



People v. Heang

2005 | Cited 0 times | California Court of Appeal | August 4, 2005

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Defendants Van Hang Heang and Pov Touch were convicted of first degree murder and conspiracy charges with a lying-in-wait special circumstance and gang, firearm, and Three Strikes enhancements in connection with the killing of Dong Dinh in San Jose on October 23, 1998. Among other points on appeal, they assert the trial court violated their confrontation and cross-examination rights and erred in imposing sentence.

FACTS

Around 8:00 p.m. on October 23, 1998, Dong Dinh's doorbell rang and his wife asked him to answer it. When he did, he was shot five times. Two of the shots entered his abdomen at a downward angle causing lethal internal injuries.

Police immediately suspected that the killing was related to the then in-progress testimony of Dong's son, Truong Dinh (Kid),¹ a member of the Asian Boys gang, in the trial of seven leaders of that gang for multiple counts of murder and attempted murder. The seven leaders were known as the Van Nuys Seven, and the defendants included Kid's uncle Son Bui (Sonny), an OG, that is, Original Gangster, one of the founding members of the Asian Boys gang in 1985, and a "shot-caller" or leader of the current membership. Two years earlier, Kid had testified before the Los Angeles grand jury which handed down the indictment on which the Van Nuys Seven were being tried.

The Asian Boys, a powerful gang in the Los Angeles area, were involved in extortion from business people in the Asian community and home-invasion robberies, drive-by shootings and murders of rival gang members, witness intimidation, auto theft, air bag theft, and insurance fraud. In 1995 and 1996, Los Angeles authorities investigated a series of murders and attempted murders believed to have been committed by the Asian Boys in 1994 and 1995. In 1996, several gang members under police surveillance, including Kid, committed a drive-by shooting of a group of rival gang members, which led to the arrest of Kid and several of the gang leaders and participants in the shooting.

Kid and a fellow arrestee, Asian Boy member Paolo Prada, secretly began cooperating with the



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prosecution and provided evidence against the gang leadership. Kid's testimony was critical evidence supporting the indictments, and without his and Prada's testimony, the prosecution would not have had a case against the Van Nuys Seven.

The authorities tried to keep Kid's cooperation with the police a secret, but rumors that he was a "snitch" started circulating among gang members after Kid was "rolled up" (moved out of his cell) in the middle of the night without explanation. This caused the OGs to wonder where he went. Because of his cooperation, Kid was initially released, but when his dealings with police became known to gang members, he was placed in protective custody. However, while he was out of custody in 1997, Asian Boys member Trung "Chris" Luu confronted him at a pool hall about rumors that he had become a snitch. At the time, Luu considered the rumors to be unconfirmed because he knew there was no "green light" for other gang members to take any action against Kid. A "green light" is the official sanction by gang leaders for the execution of an informant like Kid. