:28 a.m. and 10:57 a.m., Niroula's cell phone was in Bakersfield; it arrived in San Francisco by 2:13 p.m.

The victim's friend, Edward Mullikin, had made tentative plans for the victim to meet him at the festival of lights parade one night during the weekend of December 6. The victim did not attend the parade. While Mullikin watched the parade, another of the victim's friends, Cody Stoughton, called Mullikin and asked for the victim's whereabouts—Stoughton was concerned the victim was missing. After the parade, Stoughton and Mullikin went to the victim's house; Mullikin had a key to the home.

Inside the house, Mullikin saw a pack of cigarettes, "a melted-down Scotch and water, crackers, [and] cheese." The victim did not smoke, but Niroula did. Stoughton was concerned, but Mullikin thought the victim might be with a date, so the two men left. Mullikin and Stoughton returned to the house later to again check on the victim. The scotch, cigarettes, crackers, and cheese were gone "and the table was wiped clean." There were pieces of silver on the dining room table that had not been on the table during Stoughton and Mullikin's previous visit. Mullikin had not heard from the victim or seen the victim's dog since December 5. Mullikin reported the victim missing on December 7.

D. FINANCIAL CRIMES

Garcia was interviewed by Palm Springs Police Detective Frank Browning. During the interview, Garcia admitted using the victim's ATM card. ATM withdrawals

were made in Sacramento, San Francisco, and Palm Springs through December 21, 2008. The withdrawals totaled over $14,000.

The victim's American Express credit card was used from December 6 to December 17 to purchase Godiva chocolates in Sacramento and San Francisco, items at Hermes, restaurant meals, a MacBook and various other items from the Apple store. The activity on the American Express card totaled $8,867.61.

Charges were also made to the victim's second American Express account. The charges on the card included Costco, Pro Sun Tanning, Abercrombie clothing, Godiva Chocolate, Apple, Best Buy, magazines and books, restaurants, and the Four Seasons Hotel in San Francisco. Charges were made from December 11 through January 11. The December activity on the second account totaled $17,422.84. The January activity on the second account totaled $4,597.77.

Items purchased from the Apple website with the victim's credit card on December 14 and 30 were shipped to Garcia's residence. One of the Apple items was a computer that was seized when Garcia was arrested.

E. DEFENSE

Garcia presented the testimony of a bloodstain pattern expert. The Department of Justice did not find any blood in the victim's kitchen. The expert concluded it was unlikely the victim was killed in his kitchen, because people are usually in a hurry to clean when they have to dispose of a body, and they miss cleaning blood on the walls or ceiling. The expert did not find any forensic evidence supporting the allegation that the victim was repeatedly stabbed in the kitchen.

Garcia also presented the testimony of Christopher Pavan, a digital forensic examiner. Pavan opined that law enforcement did not follow proper forensic procedures when handling Garcia's computer. Pavan also explained that text messages can be altered on an iPhone. Pavan could not prove the messages on Garcia's telephone were or were not altered. Pavan was not accusing law enforcement of planting evidence or modifying the content of Garcia's telephone.

During closing argument, Garcia theorized that the victim was not dead, but perhaps in a foreign jail. Garcia pointed to the lack of a body, blood, and weapon to demonstrate that the victim was not murdered. Alternatively, to the extent the jury found the victim was killed, Garcia asserted he was not part of a conspiracy to murder the victim. Rather, Garcia conspired to commit financial crimes, and the decision to murder the victim was made last-minute, without Garcia's knowledge. Garcia asserted there would have been no need to deceive the victim if the plan were to kill him. Garcia also pointed to the fact that McCarthy and Bustamante were unarmed when they went to the victim's house as proof that the decision to kill was made at the last minute.

DISCUSSION

I. GARCIA'S APPEAL

A. SUBSTANTIAL EVIDENCE

Garcia contends his convictions for murder and conspiracy to commit murder must be reversed because there is not sufficient evidence to support a finding that Garcia conspired to murder the victim.

"'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence . . . . [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility.'" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.)

"'A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.'" (*People v. Johnson* (2013) 57 Cal.4th 250, 257.)

On December 2, the following text message exchange took place: Niroula texted Garcia, "We can't do it today txt me his number and I am cancelling until tomorrow." Garcia responded, "This is a mess fuck it the whole things off. You should have asked me for that info on Friday when you were here not wait till the day of. Why do you need a map of the house anyway I thought these guys were pros. This is a joke."

Niroula replied, "Dude I need it for me thad why to check no one is in You were supposssdd to give me on email a non disclosure as well as layout and questions when I came to sac and u never gave anything. [¶] Okay fine it's off have a nice life I am not going in without a layout."

The discussion about needing a layout of the victim's house, "these guys [being] pros," and not being able to "do it today" indicates more than a financial crime was being planned. A trier of fact could reasonably deduce from this evidence that a crime of violence was being planned rather than a series of financial crimes because "it" was called off for the day—a singular event, and that singular event required a layout of the victim's house and people who were believed to be "pros." If Garcia and Niroula were planning only a series of financial crimes, they would not need "pros" involved because they had the financial information they needed. Garcia had access to the victim's bank accounts, e.g., the Schwab account, without the help of "pros" who needed a layout of the victim's home. Thus, this evidence supports a finding that Garcia and Niroula were planning a crime of violence.

The following day, on December 3, Niroula texted Garcia, "Okay I am at home depot buying picks and shovel and a. Drum and cement when done will call you." This message provides more support for the finding that Garcia and Niroula were planning a crime of violence, as the message can be understood as Niroula commenting to Garcia on items that would be needed when disposing of the victim's body.

The next day, on December 4, Garcia texted Niroula, "I'm going to go buy us plane tickets home just in case this goes haywire." This text message again supports a

finding that Garcia and Niroula were planning a single crime that required a personal presence in the Palm Springs area—they were not merely conducting financial crimes that could be conducted online.

Also on December 4, when McCarthy and Bustamante chose not to kill the victim, Niroula asked why they "didn't go through it, with the plan to kill [the victim]." This evidence reflects there was a plan to commit a crime of violence, in particular, a plan to murder the victim.

Niroula said he would arrange for McCarthy and Bustamante to enter the victim's house, and that Niroula would be present for the killing. Garcia texted Niroula, "I'm going to bed this whole thing is a bust. Time to call it quits. [¶] You can tell [redacted text] the bad news." Niroula responded, "No we can't I can't danny [¶] I am gonna do this myself." Garcia replied, "Ok more power to you. I already knew this wasn't going to happen. [¶] I knew not to have faith in people I never met and who I doubt ever existed. At least when I am in charge I know what I am capable of." Niroula responded, "Okay I am gonna go in at 5 tomorrow so chill your panties okay."

The foregoing messages support a finding that Garcia knew about the plan to kill the victim because (1) the killing is the act that failed to occur on December 4, and (2) Garcia commented "this whole thing is a bust." The thing that was "a bust" was the murder; hence, this message implies that Garcia knew the murder was supposed to occur. Further, Niroula replied that he would be going "in at 5 tomorrow," indicating his plan to return to the victim's house the following evening. As a result, Garcia was

aware that the plan to kill the victim was ongoing despite the failed attempt on December 4.

The next evening, December 5, Niroula returned to the victim's house. This evidence supports the finding that Niroula accurately informed Garcia of the plan to return to the victim's house. Bustamante stabbed the victim, and the victim died as a result. Niroula had let Bustamante into the victim's house, and communicated with Bustamante prior to the killing. The text messages between Niroula and Bustamante had been deleted from Bustamante's phone, but were recovered by law enforcement; although, it is unclear when reading the messages if the messages were incoming or outgoing.

The messages between Niroula and Bustamante on the evening of December 5 read: "This is the only opportunity. You are inside. Street patrol is on the corner"; "stab with a nife"; "Do it now"; "98 million is too much to lose"; "Inform"; "what is going on"; "Jump the wall from garage and stay on the ground"; "Okay try to stab"; "I am gonna go ask for cigarette alarm will be off get in the garage then"; "I am outside the back garage"; "We are unde[r] kitchen window"; "We are ready"; "Wait he is looking for lighter."

The foregoing messages support a finding that Bustamante did not decide by himself to kill the victim; rather, there was a plan for Bustamante to kill the victim and Niroula was part of that plan. As discussed *ante*, the evidence supports a finding that Garcia and Niroula were planning a crime of violence at the victim's house, Garcia knew about the failed murder attempt on December 4, and knew about the plan to return

to the victim's house on December 5. A trier of fact can reasonably infer that Bustamante and McCarthy were the "pros" Garcia discussed in the December 2 text messages to Niroula, and thus Garcia played an active role in planning the victim's murder.

After the murder, Garcia and Niroula texted one another about Garcia traveling to Palm Springs. Garcia was traveling "as fast as humanly possible." The plan was for Garcia to arrive by 6:00 or 7:00 a.m. and "change the stuff" before the victim's employee arrived at the victim's house at 8:00 or 9:00 a.m. Although McCarthy cleaned the victim's kitchen, so the blood was no longer visible, McCarthy knew "Niroula was supposed to have later on, at another point in time . . . someone clean." Garcia asked about the house alarm being off, and Niroula confirmed the alarm was off. Niroula informed Garcia that houses in the desert are furnished when sold, so Garcia only needed to remove personal effects, such as "[c]lothes, luggage, paperwork, [and] shoes." Garcia responded, "Ok that makes life easier." The jury could infer from this evidence that Garcia's roles in the murder, besides planning, were cleaning the crime scene and preparing the house for sale. Garcia's comment "Ok that makes life easier," reflects a prior belief that he would need to remove more objects from the house, and thus a prior knowledge of the events that would take place in the victim's house, i.e., the murder.

In sum, a reasonable trier of fact could deduce from the evidence that Garcia conspired to commit the victim's murder. Garcia had the specific intent to agree or conspire to commit an offense as shown by the multiple text messages between Garcia

and Niroula. For example, the discussion about McCarthy and Bustamante being "pros" and needing a layout of the house reflects Garcia's intent to plan a crime of violence. Garcia had the specific intent to commit the elements of the offense of murder as shown by the failed murder attempt on December 4, and Garcia's message that "this whole thing is a bust"—the message reflects Garcia's intent that the victim be killed because it shows his plan was for the murder to occur, hence the plan being "a bust" when the murder did not occur. There is proof of an overt act by a party to the agreement because Niroula let Bustamante into the victim's home and Bustamante repeatedly stabbed the victim, thus reflecting the overt act of murder. Accordingly, we conclude substantial evidence supports the finding that Garcia conspired to murder the victim.

B. SIXTH AMENDMENT

1. *PROCEDURAL BACKGROUND*

Niroula and Garcia were self-represented at trial. During trial, on August 20, 2012, Niroula informed the court that he would testify. Niroula asked to have the next day off in order to prepare his testimony. The trial court granted Niroula's request. On August 22, Niroula changed his mind and decided not to testify. The court recessed at noon because no other witnesses were available that day.

On August 23, the prosecutor informed the court that Niroula had served her with a subpoena to testify in the trial. Niroula believed the prosecutor listened to recorded telephone calls that included information regarding the value of Garcia's company. The prosecutor asserted the evidence would be "pure hearsay," without an exception. The prosecutor indicated her intent to move to quash the subpoena. Niroula responded that

if the court quashed the subpoena, then he would need to testify. The trial court permitted Niroula to testify.

Niroula testified that there was no plan to kill the victim. Rather, the plan was to send the victim out of the country and then frame Garcia for the theft of the victim's assets. Niroula hated Garcia because Niroula, who was from Nepal, believed Garcia reported Niroula's lack of visa compliance to United States Immigrations and Customs Enforcement. As a result of the report, Niroula was taken into custody and housed in a county jail. While at the jail, Niroula was repeatedly raped by two men and contracted HIV. Niroula blamed Garcia for the rape and his contraction of HIV. Niroula also blamed Garcia for Niroula's mother no longer communicating with Niroula; Niroula believed Garcia told Niroula's mother about Niroula being arrested and about Niroula's life in San Francisco, which caused her to stop speaking with Niroula—Nepal is "a very homophobic society" and Niroula had tried to keep his dating life private. Niroula felt that Garcia "destroyed" Niroula's life.

Niroula wanted revenge against Garcia, which is why Niroula tried to frame Garcia for the victim's murder and various theft offenses. Niroula learned about the victim from Replogle. Niroula and Replogle met with the victim in San Francisco on December 6. Niroula was also with the victim in San Francisco on December 11, and therefore, the victim could not have been murdered on December 5. Through Replogle, the victim was sent to Mexico. The victim agreed to hide in Mexico because Niroula offered to give him money, after Garcia was imprisoned, from the sale of Garcia's technology company, in which Niroula had invested.

Niroula caused forged or altered text messages to be inserted into Garcia's telephone or telephone account. Niroula also used false identifications to make it appear Garcia traveled from the Bay Area to Palm Springs. Niroula caused purchases made with the victim's credit card to be sent to Garcia's address to make it appear as though Garcia was using the victim's financial information. Niroula's direct examination began on August 23, and lasted for two hours that day. Niroula's direct examination continued on August 24; it began around 9:00 a.m., and ended around 2:10 p.m.

When Garcia cross-examined Niroula, Niroula answered a few of Garcia's questions, but then refused to answer further questions by Garcia because Garcia "destroyed" Niroula's life. Niroula asserted his Fifth Amendment right to not testify. The trial court excused the jury and explained Niroula had to testify on cross-examination or the court would strike Niroula's direct testimony. The court decided to let the prosecutor cross-examine Niroula, so as to not cause more delay for the jurors. Niroula explained that he would refuse to answer the prosecutor's questions as well by asserting his Fifth Amendment right to not testify. The prosecutor and Garcia said they wanted to question Niroula, even if he refused to answer, so the jury could observe his refusals.

The trial court explained to Niroula that he did not have a Fifth Amendment right to not testify because he had already testified on direct examination. The trial court explained that if Niroula refused to answer on cross-examination, then the court would hold him in contempt. When the jury returned, the prosecutor began cross-examining

Niroula. After the prosecutor's second question, Niroula said, "[G]iven that you have my calls with my attorneys, I'm not going to dignify you with an answer."[7] As the prosecutor questioned Niroula, he responded by questioning the prosecutor. Niroula then offered to answer the prosecutor's questions, if she returned the recordings of Niroula's telephone conversations. The court reminded Niroula that he would be held in contempt if he refused to answer questions on cross-examination.

Niroula answered some of the prosecutor's questions. The prosecutor asked questions calling for a "yes" or "no" response. Niroula responded by asking questions or by trying to give explanations. The court reminded Niroula that he had to answer the prosecutor's questions or be held in contempt. Niroula said he would answer the questions if he could give explanations. When prevented from giving explanations, Niroula again refused to testify. Niroula explained it was part of his plan for revenge against Garcia to have Niroula's testimony stricken, so that Garcia would know he was framed, but the jury would be prevented from using that information. The court said it would not strike Niroula's testimony.

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[7] During the course of Niroula's and Garcia's confinement at the county jail, sheriff's deputies recorded telephone calls made by Niroula and Garcia; some of those calls included Niroula's calls to criminal defense attorneys in which he discussed trial tactics. The calls were recorded by the deputies because the attorneys had not registered their telephone numbers with the jail; if the telephone numbers had been registered, the deputies would have known not to record the calls. During discovery, the prosecutor disclosed the recordings to all defendants, including Garcia. Garcia listened to the conversations between Niroula and the attorneys. The prosecutor thought perhaps she heard "the first couple [conversations] maybe when he was discussing bail," but did not recall much of the conversations.

The prosecutor resumed her cross-examination of Niroula. Niroula answered many of the prosecutor's questions, but occasionally argued with the prosecutor. On August 29, the cross-examination of Niroula resumed. Niroula refused to answer the prosecutor's questions. The prosecutor asked a series of questions; Niroula repeatedly declined to answer. Garcia then began cross-examining Niroula. Niroula refused to answer Garcia's questions. Garcia asked a series of questions; Niroula repeatedly declined to answer.

The trial court asked Niroula questions submitted by the jurors; Niroula answered them. Garcia then resumed questioning Niroula. Garcia asked Niroula a series of questions; Niroula declined to answer. The trial court asked Niroula more questions submitted by the jury, which Niroula answered. Niroula rested his case.

Outside the presence of the jury, Garcia expressed "serious concerns with the fact that [he] was not able to cross-examine [Niroula] because he was refusing to answer [Garcia's] questions." The court responded, "Well, me too." The trial court said it read cases that reflected striking Niroula's testimony was inappropriate, and the appropriate options were to (1) hold Niroula in contempt, and/or (2) permit the prosecutor and Garcia to comment on Niroula's refusals during closing argument.

The trial court asked Garcia what he wanted the court to do. Garcia responded, "We're in a bit of a legal quagmire." Garcia asserted Niroula's testimony was contrary to Garcia's theory of the case. The trial court explained that Garcia's theory of the case was that a murder did not occur in the victim's house, and Niroula testified there was no murder, so Niroula's testimony did not contradict Garcia's theory of the case. Garcia

expressed concern that the jury would think Niroula was "falling on his sword" for Garcia, but that Garcia was equally culpable. Garcia explained that Niroula's "statements were so outlandish, so incredulous, the jury may just assume everything he said was a bold-faced lie, including the fact that he says [the victim] was not murdered."

The court again asked Garcia what he wanted the court to do. The court explained that it did not believe the law gave it the authority to strike Niroula's testimony and its only option was to hold Niroula in contempt and permit comments in closing argument about Niroula's refusals to answer questions. The trial court explained that striking Niroula's testimony would not be a proper remedy because it would harm Niroula's right to testify in his own defense. Garcia moved for a mistrial. The trial court denied Garcia's motion because it believed case law did not support such a remedy. The trial court held Niroula in contempt, and permitted Garcia and the prosecutor to comment, during closing arguments, upon Niroula's refusal to answer cross-examination questions.[8]

2. *ANALYSIS*

a) Striking Niroula's Testimony

Garcia contends the trial court erred by violating his Sixth Amendment right to confront Niroula. Garcia asserts the trial court should have granted his motion for a mistrial, or, at the very least, stricken Niroula's testimony.

[8] The court scheduled the contempt proceedings for November 9.

Cross-examination is "'"the greatest legal engine ever invented for the discovery of truth,"'" and it has two purposes. (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733.) "Its chief purpose is 'to test the credibility, knowledge and recollection of the witness. [Citations.] The other purpose is to elicit additional evidence.' [Citations.] Because it relates to the fundamental fairness of the proceedings, cross-examination is said to represent an 'absolute right,' not merely a privilege [citations], and denial or undue restriction thereof may be reversible error." (*Ibid.*)

"'Where a witness refuses to submit to cross-examination, or is unavailable for that purpose, the conventional remedy is to exclude the witness's testimony on direct.' [Citation.] Moreover where a witness 'frustrates' cross-examination by declining to answer some or all of the questions, the court may strike all or part of the testimony. [Citation.] The decision whether to strike the direct examination, or a partial strike of the testimony, of a witness who does not submit to cross-examination is left to the discretion of the trial court." (*People v. Noriega* (2015) 237 Cal.App.4th 991, 1000-1001.)

A criminal defendant has a constitutional right to testify on his own behalf. (*People v. Johnson* (1998) 62 Cal.App.4th 608, 617.) "In deciding whether to strike a defendant's or a defense witness's testimony based on his or her refusal to answer one or more questions, the trial court should examine '"the motive of the witness and the materiality of the answer." [Citation.]' [Citation.] The court should also consider if less severe remedies are available before employing the 'drastic solution' of striking the witness's entire testimony. [Citation.] These include striking part of the testimony or

allowing the trier of fact to consider the witness's failure to answer in evaluating his credibility." (*People v. Seminoff* (2008) 159 Cal.App.4th 518, 525-526.)

In the instant case, we have the fundamental rights of two codefendants clashing with one another: Niroula's right to testify in his defense clashing with Garcia's right to confront witnesses against him. First, in regard to Niroula being a witness against Garcia, it is notable that Niroula did not directly incriminate Garcia. Niroula testified that Garcia was entirely framed by Niroula; however, this testimony conflicted with Garcia's version of events, which is that Garcia was part of the financial crimes, but not part of the last-minute decision to murder the victim, assuming a murder occurred. One might conclude Niroula's conflicting version of the events undermined Garcia's theory of the case, and could have caused the jury to find that one, if not both, of the defendants was lying. Therefore, although Niroula did not directly incriminate Garcia, his testimony could be viewed as damaging to Garcia's credibility and therefore Niroula could be considered a witness against Garcia. (See generally *People v. Homick* (2012) 55 Cal.4th 816, 848 [codefendants' trial should be severed when they present conflicting defenses].)

Second, we consider whether the trial court's action violated Garcia's Sixth Amendment right of confrontation. As explained *ante*, a primary interest secured by the confrontation clause is a defendant's right to cross-examine witnesses against him. (*Davis v. Alaska* (1974) 415 U.S. 308, 315.) Niroula refused to answer Garcia's questions. Because Garcia was unable to cross-examine Niroula, we conclude Garcia's right of confrontation was violated.

Third, we consider whether the trial court could have stricken Niroula's testimony given that Niroula was a codefendant with a right to testify in his own defense. (*People v. Johnson*, *supra*, 62 Cal.App.4th at p. 617.) "Where a witness refuses to submit to proper cross-examination regarding material issues, the striking out or partial striking out of direct testimony is common, and has been allowed even where the result was to deprive a criminal defendant of the fundamental constitutional right to testify [o]n his own behalf." (*Fost v. Superior Court*, *supra*, 80 Cal.App.4th at p. 736.) "As the Supreme Court has said, a criminal defendant '"has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts."'" (*Ibid.*) "Striking a witness's entire testimony is, of course, a 'drastic solution,' only to be employed 'after less severe means are considered.'" (*Ibid.*)

In deciding whether to strike Niroula's testimony, the trial court needed to consider Niroula's motive for not answering Garcia's questions and the materiality of Niroula's potential answers. (*People v. Reynolds* (1984) 152 Cal.App.3d 42, 47.) We apply the abuse of discretion standard when reviewing the trial court's decision to not strike Niroula's testimony. (*Ibid.*)

Initially, when Niroula refused to answer Garcia's questions, he said he was refusing because Garcia destroyed Niroula's life; Niroula then asserted his Fifth Amendment right not to testify. Later, Niroula said he was refusing to testify because Garcia was in possession of Niroula's privileged attorney-client communications. Another possible motive is that Niroula was manipulating the court's process. Niroula

testified that he was HIV positive and expected to live only two more years. Niroula said to the jury on direct examination, "I don't care what you do. I don't care whether you believe me or not." One could infer from Niroula's statements that he, believing he was dying, decided to tell a story that he believed would assist his friend, Garcia; and then (a) protect that story by not subjecting it to cross-examination, or (b) create a procedural issue.

None of these possible motives provide a sound reason for preserving Niroula's direct examination testimony. Niroula had cited his Fifth Amendment privilege; however, (1) it appears he was not citing it in a meaningful way, as he had just explained his motive for not testifying was revenge against Garcia for Garcia destroying Niroula's life; and (2) to the extent Niroula was citing the Fifth Amendment in a meaningful way, it is contradictory to Niroula's direct examination wherein he confessed to various crimes and to framing Garcia. Thus, it does not appear Niroula was refusing to testify based upon a meaningful assertion of the Fifth Amendment privilege. Therefore, Niroula was refusing to testify due to (1) revenge against Garcia; (2) anger over the attorney-client communications in Garcia's possession; or (3) to manipulate the court's process. Contrary to the trial court's conclusion, these motives support a decision to strike Niroula's testimony.

Next, we consider the materiality of Niroula's potential answers. Cross-examination is material when it concerns "matters about which the witness testified on direct examination," as opposed to a collateral matter. (*Board of Trustees of Mount San Antonio Jr. College Dist. of Los Angeles County v. Hartman* (1966) 246 Cal.App.2d

756, 764.) Garcia expressed to the trial court a concern that the jury would conclude Niroula was lying because Niroula's version of the events was "so outlandish, so incredulous," and thereby conclude the victim was killed, as opposed to missing. It can be inferred from these concerns that Garcia wanted to utilize the cross-examination to show Niroula lacked credibility.

Garcia asked questions such as (1) "Was everything you said the truth?"; (2) "If this is all about revenge, do you think it's fair to Mr. and Mrs. Garcia [(Garcia's parents)] to put them through this?"; (3) "But in all your admissions, isn't it true that you place the blame on other people?"; (4) "Do you consider yourself a victim?" Garcia's questions were designed to elicit information about Niroula's credibility, e.g. if Niroula blames others and sees himself as a victim then he may be a manipulator playing the role of a victim, thus lacking credibility.

Niroula's credibility was a material issue because it concerned his direct examination testimony—whether it was true the victim was still alive, that Niroula saw the victim on December 11, and that Niroula framed Garcia. Further, if Garcia successfully demonstrated on cross-examination that Niroula lied during his direct testimony, then they jury might thereby find Garcia to be more trustworthy, and thus his version of the events to be more trustworthy, because Garcia was not relying on Niroula's "outlandish" story in a bid for a not guilty verdict. In sum, the cross-examination went to a material issue.

Fourth, we consider whether the trial court erred by not striking Niroula's testimony. As concluded *ante*, Niroula did not have a reasonable motive for refusing to

answer cross-examination questions, and his testimony would have addressed his credibility, which was a material issue. "[T]he right of cross-examination takes on added significance where the witness's credibility is of special significance to the proceedings." (*People v. Seminoff, supra,* 159 Cal.App.4th at p. 527.) Because the right of confrontation is so important when credibility is at issue, and a trial court can strike testimony even if it interferes with a defendant's right to testify in his own defense, we conclude the trial court erred by not striking Niroula's testimony.

b) Harmless Error

We examine whether the Sixth Amendment violation was harmless beyond a reasonable doubt. The factors to consider in conducting this analysis are: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

Niroula was not a prosecution witness. Niroula was called as a witness on his own behalf. During closing argument, the prosecutor repeatedly referred to Niroula's statements as lies, and called Niroula a "Liar." Given that the prosecutor did not call Niroula as a witness and tried to discredit Niroula during closing argument, we conclude Niroula's testimony was not important to the prosecution's case.

Niroula testified that the victim was alive, and that Niroula framed Garcia for the charged offenses. Garcia presented expert testimony reflecting it was unlikely the

victim was killed in his kitchen due to the lack of bloodstain evidence. Thus, in regard to the murder, Niroula's testimony was not cumulative, because Niroula is not an expert; however, Niroula and Garcia both presented evidence reflecting the victim was not killed.

As to the financial crimes, Niroula contradicted Garcia's extrajudicial statements. Niroula testified that he framed Garcia for the financial crimes, but Garcia admitted to Browning that he (Garcia) used the victim's ATM card. Thus, on the point where Niroula contradicted Garcia, Garcia had already admitted to the offense.

Next, we consider the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points. As to the murder, Niroula testified he was with the victim in San Francisco on December 11, and therefore, the victim could not have been murdered on December 5. This testimony was contradicted by McCarthy, who testified that Bustamante murdered the victim on December 5 at Niroula's direction. However, Niroula's murder testimony was corroborated by Garcia's expert, who opined that it was unlikely a murder occurred in the victim's kitchen.

As to the financial crimes, Niroula testified that he framed Garcia. This testimony was contradicted by Garcia's out-of-court statement to Detective Browning wherein Garcia admitted using the victim's ATM card. Thus, as to both the murder and the financial crimes there was evidence contradicting Niroula's testimony.

As to the extent of cross-examination otherwise permitted, we note that Niroula did answer some of the prosecutor's cross-examination questions. The questions

Niroula answered pertained to Niroula defrauding other people and entities of money; Niroula having admitted to being in the victim's home; how Niroula met Garcia; and whether Niroula won acting awards in school. The prosecutor's questions were designed to paint Niroula as a professional scam artist who was lying to the jury.

The final factor to consider is the overall strength of the prosecution's case. Garcia admitted using the victim's ATM card. Thus, the prosecutor had a strong case related to the financial crimes. As to the murder, the prosecutor presented text messages between Garcia and Niroula wherein:

(1) Niroula asked for the victim's telephone numbers and Garcia responded, "If they are so good they can find his number themselves," indicating Garcia had knowledge of McCarthy's and Bustamante's involvement due to the use of the word "they";

(2) In that same text message conversation, Garcia wrote, "people like [redacted text] are major fuck ups that we don't need right now," Bustamante's first name is Miguel, again indicating Garcia knew of Bustamante's involvement, from which one can infer Garcia knew Bustamante and McCarthy were assigned the task of murdering the victim;

(3) In another text message, Garcia questioned, "Why do you need a map of the house anyway I thought these guys were pros," one can infer from this text message that Garcia believed Bustamante and McCarthy were professional killers and their task was to kill the victim, hence the question as to why they would need a map of the victim's home;

(4) On December 4, when McCarthy and Bustamante chose not to kill the victim, Garcia texted, "I'm going to bed this whole thing is a bust. Time to call it quits." One can infer that Garcia was part of the planning process for killing the victim because the thing that did not occur on December 4 was the murder, therefore when Garcia wrote "this whole thing is a bust," he was referring to the murder, indicating he knew the murder was supposed to take place;

(5) On December 4, after the killing did not occur as planned, Niroula assured Garcia that he would try again the following day. Thus, Garcia knew the murder was still planned to take place on December 5;

(6) McCarthy testified to being involved in the victim's murder. McCarthy said Niroula let him and Bustamante into the victim's house. McCarthy grabbed the victim and held a knife to the victim's chest, and Bustamante repeatedly stabbed the victim. McCarthy then cleaned the crime scene at Niroula's direction. This evidence reflects the victim was killed, and that he was killed at Niroula's behest; and given the text messages from Garcia, that Garcia was also involved in planning the victim's death;

(7) After the murder, Niroula contacted Garcia, and Garcia drove to Palm Springs.

This evidence indicates Garcia's prior awareness of the murder plans because one would expect that if Garcia was unaware a murder was going to occur then he would have stayed home following the killing, telling Niroula, "you've gone too far, I don't want to be involved in this," or something along those lines; instead, Garcia went to Palm Springs, which indicates he knew the murder was going to take place and had

planned to assist in cleaning the crime scene. Indeed, Garcia texted Niroula about the alarm at the house being off and whether to leave the furniture in the home for the future sale of the property. This evidence indicates one of Garcia's role in the conspiracy was to take control of the property after the killing.

The prosecution had evidence from Garcia's own words (his text messages) reflecting Garcia took part in planning the victim's murder, was upset when the victim was not killed as planned on December 4, was informed the murder would instead take place on December 5, and fulfilled his role of further cleaning the crime scene after the killing. Accordingly, the prosecution had a strong case demonstrating Garcia's involvement in both the murder and financial crimes.

In sum, Niroula was not a prosecution witness and the prosecutor tried to discredit Niroula; Niroula's testimony supported Garcia's assertion that the victim was still alive; Niroula contradicted Garcia as to the financial crimes, but Garcia had already admitted culpability as to using the victim ATM card; Niroula submitted to a partial cross-examination by the prosecutor, whose questions were designed to present Niroula as a professional scam artist who was lying to the jury; and the prosecution had a strong case against Garcia due to Garcia's own text messages being presented.

Garcia was primarily arguing that the victim was still alive, and Niroula supported Garcia on that point. To the extent Garcia did not want that support, and preferred to present Niroula as a liar, the prosecutor's cross-examination provided evidence for Garcia to work with on that point. Additionally, the prosecutor had a

strong case. Therefore, we conclude beyond a reasonable doubt that the constitutional violation did not contribute to the guilty verdict.

c) Invited Error

The People assert Garcia invited the error of the trial court not striking Niroula's testimony. Garcia asserts he did not invite the trial court's error because he requested a mistrial. We have concluded *ante*, that the trial court erred but that error was harmless beyond a reasonable doubt. As a result of our conclusion, the issue of invited error is moot. (*People v. Truman* (1992) 6 Cal.App.4th 1816, 1824 [invited error precludes a defendant from obtaining a reversal]; *People v. Travis* (2006) 139 Cal.App.4th 1271, 1280 [issue is moot when no effective relief can be granted].)

C. ABSTRACT OF JUDGMENT

Garcia contends his abstract of judgment needs to be corrected to reflect that the enhancement for taking more than $200,000 is not attached to Count 10. (§§ 186.11, subd. (a)(3), 12022.6, subd. (a)(2).) The People support Garcia's assertion.

Section 186.11, subdivision (a)(3) provides that if a "pattern of related felony conduct" results in the victim losing between $100,000 and $500,000 then the defendant shall receive an additional term of punishment. Count 10 consisted of a conviction for receiving various items of the victim's stolen property, including title to the victim's Rolls Royce and the victim's financial records. When the trial court pronounced Garcia's sentence, it imposed a two-year concurrent term on Count 10. For the financial taking enhancement, the trial court imposed a two-year consecutive prison term.

The financial taking enhancement was not attached to Count 10 during the pronouncement of judgment because (1) the enhancement can attach to a pattern of conduct rather than a specific count (§ 186.11, subd. (a)(3)); and (2) a consecutive prison term for an enhancement cannot be imposed on a count with a concurrent prison term for the felony (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311 [a consecutive term cannot be imposed on an enhancement if a concurrent term was imposed for the underlying felony]).

Garcia's abstract of judgment reflects the financial taking enhancement is associated with Count 10. This conflicts with the oral pronouncement of judgment and therefore must be corrected. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186 [abstract must reflect oral pronouncement].) Accordingly, we will direct the trial court to correct the abstract of judgment to reflect the financial taking enhancement is not associated with any particular count.

D. RESTITUTION

1. *PROCEDURAL HISTORY*

At Replogle's sentencing hearing, the court said, "You need to pay restitution to the victim in an amount to be determined at some future date, and you have a right to a hearing on that." At Bustamante's sentencing hearing, the court said, "You must pay restitution to the victim in an amount to be determined, and you have a right to a hearing on that subject should an amount be determined at some future date."

At Niroula's sentencing hearing, the trial court said, "You must pay restitution to the victim in an amount to be determined. You have a right to a hearing on that subject

should an amount be determined at some future date. That is joint and several as to all the other defendants." The prosecutor requested the court impose restitution in the amount of $215,450.27. Niroula argued that the liability for the restitution needed to be joint and several. The court responded that the law imposes joint and several liability among codefendants. The court imposed restitution in the amount of $215,450.27.

At McCarthy's sentencing hearing, the court said, "You need to pay restitution to the victim in an amount of $215,450.27. That total amount is subject to hearing, however, if Mr. McCarthy wants one." McCarthy requested the liability for the restitution be "joint and several with the other defendants." The court responded, "It is joint and several with the other defendants."

At Garcia's sentencing hearing, the trial court said, "You need to pay restitution to the victim in an amount to be determined at some future date, and you have a right to a hearing on that, Mr. Garcia." The prosecutor asked that the amount of restitution be $215,450.27. Garcia requested that the liability for the restitution be joint and several. Garcia remarked, "This court did not order restitution by Mr. Replogle or Mr. Bustamante who were convicted of the same crimes." The court responded, "Well, they're not before the Court. So there's not much I can do about that or can I? My guess is—although I don't remember, my guess is they probably didn't have an amount in that probation report. Somebody missed it. [¶] The amount recited by the D.A. is ordered. It's joint and several liability."

2. *ANALYSIS*

Garcia contends the case should be remanded to the trial court for a hearing on victim restitution because direct victim restitution was not imposed upon Bustamante and Replogle at their sentencing hearings, but was imposed at Garcia's, Niroula's, and McCarthy's sentencing hearings. Garcia asserts joint and several liability for restitution should be imposed upon all five codefendants.

The opinion in Bustamante's and Replogle's appeal was filed by this court on February 25, 2014. (*People v. Replogle*, *supra*, E053711.) The remittitur in that case was issued on June 18, 2014. After the remittitur, an appellate court has no further jurisdiction over the case. (§ 1265; *People v. Dutra* (2006) 145 Cal.App.4th 1359, 1366.) We no longer have jurisdiction over Bustamante's and Replogle's case and therefore cannot order a hearing to take place in that matter.

Garcia asserts this court can order a hearing because "[a] *trial court* has the authority to maintain continuing jurisdiction over the imposition of direct victim restitution beyond the time of imposition of judgment and appeal. (See *People v. Bufford* (2007) 146 Cal.App.4th 966, 971.)" (Italics added.) As Garcia indicates, the jurisdiction in the matter is vested in the trial court. Therefore, any concerns about Bustamante's and Replogle's victim restitution would be better addressed to the trial court.

Garcia asserts the instant case should be remanded for a further hearing to clarify the trial court's order as to whether the joint and several liability is shared by Garcia, Niroula, and McCarthy, or if it is shared by Garcia, Niroula, McCarthy, Replogle, and

Bustamante. Garcia contends the trial court's order is vague because it reflects the liability is joint and several but does not specifically name who shares that liability.

The People, relying on section 1202.4, subdivision (j), assert the court's order is not vague. That law provides, in relevant part, "Restitution collected pursuant to this subdivision shall be credited to any other judgments for the same losses obtained against the defendant arising out of the crime for which the defendant was convicted." (§ 1202.4, subd. (j).) We do not find reliance on this subdivision to be persuasive because its plain language discusses judgments in the plural but defendant in the singular, as in multiple judgments against a single defendant will result in credit being provided so a single defendant is not required to pay twice pursuant to two judgments, e.g. criminal and civil judgments.

The subdivision does not explicitly address the situation of codefendants and joint and several liability. However, we note that at least one court has construed "defendant" to mean "codefendants." (*People v. Zito* (1992) 8 Cal.App.4th 736, 745.) Nevertheless, it would be helpful to know exactly which codefendants the trial court wanted to include in its order. Accordingly, we will direct the trial court to clarify its restitution order related to Garcia, to specifically indicate who shares in the joint and several liability for victim restitution.

E. PAROLE REVOCATION FINE

Garcia contends the trial court erred by imposing a parole revocation fine (§ 1202.45) because he was sentenced to life in prison without the possibility of parole. The People support Garcia's contention.

Section 1202.45, subdivision (a), provides, "In every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4."

The trial court imposed a $2,000 restitution fine (§ 1202.4, subd. (b)) and a $2,000 parole revocation fine (§ 1202.45), which was "stayed, pending successful completion of parole." The trial court sentenced defendant to prison for life, without the possibility of parole. As a result, a period of parole is not included in Garcia's sentence and a parole revocation fine should not have been imposed. We will direct the trial court to strike the $2,000 parole revocation fine (§ 1202.45).

II. NIROULA'S APPEAL

A. JUDICIAL BIAS

1. *PROCEDURAL HISTORY*

Garcia and Niroula were self-represented at trial. The trial court authorized Garcia and Niroula to use laptop computers to assist them in preparing their cases. Enrique Tira worked as Niroula's assigned private investigator.

[Redacted text]. Niroula is homosexual.

On June 19, 2012, during voir dire, Tira requested an in camera meeting with the trial court. [Redacted text].

Later on June 20, in open court, the trial court found reason to believe Tira's allegations about the recordings to be true. The trial court again expressed its concern

that Garcia recorded conversations between Niroula and Tira. The trial court ordered that Pavan, Garcia's digital forensic examiner, disable the computer's recording ability, copy the recorded material to a disc, and remove the recordings from the computer.

The following day, on June 21, the trial court had an in camera meeting with Garcia. During the meeting, when discussing the recordings, the following exchange occurred:

Garcia: "[S]ome comments . . . may have been made by this Court which imply bias or may have been inappropriate towards me and Mr. Niroula that I—

"The Court: So the first amendment doesn't apply to anything? I can't say what I think?

"Defendant Garcia: Yes, but I am saying if it implied how rulings were going to be made and showing any reason other than factors based on the law, that was just my concern is I know there were some comments made that I personally was very offended by it, felt very—were very inappropriate.

"The Court: Mr. Garcia, the First Amendment protects judges. The Commission on Judicial Performance doesn't say that, but in my view, it does. I can say what I want and the First Amendment, and you can say what you want off the record, and Mr. Reed can say what he wants off the record. Everyone is free to say what they want.

"Defendant Garcia: Absolutely.

"The Court: And in this case, you were treated and everybody will continue to be appropriately treated, and you can't deny it because it is true. I have given you more breaks than any judges would give you in years, so let's not go down that road. I

probably will not listen to them. I don't know what was said. I probably won't listen to them because I don't have time to. I have other things. I have never listened to tapes when I was a D.A. I just don't do it. Who cares[?] I am only interested in getting your laptop back. That is all I care about. So what[?]

"Defendant Garcia: And I agree. Just I am very concerned especially with comments made—

"The Court: The problem is, is that they're inadmissible because you can't record, so you're stuck. It is like a privilege, talking to your wife. It is privileged. You might not like it, but you can't use it, so what is your point?

"Defendant Garcia: It is difficult to proceed in a trial where I am facing life without the possibility of parole knowing—

"The Court: That is the outside.

"Defendant Garcia: Huh?

"The Court: That is true. That is what you're facing.

"Defendant Garcia: But knowing that this Court has made fun of Mr. Niroula's HIV status, and Miss Hinos [(the court clerk)] has indicated that you were going to deny all the motions. I mean those are hard things to just ignore. Grant it [*sic*], they may be your private and personal feelings, but—

"The Court: What do you care what I said about Mr. Niroula? He is not here. Worry about yourself right now. We are not talking about him. We are ta[l]king about you. You have yourself to worry about, Mr. Garcia. Worry about yourself, please."

On July 2, the trial court was given two discs of recordings from Garcia's laptop. The trial court said it would not listen to the recordings because the recordings could contain privileged attorney-client communications, such as conversations between Garcia and his advisory counsel.

On July 16, Niroula said, "Your Honor, I have to alert the Court that I have received evidence and information regarding a matter that concerns me regarding this Court's ability to give me a fair trial, and I believe that this Court, based on the evidence provided to me and alerted to me, is biased against me based on a commentary that the Court made with another individual, so I am going to have to have some kind of explanation from the Court in an in camera hearing this afternoon, Your Honor."

The trial court responded, "No." Niroula said he might report the issue to the Judicial Council. The court responded, "Mr. Niroula, you can do what you want." Niroula explained that the comments at issue "could have been taken out of context," which was why Niroula wanted clarification. The court replied, "Mr. Niroula, I don't have to explain myself. The record in this trial is replete with how I bent over backwards for you and Mr. Garcia." The following exchange occurred:

"Defendant Niroula: It is a commentary regarding my health status and not reading my given motions because you are concerned about where my tongue has been are inappropriate, Your Honor.

"The Court: I don't care what you think. I can say what I want. The first amendment protects me. I can say what I want. The question is, in this trial, if I have discriminated against you. If anything, I have gone out of my way to help you out, and

you know it. Quit taking stuff out of context. In the big picture, I have bent over backwards to help you."

[Redacted text].

2. *ANALYSIS*

a) Contention

Niroula contends: (1) the trial court was biased; (2) the trial judge erred, under federal law, by not ordering an evidentiary hearing regarding the trial judge's bias and recusing himself from presiding over that hearing; (3) the trial judge erred, under state law, by not ordering an evidentiary hearing regarding the trial judge's bias and recusing himself from presiding over that hearing; and (4) the trial court gave incorrect advice to Niroula about releasing the recordings.

b) Forfeiture

The People contend Niroula forfeited the judicial bias issue by not requesting a hearing and/or recusal in the trial court. If a defendant knows during the trial all of the facts related to bias that are known at the time of appeal then the bias issue may not be raised for the first time on appeal; rather, it must be raised at the earliest opportunity in the trial court. (*People v. Scott* (1997) 15 Cal.4th 1188, 1207.)

While Niroula's appeal was pending, this court unsealed and permitted Niroula to read a partial transcript of Garcia's June 21 in camera conversation with the trial court, and Niroula submitted supplemental briefing on the issue of judicial bias. As such, Niroula was given what could be considered new information about the bias issue during the appellate period because he was not previously permitted to see the in camera

transcript. Due to Niroula receiving this information after the trial ended, we will err on the side of caution and conclude he did not forfeit the bias issue.

c) Bias

Niroula contends the trial court was biased. In particular, Niroula contends the court's "remarks expressed bias, and the court's expressed bias showed actual bias."

""While a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist '"the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable."' [Citation] Where only the appearance of bias is at issue, a litigant's recourse is to seek disqualification under state disqualification statutes: 'Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.' [Citation.] Finally, . . . only the most 'extreme facts' would justify judicial disqualification based on the due process clause." (*People v. Freeman* (2010) 47 Cal.4th 993, 996.)

When Garcia spoke to the trial court, he said, "But knowing that this Court has made fun of Mr. Niroula's HIV status, and Miss Hinos [(the court clerk)] has indicated that you were going to deny all the motions. I mean those are hard things to just ignore." When Niroula spoke to the trial court, he said he needed "to have some kind of explanation from the Court" about whether the court was "biased against [Niroula] based on a commentary that the Court made with another individual." Niroula

explained that the comments at issue "could have been taken out of context," which was why Niroula wanted clarification. Niroula said the comments concerned his "health status and not reading [Niroula's] given motions because you are concerned about where my tongue has been." The trial court told Niroula, "Quit taking stuff out of context."

The hearsay evidence about the alleged comments of the trial judge and court clerk is lacking context and clarity. According to Garcia, the trial judge made an inappropriate comment about Niroula's HIV status, and the courtroom clerk made a comment about the judge denying motions. Niroula asserts two comments were made, the first about health status, the second about not reading motions. Given the evidence, the only thing we can conclude is that the trial judge allegedly made a remark about Niroula's HIV status, and the courtroom clerk made a comment about the court not reading motions. There is nothing indicating what the trial court may have said about Niroula's HIV status, assuming a comment was in fact made. There is some information regarding the judge commenting about his concern for where Niroula's tongue had been, but these allegations about the trial court's comments are uncertain. Niroula himself stated that he wanted more information about the trial court's comments in order to put them into context. The information in the record is too vague to indicate bias. In sum, due to the lack of information regarding what the trial judge allegedly said about Niroula's HIV status, we conclude an appearance of bias and actual bias have not been demonstrated.

d) Federal Law

Niroula contends the trial judge erred, under federal law, by not ordering an evidentiary hearing regarding the trial judge's bias and recusing himself from presiding over that hearing. Niroula contends the matter should be remanded to the trial court for a hearing.

In *Hurles v. Ryan* (2014 Ninth Cir.) 752 F.3d 768 the Ninth Circuit Court explained that a habeas petitioner is entitled to a hearing concerning judicial bias if (1) the petitioner developed the factual bases of his claim in state court by seeking and being denied an evidentiary hearing; (2) the petitioner has shown his entitlement to a hearing; and (3) the allegations, if true, would entitle him to relief. (*Id*. at pp. 791-792.)

[Redacted text]. Additionally, Niroula's allegations are too vague to demonstrate he would be entitled to relief. On this record, all that can be properly alleged is the trial court made a comment about Niroula's HIV status that offended Garcia and Niroula. There is no context or specifics given about the comment. As such, Niroula has not shown he would be entitled to relief. Accordingly, we deny Niroula's request to remand the matter back to the trial court for an evidentiary hearing. Further, we conclude the trial court did not err by not holding an evidentiary hearing because (1) a hearing was not requested, and (2) as discussed in the subsection *ante*, the record does not reflect an appearance of bias or actual bias.

e) State Law

Niroula contends the trial judge erred, under state law, by not ordering an evidentiary hearing regarding the trial judge's bias and recusing himself from presiding

over that hearing. Niroula contends the matter should be remanded to the trial court for a hearing.

In *People v. Guerra*, the trial judge became outraged when trial counsel failed to inform the court that he had requested a stay, which would have obviated the need to summon 300 prospective jurors. The trial judge's comments were made outside the presence of the jurors/prospective jurors; the judge unequivocally stated the defendant would receive a fair trial; the judge did not display overt bias during the trial; the defendant did not request the judge recuse himself; and the defendant did not express concern about the judge's fairness during the trial. Based upon those circumstances the Supreme Court concluded the defendant's judicial bias claims were without merit. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

In the instant case, the trial court's alleged comment was made outside the presence of the jurors and the parties; the trial judge unequivocally told Niroula he had not discriminated against Niroula and had "gone out of [his] way to help [Niroula]," implying the court would continue to provide Niroula with a fair trial; Niroula does not point to bias in rulings made during the trial; and Niroula did not request the trial judge recuse himself during the course of the trial.

The only factor that lies somewhat in Niroula's favor is the expression of concern about fairness. [Redacted text]. Thus, while Niroula expressed concern, Niroula admitted he did not have all the information he needed in order to be concerned—Niroula needed to look at a transcript to determine what actually happened

before he truly raised the issue of bias with the trial court. Accordingly, while this factor is somewhat in Niroula's favor, it is not terribly strong given Niroula's uninformed expression of concern.

Due to the similarities between the instant case and *Guerra* we conclude the trial court did not err when it did not hold a hearing concerning judicial bias. Additionally, we deny Niroula's request to remand the matter to the trial court for a hearing as there is little in this record to indicate merit in Niroula's claim of bias.

f) Obstruction

Niroula contends the trial court gave misleading advice to Niroula about releasing or using the recordings. Niroula asserts the court gave misleading advice because it was trying "to make sure no one heard the derogatory and inappropriate remarks made by the court, its clerk, and other staff." Defendant asserts these acts of obstruction are further proof of the trial court's bias.

For the sake of judicial efficiency, assuming Niroula is correct that the trial court made incorrect legal statements about the recordings, such statements do not show bias, they merely show a mistake. Again, it is unclear what is on the recordings other than an alleged comment about Niroula's health. Niroula would have this court speculate that the health comment was negative; speculate that the content of the comment revealed bias; and then speculate that the trial court, with a court reporter present, intentionally gave Niroula misleading advice for the purpose of covering up the allegedly biased statements. There is too much speculation required on this point, as such, a reversal is

not warranted. (*People v. Gray* (2005) 37 Cal.4th 168, 230 [speculation will not support reversal of a judgment].)

B. SEVERANCE MOTION

1. *PROCEDURAL HISTORY*

As explained *ante*, during the course of Niroula's and Garcia's confinement at the county jail, sheriff's deputies recorded telephone calls made by Niroula and Garcia, some of those calls included Niroula's calls to criminal defense attorneys in which he discussed trial tactics. The calls were recorded by the deputies primarily due to the attorneys not having registered their telephone numbers with the jail; if the telephone numbers had been registered, then the deputies should have known not to record the calls. During discovery, the prosecutor disclosed the recordings to all defendants, including Garcia. Garcia listened to the conversations between Niroula and the attorneys.

Prior to trial, Niroula moved to sever the joint trial due to Niroula's belief that Garcia would use the telephone recordings "in conjunction with his own antagonistic defense." The prosecutor opposed the motion. The trial court denied the motion without prejudice. The trial court denied the motion, in part, because it did not know the content of the recorded telephone calls.

During trial, Niroula filed a motion to reconsider his motion to sever the joint trial. Included in the motion was a transcript from Niroula's investigator's interview with Garcia. In the interview, Garcia said he listened to Niroula's telephone calls from the jail, including calls to attorneys. Garcia said his interests were adverse to Niroula's

interests because they have "competing defenses." Garcia said the recordings of Niroula's telephone calls included "intimate details regarding the facts and merits of the case as well as potential motions [Niroula] would be filing and [Niroula's] general strategy for his defense." Garcia disclosed that he prepared his own defense "in accordance to learning [Niroula's] strategy." For example, Garcia subpoenaed records that he learned about through the telephone calls, and he intended to "impeach [Niroula's] defense." The transcript is written into the motion, it is not attached as a separate document and does not include a veracity statement.

At the hearing on the motion for reconsideration, the trial court said it still lacked evidence as to whether "Mr. Garcia listened to these calls, or Mr. Niroula made those calls, or what the content of the calls was." The trial court also said it lacked evidence as to what Garcia would do with the alleged information from the recordings. The trial court noted the prosecutor had not heard the recordings, and thus had not benefitted from the recordings. The trial court found that if the trial were severed the "[s]ame witnesses, same everything" would be presented at the severed trials, so the two trials "would be exactly the same." The trial court explained the jury would not hear the telephone recordings in either trial because "those are privileged calls and they're hearsay and irrelevant," and thus inadmissible. The trial court clarified that it assumed for the sake of argument that the calls were privileged because the court did not know the content of the recordings.

The prosecutor asserted Garcia and Niroula had worked together on their defense strategy—the prosecutor had witnessed the trial court permit Garcia and Niroula to meet

together in the jury box when their case was not on calendar. Garcia and Niroula had also asked the trial court to rescind the stay away order so they could be housed together. Additionally, the prosecutor noted that in Niroula's opening statement he made comments that would exonerate Garcia by stating Garcia "had nothing to do with [the crimes]." Further, in Garcia's cross-examination of McCarthy, Garcia directed his questions at McCarthy's credibility, the details of the murder, the blood, and the cleanup, which were designed to argue the murder did not occur, as opposed to questioning McCarthy about Niroula being present and Garcia not being present. In other words, Garcia's questions were designed to exonerate both himself and Niroula, as opposed to blaming Niroula. Further, the prosecutor said Niroula had mentioned he spoke to the attorneys on the telephone recordings about his immigration status, as opposed to the criminal charges.

The trial court said, "So the bottom line is even if—even if Garcia has listened to these, even if he has, and I'm saying 'even if,' [b]ecause I have no evidence that he has, folks. Okay. None. This is all premature. Even if he has listened, the D.A. has not benefited. So the cases seem to say, Mr. Niroula, that I have reviewed, the cases I've seen talk about whether the D.A. got something out of it and they could use it against the defendant." The court explained, "So what I need to do, at some point, not today, probably is, Mr. Garcia needs to come in camera and tell me to the extent he can" about the recordings he allegedly heard.[9]

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[9] Garcia was not present at the hearing on the motion for reconsideration.

Niroula offered to participate in an in camera discussion concerning the content of the telephone calls. The trial court again said it needed to have an in camera discussion with Garcia. The trial court denied Niroula's motion without prejudice.

Later in the trial, Niroula again requested the joint trial be severed due to discovery issues, including, in part, the recorded telephone calls. The trial court impliedly denied the motion by saying the trial would proceed. Niroula requested he be returned to the jail and tried in absentia. Nevertheless, Niroula continued to participate in the trial.

2. *ANALYSIS*

Niroula contends the trial court erred by denying his severance motion.

"The Legislature has expressed a preference for joint trials. [Citation.] Section 1098 states that multiple defendants jointly charged with a felony offense 'must be tried jointly, unless the court order[s] separate trials.' This rule applies to defendants charged with '"common crimes involving common events and victims."'" (*People v. Carasi* (2008) 44 Cal.4th 1263, 1296.)

"[S]eparate trials may be ordered in the face of antagonistic defenses. [Citation.] . . . [S]uch conflict exists only where the acceptance of one party's defense precludes the other party's acquittal." (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1296.) Severance may also be appropriate "when 'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants.'" (*People v. Coffman* (2004) 34 Cal.4th 1, 40.) "We review the denial of severance for abuse of discretion—a

deferential standard based on the facts as they appeared when the ruling was made." (*Carasi*, at p. 1296.)

Garcia and Niroula were jointly charged with murder and other felonies. Accordingly, the preference for a joint trial was triggered. (§ 1098.) Niroula's severance motions did not include any evidence. As a result, there is no evidence reflecting the possible content of the telephone recordings, whether Garcia listened to the recordings, or how Garcia may have intended to use the recordings. Due to the preference for joint trials, and the lack of evidence concerning why the joint trial would need to be severed, we conclude the trial court did not abuse its discretion in denying severance.

Moreover, we note in the transcript of Garcia's interview, which was incorporated into the body of Niroula's motion and lacked a veracity statement, Garcia said he listened to conversations involving eight attorneys whose names he could recall: (1) George Lazarus; (2) Robert Amparan; (3) Chelsea Nelson; (4) Angela Bean; (5) Gregory Johnson; (6) Stephen Swiegart; (7) Geoffrey Rottwein; and (8) Stuart Hanlon. In response to a question from the trial court, Niroula said Amparan represented Niroula in federal cases in San Francisco and Marin; Lazarus was present when Niroula was arrested in San Francisco; Bean and "Chelsea Healy," who we assume is the same as Chelsea Nelson, represented Niroula in immigration matters; and Johnson and Swiegart were "consulted," but a retainer agreement was not signed. Given that several of the attorneys appear to have been consulted about other legal matters, it cannot be inferred from the record that Niroula had important strategy

conversations about the instant case such that the possibility of Garcia hearing the recordings would necessarily implicate a violation of Niroula's trial rights.

Niroula raises an argument about the government impermissibly infringing on his attorney-client privilege by recording the telephone conversations. Niroula contends his right of due process was violated by the government's misconduct. Niroula's severance motion was based upon Garcia listening to the recorded conversations, not upon government misconduct. Nevertheless, to the extent Niroula attempted, at the trial court, to argue the government misconduct issue as part of the severance motion, we note that as part of Garcia's motion to recuse the district attorney's office, the trial court found the prosecutor did not listen to the allegedly privileged telephone calls. Niroula's appellate argument does not undermine this factual finding. Accordingly, we find the government misconduct issue on appeal to be unpersuasive.

C. RESTITUTION

In a restitution argument similar to Garcia's restitution contention, Niroula asserts (1) his minute order and abstract of judgment should be amended to reflect the trial court imposed joint and several liability; and (2) Bustamante's and Replogle's case should be remanded for the trial court to impose joint and several liability for the restitution.

We addressed the Bustamante and Replogle issue within the portion of the opinion addressing Garcia's appeal, but will address it here as well. The opinion in Bustamante's and Replogle's appeal was filed by this court on February 25, 2014. (*People v. Replogle*, *supra*, E053711.) The remittitur in that case was issued on June

18, 2014. After the remittitur, an appellate court has no further jurisdiction over the case. (§ 1265; *People v. Dutra*, *supra*, 145 Cal.App.4th at p. 1366.) We no longer have jurisdiction over Bustamante's and Replogle's case and therefore cannot order a hearing to take place in that matter.

Next, we address the minute order and abstract of judgment issue. During the oral pronouncement of judgment for Niroula, the trial court said liability for victim restitution would be "joint and several as to all the other defendants." The minute order does, in fact, include the "joint and several" language; the abstract of judgment does not. We will direct the trial court to amend the abstract of judgment to include the "joint and several" wording, and to identify which individuals share that liability.

D. PAROLE REVOCATION FINE

Niroula joins in Garcia's contention that the trial court erred by imposing a parole revocation fine (§ 1202.45) because Niroula and Garcia were sentenced to life in prison without the possibility of parole. The People supported Garcia's contention.

Section 1202.45, subdivision (a), provides, "In every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4."

The trial court imposed a $2,000 restitution fine (§ 1202.4, subd. (b)) and a $2,000 parole revocation fine (§ 1202.45), which was "stayed, pending successful completion of parole." The trial court sentenced defendant to prison for life, without the

possibility of parole. As a result, a period of parole is not included in Niroula's sentence and a parole revocation fine should not have been imposed. We will direct the trial court to strike the $2,000 parole revocation fine (§ 1202.45).

E. TAKING ENHANCEMENT

Niroula joins in Garcia's contention regarding their abstracts of judgment being corrected to reflect the enhancement for taking more than $200,000 is not attached to Count 10. (§§ 186.11, subd. (a)(3), 12022.6, subd. (a)(2).) The People supported Garcia's assertion.

Penal Code section 186.11, subdivision (a)(3) provides that if a "pattern of related felony conduct" results in the victim losing between $100,000 and $500,000 then the defendant shall receive an additional term of punishment. Count 10 consisted of a conviction for receiving various items of the victim's stolen property, including title to the victim's Rolls Royce and the victim's financial records. When the trial court pronounced Niroula's sentence, it imposed a two-year concurrent term on Count 10. For the financial taking enhancement, the trial court imposed a two-year consecutive prison term.

The financial taking enhancement was not attached to Count 10 during the pronouncement of judgment because (1) the enhancement can attach to a pattern of conduct rather than a specific count (§ 186.11, subd. (a)(3)); and (2) a consecutive prison term for an enhancement cannot be imposed on a count with a concurrent prison term for the felony (*People v. Mustafaa*, *supra*, 22 Cal.App.4th at p. 1311 [a

consecutive term cannot be imposed on an enhancement if a concurrent term was imposed for the underlying felony]).

Niroula's abstract of judgment reflects the financial taking enhancement is associated with Count 10. This conflicts with the oral pronouncement of judgment and therefore must be corrected. (*People v. Mitchell*, *supra*, 26 Cal.4th at pp. 185-186 [abstract must reflect oral pronouncement].) Accordingly, we will direct the trial court to correct Niroula's abstract of judgment to reflect the financial taking enhancement is not associated with any particular count.[10]

III. MCCARTHY'S APPEAL

A. PROCEDURAL HISTORY

1. *MCCARTHY'S STATEMENTS*

The victim was killed on December 5, 2008. Mullikin reported the victim missing on December 7. On January 7, 2009, an attorney who had previously represented the victim contacted Browning to report a U-Haul truck was parked in front of the victim's residence. Browning went to the victim's house. Bustamante was at the victim's residence with a key to the residence in his possession. Police arrested Bustamante.

Arthur Jimenez, a jailhouse informant, told police Bustamante said a person with the last name Macain accompanied Bustamante on the night of the murder. Browning's partner, Detective Min, interviewed women who, on December 3rd or 4th, had met

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[10] Niroula has also petitioned this court for a writ of habeas corpus. We resolved the petition by separate order. (*In re Niroula* (E064352) [filed Apr. 6, 2016].)

Bustamante and another man who was half Japanese and half African-American. Through research, Min and Browning found McCarthy told people he was half Japanese, so the detectives deduced McCarthy was with Bustamante on December 3rd or 4th. The detectives wanted to speak with McCarthy, but did not consider him to be a suspect.

Bustamante's girlfriend, Michelle McCollum, was in attendance during one of Bustamante's court appearances. Browning spoke to McCollum, who said she lived with Bustamante and McCarthy. McCollum told Browning where McCarthy worked, which was at a medical facility.

On July 16, 2009, at approximately 9:30 a.m., Browning and Min arrived at McCarthy's place of employment in San Francisco. Browning and Min wore plain clothes with exposed badges and drove an unmarked law enforcement vehicle. During the first five minutes of speaking with the detectives, McCarthy denied being involved in the offenses in Palm Springs. Browning explained to McCarthy that the detectives had searched McCarthy's apartment and had documents reflecting McCarthy was in Palm Springs on December 2nd. Within 20 minutes, McCarthy admitted to being in Palm Springs and in the victim's house.

McCarthy agreed to go to the San Francisco Hall of Justice Police Department with the detectives. Browning told McCarthy he could meet them at the police station, but McCarthy said he did not have a car and asked for a ride. The detectives gave McCarthy a ride to the police station. McCarthy was not handcuffed and rode in the front passenger seat.

At the police station, the detectives and McCarthy went into an interview room. The door was not locked. McCarthy was not handcuffed. Browning thanked McCarthy for coming and told McCarthy he was free to leave at any time. McCarthy went to the restroom unaccompanied while at the police station.

During the interview, McCarthy told the detectives he entered the victim's house with Bustamante; Niroula was already present in the house. McCarthy said he witnessed Bustamante stab and kill the victim. McCarthy admitted going to Home Depot with Bustamante to purchase a shovel and then to bury the victim. McCarthy explained he had gone to Palm Springs to "party with Bustamante." When McCarthy walked into the victim's home, he saw Bustamante and the victim were about to fight. McCarthy grabbed the victim to stop him from harming Bustamante. McCarthy saw Bustamante punch the victim in the stomach with an object, and saw the victim fall to the floor. McCarthy went out to the car, and when he returned something was wrapped up on the floor, which McCarthy thought might be the victim's body. McCarthy then "got entangled in [the criminal acts] when he assisted in burying the body." Browning asked McCarthy to accompany the detectives to Palm Springs to show them where the victim was buried. McCarthy agreed to travel with the detectives. Browning believed there was insufficient evidence tying McCarthy to the crime, and that McCarthy would only be a witness in the case.

After approximately 60 to 90 minutes at the San Francisco police station, the two detectives and McCarthy left to drive to Indio. The group traveled for approximately eight hours in the unmarked police car. The men shared casual conversation and

listened to the radio. They stopped for food and fuel. McCarthy was not handcuffed and slept for a large portion of the trip. McCarthy was wearing his work scrubs and had a bag containing a shirt and pants. McCarthy did not have money, toiletries, or a cell phone with him. Browning believed the cell phone was left in McCarthy's locker at work.

The group arrived in Indio at approximately 9:00 p.m. They went to a Home Depot that McCarthy believed resembled the one where he and Bustamante purchased the shovel, and then the group began searching for the burial location. The victim's body was not located.

At approximately 1:00 a.m., police checked McCarthy into a motel. McCarthy spent the night at the motel, and the detectives went home. McCarthy was alone at the motel. Police officers were stationed within a block of the motel. Browning instructed the officers to call him and detain McCarthy if it appeared McCarthy "was grabbing his bag and leaving town," but to leave McCarthy alone if "he were to get out and walk around."

The following morning, at approximately 9:00 or 10:00 a.m., Browning met McCarthy at the motel. Jamie Johnson, a crime scene technician was also present. Browning, Johnson, and McCarthy drove around Indio, Desert Hot Springs, Beaumont, and Fontana looking for landmarks that might trigger McCarthy's memory. McCarthy was not free to leave while in the car. During lunch, McCarthy asked Browning if they could search one more area and then go home. They continued searching, and then, after failing to locate the victim's body, they returned to the Palm Springs police station

at approximately 4:00 or 5:00 p.m. McCarthy was shown to an interview room with an unlocked door. Browning informed McCarthy of the locations of the restrooms and exits, in case McCarthy wanted to "step outside." McCarthy went to the restroom unattended.

During the drive around Riverside and San Bernardino Counties on the second day, Browning noticed discrepancies between things McCarthy had said on the first day, in San Francisco, and things he was saying during the second day. For example, McCarthy initially said the body was buried at night, but later said the body was buried during the daytime. McCarthy had also inconsistently said (1) he drove to Palm Springs with Bustamante; (2) he flew to Palm Springs with Bustamante and drove back to San Francisco in Bustamante's car; and (3) he flew to Palm Springs with Bustamante and Niroula and returned to San Francisco in the victim's car. The discrepancies caused Browning to realize McCarthy was the "Macain" figure (mentioned by the jailhouse informant) who accompanied Bustamante on the night of the murder.

Due to McCarthy's inconsistent statements, at approximately 5:00 or 6:00 p.m., Browning informed McCarthy of his *Miranda* rights. After reading McCarthy his rights, Browning asked, "'With those rights in mind, talk to me about what's going on, is that cool?'" McCarthy responded, "'Okay.'" Browning confronted McCarthy about his inconsistent statements. McCarthy then gave a different version of the events.

McCarthy became "choke[d] up," emotional, and remorseful. McCarthy explained that he flew to Palm Springs with Niroula and Bustamante with the intention of kidnapping the victim and stealing his identity in order to "clean out his financial

accounts"—a plan created by Niroula. After arriving in Palm Springs, the plan changed from kidnapping the victim to killing the victim because there was concern that the victim would "resurface" and object to the power of attorney documents used to access his accounts.

McCarthy also discussed the failed plan to kill the victim on December 4, and the revised plan to kill the victim the following day, December 5. McCarthy described how the killing occurred: Niroula opened the door; McCarthy and Bustamante entered the victim's house; McCarthy "display[ed] the knife to [the victim's] chest throat area"; Bustamante stabbed the victim; the victim died; Niroula instructed McCarthy to take the victim's wallet, which he did; McCarthy wrapped the victim's body in bedding; McCarthy and Bustamante cleaned the victim's blood from the floor; McCarthy and Bustamante placed the victim's body in the trunk of the victim's car; they took the victim's dog; McCarthy, Bustamante, and Niroula drove away from the residence in the victim's car; McCarthy and Bustamante drove to Fontana, where they stayed at a motel; McCarthy and Bustamante went to Home Depot, where they bought a map and shovel; McCarthy and Bustamante drove to "a scenic route area," where they buried the victim's body; and Bustamante paid McCarthy $5,000 for his role in the killing.

Browning's belief that McCarthy was a witness was "overturned by [Browning's] supervisor," who instructed Browning to arrest McCarthy. McCarthy was arrested on the second day, after the Mirandized interview at the police station. Upon being arrested, McCarthy dropped his head; he did not appear surprised at his arrest and did not ask why he was being arrested. Two or three days later, at the victim's house,

and after being Mirandized a second time, McCarthy participated in a videotaped interview wherein he pointed out where different portions of the crime occurred.

2. *PRELIMINARY HEARING*

On September 9, 2009, at the preliminary hearing, the trial court, in particular Judge Stroud, said, "I want to put on the record that during the break that I met with the attorneys. I did express some concern to the attorneys that objectively it appeared to the Court that Mr. McCarthy was in custody." The court explained, "[N]ot withstanding [*sic*] what he was told, he's really not free to leave at any point after San Francisco. Certainly, they had probabl[e] cause to arrest him. And I don't want to make assumptions, but I think if he said I want to go home [to] San Francisco, he would have found a new home down here in the desert." The court said the attorneys could address the issue the next day.

On September 10, the prosecutor and McCarthy submitted memorandums as to whether McCarthy's rights would be violated by using, as evidence, the statements McCarthy made to Browning. The prosecutor argued McCarthy was not in custody during the trip to Palm Springs because he volunteered to accompany the detectives to Southern California. The prosecutor argued it was irrelevant that McCarthy was being observed by police while at the motel, because McCarthy was unaware of the officers' presence. The prosecutor asserted, "[T]he only real questioning that occurred after leaving San Francisco occurred at the Palm Springs Police Station after McCarthy expressly waived his *Miranda* rights." McCarthy's memo was a statement of the law related to *Miranda*.

On September 14, the trial court addressed the *Miranda*/custody issue. The trial court said, "I'm going to make a specific finding and let the appellate court deal with the issue. I'm satisfied that Mr. McCarthy was, in fact, in custody." The court explained: McCarthy was not offered a change of clothes, he did not have money with him, he was transported for eight hours with two law enforcement officers, he was placed in a motel by officers, law enforcement officers were monitoring him overnight, and McCarthy said he wanted to leave but was taken to continue searching for the victim's body.

The court concluded, "Considering the totality of all the circumstances, this Court really makes a finding that he was effectively in custody. Now, he's in custody, but he doesn't know it. This may be an investigatory technique. [¶] Browning did say he's used it before and let somebody go. Well, I don't know much about that case where he let somebody go. But all I can say is this type of investigatory technique is pushing the envelope."[11]

The court continued, "Now, as to whether the statements will come in, I may be pushing the envelope also in allowing it in and that's because the *Miranda* case really

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[11] Browning testified that, in a different case involving a home-invasion robbery (with codefendants) Browning spoke to one of the codefendants, who was on probation. The codefendant admitted his role in the home-invasion robbery. Browning did not immediately arrest the codefendant, but instead sought a warrant, and the codefendant was later arrested by sheriff's deputies. Browning sought the warrant so "it would not be challenged that he was not free to leave." Browning explained, "Again, he did confess. I did not arrest him. I left his house. I left him there. And I filed a warrant for his arrest later. [¶] Same intention it was going to be for McCarthy, however situations changed once we got to Palm Springs."

centers around coercion. And the circumstances which would give rise to a person, a suspect or a person who is in custody to be subject to coercive nature of investigation techniques by officers. [¶] Because he didn't realize he was in custody under the scenario he didn't know there were officers monitoring him and things of that sort. I see there's a lack of that coercive nature, and so I have not found a case exactly on point in this respect. [¶] So, as I said, while I'm letting it in, I'm going to leave it up—I'm not going to make any new law in the case. I'm going to leave it up to the appellate courts to deal with the issue."

McCarthy's attorney argued that the circumstances reflected McCarthy was in custody from the time he left San Francisco; McCarthy was asked incriminating questions; and therefore, the questions asked by Browning amounted to a custodial interrogation. The trial court responded, "And I agree with a lot of what you've indicated that he was in custody. . . . [¶] . . . [¶] I don't find that he knew he was in custody. I think he really thought he was free to leave. He didn't ask to until the second day. [¶] I believe that he thought he was not in custody." The trial court, still Judge Stroud, held McCarthy to answer on charges of (1) murder (§ 187), and (2) two counts of conspiracy (§ 182).

3. *MOTION TO SET ASIDE THE INFORMATION*

On November 2, 2009, McCarthy filed a motion to set aside the information. (§ 995.) In the motion, McCarthy argued his right against self-incrimination was violated by his statements made to Browning being used at the preliminary hearing

because his *Miranda* rights had been violated. The prosecutor opposed the motion. On December 7, Judge Downing held a hearing on the motion.

After hearing argument, Judge Downing said, "I do believe the judge's findings at the prelim were correct. He took a lot of time with this case. He did not rush through it. He spent a lot of time with it, and he made findings on the record, clear findings and the reasons for the findings that Mr. McCarthy was in custody from the moment he was picked up at the doctor's office. I don't see anything wrong with his findings.

"My problem and yours is whether or not the *Miranda* advisement was coercive was all a—the conversations with Mr. McCarthy before the *Miranda* advisements such that the *Miranda* advisement was coercive and, therefore, the whole thing should be suppressed[.] That's the issue for me.

"I don't have any doubt he was in custody. Come on. He clearly was. Because he wasn't in handcuffs and they didn't tell him, 'You're under arrest,' doesn't mean he wasn't in custody. Anybody would think that he was not free to leave. I mean, he wasn't. And he wasn't.

"At some point for sure, certainly when he got to the motel, he wasn't free to leave. He wasn't going to jump out of that police car in San Francisco. I submit to you had he jumped out they would have grabbed him." The court commented, "I don't like what the police did here. I think they pushed the line real, real close." The court found the relationship between McCarthy and the officers during the drive to Southern California, that same night while looking for the victim's body, and looking for the body on the second day "was very relaxed, casual, no coercion, no force, no threats, any

of that. Clearly in rereading, all that shows this was a very relaxed type environment in which there was no way Mr. McCarthy was threatened or anything like that."

The court continued, "The problem was the fact that he was in custody because the magistrate so found, does that affect his *Miranda* advisement which was, again, clear and concise, and according to the rules, and Mr. McCarthy waived it?

"The question is, was he coerced because of the 30 hours he spent with the police before the *Miranda* advisement? There's two cases: One goes one way; one goes the other. Surprise, surprise. *Missouri versus Siebert* says it was too much, and *Oregon versus Elstad* said under the circumstances of both those cases, it was okay. Neither case talked about 30 hours being talked to before *Miranda* advisements. There were a few hours in each of those two cases. So that concerns me greatly.

"There were obviously two different sets of conversations here, the first prior to *Miranda*, in which basically Mr. McCarthy didn't admit to much involvement at all, and the statement after *Miranda*, in which he basically confessed to the murder as an aider and abetter, being unlawfully or responsible, I believe, as the stabber himself. [¶] He was not the stabber . . . . [¶] I think it's real close. From looking at it all, I don't think that Mr. McCarthy's rights were violated. I think he gave a knowingly intelligent waiver. I think it's close." The court ruled that McCarthy's pre-*Miranda* statements were inadmissible, but his post-*Miranda* statements were admissible.[12]

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[12] On January 22, 2010, this court issued a summary denial of McCarthy's writ petition. (*McCarthy v. Superior Court* (Jan. 22, 2010, E049833).)

4. *SUPPRESSION MOTION*

On July 14, 2010, McCarthy filed a motion to suppress the statements he made to Browning. (§ 1538.5.)[13] The prosecutor opposed the motion. The trial court held an evidentiary hearing on the motion wherein Browning testified. Browning testified about his first contact with McCarthy, at McCarthy's place of work, as well as the interview at the Palm Springs police station. Browning explained that McCarthy walked into the Palm Springs police station on his own. McCarthy used the restroom unaccompanied; the restroom is located "within feet" of the lobby doors, but McCarthy did not try to leave.

Browning also testified about McCarthy's question, during the search for the victim's body, regarding returning home. McCarthy asked "when he could be going home." Browning asked if McCarthy would mind checking one more area for the victim's body. McCarthy agreed. That discussion occurred at approximately 2:00 or 3:00 p.m. on July 17. McCarthy did not renew his question about returning home or protest going to the Palm Springs police station.

After Browning's testimony, the trial court said, "The point is he's taken in, he's Mirandized. He's given his rights. He's got the right to say, 'I want a lawyer,' and he

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[13] Section 1538.5 motions typically concern alleged violations of Fourth Amendment search and seizure rights. (*People v. Superior Court* (*Zolnay*) (1975) 15 Cal.3d 729, 733.) McCarthy argued the motion was procedurally correct because "other evidence was seized as a result of the violation of [his] *Miranda* and Fifth Amendment rights."

doesn't. Instead, he tells the police, okay, and he confesses. I don't see the error, myself."

After argument from both sides, the trial court concluded, "[T]he court finds that he was treated with the utmost respect, and at the time Mr. McCarthy was Mirandized, that his waiver was voluntarily, intelligently, freely, and voluntarily given. It was not the product of any type of coercion, whatsoever. The opposite is true. Mr. McCarthy had the option at that moment of refusing to talk if he had wanted to, and the option of asking for a lawyer if he had wanted to. [¶] What had previously transpired between him and the police did not affect his judgment, in my opinion, as to wanting to talk to the police. And he did talk. So I don't see that it was in violation of his rights, at all. The police, as far as I can tell here, acted appropriately during the entire 36 hours or however long it was. [¶] So that is the ruling of the Court." The court denied, in part, McCarthy's section 1538.5 motion, ruling that the post-*Miranda* statements would be admissible, but the pre-*Miranda* statements were inadmissible. McCarthy entered a guilty plea and testified against his codefendants.

B. ANALYSIS

1. *CONTENTION*

McCarthy contends the trial court erred by ruling his post-*Miranda* statements to Browning would be admissible because Browning used a "two-step" interrogation process, which violated McCarthy's constitutional rights.

2. *LAW*

"In reviewing *Miranda* issues on appeal, we accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained." (*People v. Smith* (2007) 40 Cal.4th 483, 502.)

"'Even when a first statement is taken in the absence of proper advisements and is incriminating, so long as the first statement was voluntary a subsequent voluntary confession ordinarily is not tainted simply because it was procured after a *Miranda* violation. Absent "any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," a *Miranda* violation—even one resulting in the defendant's letting "the cat out of the bag"—does not "so taint[] the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period."'" (*People v. Scott* (2011) 52 Cal.4th at p. 477.)

"In deciding the question of voluntariness, the United States Supreme Court has directed courts to consider 'the totality of circumstances.' [Citations.] Relevant are 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.'" (*People v. Williams* (1997) 16 Cal.4th 635, 660.)

3. *PRE-MIRANDA STATEMENTS*

a) Coercion

We address the voluntariness of the pre-*Miranda* statements. We start with the factor of coercion. The detectives asked McCarthy if he would go with them to the San Francisco Hall of Justice Police Department. McCarthy agreed to go. Browning thanked McCarthy for coming and told McCarthy he was free to leave at any time. Browning asked McCarthy to accompany the detectives to Palm Springs to show them where the victim was buried. McCarthy agreed to travel with the detectives. The men shared casual conversation and listened to the radio. McCarthy slept for a large portion of the trip.

McCarthy and the detectives arrived in Indio at approximately 9:00 p.m., and searched for the victim's body until approximately 1:00 a.m., at which point McCarthy was left alone in a motel room overnight. At 9:00 or 10:00 a.m., Browning met McCarthy at the motel to resume the search for the victim's body. During lunch, at approximately 2:00 or 3:00 p.m., either (1) McCarthy asked Browning if they could search one more area and then go home; or (2) McCarthy asked "when he could be going home," Browning asked if McCarthy would mind checking one more area for the victim's body, and McCarthy agreed. They continued searching until returning to the Palm Springs police station at approximately 4:00 or 5:00 p.m. Browning informed McCarthy of the locations of the restrooms and exits, in case McCarthy wanted to "step outside." McCarthy went to the restroom unattended. The restroom is located "within

feet" of the lobby doors, but McCarthy did not try to leave. At approximately 5:00 or 6:00 p.m., Browning informed McCarthy of his *Miranda* rights.

There is nothing indicating Browning coerced McCarthy into speaking to him about the crime. McCarthy slept for most of the trip to Southern California and was left alone overnight in a motel room, during those times he was not speaking to police. While awake with the detectives, McCarthy was assisting in the search for the victim's body—a search he volunteered to participate in. McCarthy was in restaurants and near exit doors to the police station, but he did not try to physically leave or refuse to continue with the search. Given the evidence, McCarthy's actions and words were not coerced.

b) Length of Time

Next, as to the length of the interrogation, the detectives met McCarthy at his place of employment on July 16 at approximately 9:30 a.m. After 15 or 20 minutes, they left for the San Francisco police station. The men spent approximately 60 to 90 minutes at the police station before leaving for Southern California. McCarthy slept for much of the trip south. From approximately 9:00 p.m. to 1:00 a.m., the men searched for the victim's body. From 1:00 a.m. until approximately 9:00 or 10:00 a.m. McCarthy was alone in his motel room. On July 17, McCarthy was with Browning, not Mirandized, from 9:00 or 10:00 a.m. to 5:00 or 6:00 p.m.

Overall, McCarthy's pre-*Miranda* time with the detective began at 9:30 a.m. on July 16 and ended around 5:00 or 6:00 p.m. on July 17. However, during that time, McCarthy slept while in the detectives' company and was left alone in a motel room for

eight or nine hours. As a result, the biggest piece of the "interrogation" time was on July 17 when McCarthy was with Browning not Mirandized, from 9:00 or 10:00 a.m. to 5:00 or 6:00 p.m.

c) Location

The third factor is location. McCarthy was primarily in a car while with Browning. They stopped at restaurants, but were otherwise in a vehicle looking for the victim's body. On one hand, being in a car might be less intimidating than being in a police station environment, but, on the other hand, it could be considered more difficult to leave a car than a building.

d) Continuity

The fourth factor is continuity. As explained *ante*, after leaving San Francisco, McCarthy slept for most of the eight-hour trip to Southern California. After searching for the victim's body for approximately four hours, McCarthy was left alone in a motel for eight or nine hours. On July 17, McCarthy was with Browning, not Mirandized, for seven to nine hours. Thus, there were large breaks in the "interrogation" during the two-day period; however, McCarthy was with Browning for most of the workday on July 17.

e) McCarthy's Condition

Next, we address McCarthy's maturity, education, physical condition, and mental health. McCarthy is a former marine. He has an Associate's Degree in nursing. He was working in a medical office when contacted by the detectives. McCarthy confessed to moving the victim's body out of the victim's house and burying the

victim's body. Given McCarthy's Associate's Degree, he is educated. McCarthy's medical employment and military service show maturity and that he is mentally healthy. McCarthy's acts of moving and burying the victim reflect that he is physically healthy because those actions require physical strength. Thus, there is evidence reflecting McCarthy is educated, mature, physically fit, and mentally healthy.

f) Conclusion

In sum, McCarthy volunteered to assist the detectives in locating the victim's body; McCarthy was contacted by the detectives approximately 32 hours before he was Mirandized; he was in a car during most of the time spent with Browning; there were large breaks during the 32-hour period, in which McCarthy slept or was left alone; and McCarthy is educated, mature, physically fit, and mentally healthy.

While 32 hours is a lengthy period of time from initial contact to being informed of one's *Miranda* rights, McCarthy was not with the detectives during that whole period. Further, there is nothing indicating McCarthy wanted to leave. He asked about the possibility of going home once, but appeared to be in no rush to leave—he stayed at the motel and he stayed at the Palm Springs police station when he was near the exit doors. Given the totality of the circumstances, we conclude McCarthy's pre-*Miranda* statements were voluntary.

4. *POST-MIRANDA STATEMENTS*

a) Coercion

We now address the voluntariness of McCarthy's post-*Miranda* statements, in particular, the factor of coercion. On July 17, at 4:00 or 5:00 p.m., Browning and

McCarthy arrived at the Palm Springs police station. McCarthy was shown to an interview room with an unlocked door. Browning informed McCarthy of the locations of the restrooms and exits, in case McCarthy wanted to "step outside." McCarthy went to the lobby restroom unattended, and the restroom was located near the lobby exit doors.

At approximately 5:00 or 6:00 p.m., Browning informed McCarthy of his *Miranda* rights. After reading McCarthy his rights, Browning asked, "'With those rights in mind, talk to me about what's going on, is that cool?'" McCarthy responded, "'Okay.'" Browning confronted McCarthy about his inconsistent statements. McCarthy became "choked up," emotional, and remorseful. McCarthy confessed to his role in the killing.

There is nothing indicating coercion on the part of law enforcement. It appears from the evidence that McCarthy was in an unlocked room, aware he could leave the room, and aware of the locations of the exits. There was no pressure on McCarthy to waive his rights or make a statement.

b) Length of Time

The overall time period from initial contact to McCarthy confessing was approximately 32 hours—from 9:30 a.m. on July 16 to 5:00 p.m. on July 17. The time from McCarthy being Mirandized to McCarthy confessing was much shorter. McCarthy was informed of his *Miranda* rights, waived his rights, was confronted with his inconsistent statements, and confessed.

c) Location

The post-*Miranda* statements were made in the Palm Springs police station, in an interview room with an unlocked door.

d) Continuity

During the 32-hour period from contact to the waiver of *Miranda* rights, McCarthy slept for most of the eight-hour ride to Southern California and was left alone in a motel room for eight or nine hours. On July 17, McCarthy was with Browning, not Mirandized, for seven to nine hours. The post-*Miranda* period—from *Miranda* rights being given to the confession—was continuous, but also, as discussed *ante*, was a much shorter amount of time.

e) McCarthy's Condition

As discussed *ante*, there is evidence that McCarthy was educated, mentally healthy, physically fit and mature.

f) Conclusion

In sum, there is nothing indicating the post-*Miranda* statements were coerced; the length of time from *Miranda* rights to confession was not lengthy; the statements were made in a police station interview room with an unlocked door; the post-*Miranda* portion of the interrogation was continuous; and there is evidence supporting the finding that McCarthy was educated, mentally healthy, physically fit and mature. Given the foregoing circumstances, McCarthy's post-*Miranda* statements to Browning were voluntary. There is nothing indicating McCarthy was pressured by law enforcement or

caused to suffer undue stress. Rather, the record reflects McCarthy chose to waive his rights and make a statement.

5. *MISSOURI V. SIEBERT*

McCarthy analogizes his case to *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*), in which police obtained an un-Mirandized confession from the defendant, gave her a 15- to 20-minute break, administered the *Miranda* warning, and then obtained the confession again. (*Seibert*, at pp. 604-605.) The trial court excluded the defendant's pre-*Miranda* statement, but admitted the post-*Miranda* statement. (*Seibert*, at p. 606.) The United States Supreme Court concluded the post-*Miranda* statements were inadmissible. (*Seibert*, at p. 617.) Four United States Supreme Court Justices (a plurality) reasoned that the trial court erred because after a defendant initially confesses, a defendant is likely to be perplexed "about the reason for discussing [*Miranda*] rights at that point," and thus the administration of *Miranda* rights after a confession misleads the defendant. (*Seibert*, at pp. 603, 613-614.)

In the instant case, McCarthy had not confessed prior to being informed of his *Miranda* rights; he had perhaps implicated himself as an accessory-after-the-fact, but had not admitted his role in the murder. McCarthy was Mirandized because he contradicted himself about some details, such as how he traveled between Palm Springs and San Francisco and what time of day the victim's body was buried. There was no reason for McCarthy to be perplexed about his rights because he had not admitted his role in the murder prior to being Mirandized. Because McCarthy had not confessed to

the murder prior to being informed of his *Miranda* rights, the reasoning of *Siebert* does not apply.

6. *CONCLUSION*

McCarthy's pre-*Miranda* statements were voluntary. McCarthy's post-*Miranda* statements were voluntary. As such, the post-*Miranda* statements were properly found to be admissible. (*People v. Scott*, *supra*, 52 Cal.4th at p. 477.) We conclude the trial court did not err.

DISPOSITION

1. As to defendant and appellant Garcia, the trial court is directed to:

a. Amend Garcia's abstract of judgment to reflect the financial taking enhancement is not associated with Count 10 or any other count (§§ 186.11, subd. (a)(3), 12022.6, subd. (a)(2));

b. Amend its restitution order, to specifically indicate who shares in the joint and several liability for victim restitution; and

c. Strike the $2,000 parole revocation fine (§ 1202.45). In all other respects, the judgment against Garcia is affirmed.

2. As to defendant and appellant Niroula, the trial court is directed to:

a. Amend Niroula's abstract of judgment to reflect the financial taking enhancement is not associated with Count 10 or any other count (§§ 186.11, subd. (a)(3), 12022.6, subd. (a)(2));

b. Amend its restitution order, to specifically indicate who shares in the joint and several liability for victim restitution; and

c. Strike the $2,000 parole revocation fine (§ 1202.45). In all other respects, the judgment against Niroula is affirmed.

3. The judgment against defendant and appellant McCarthy is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.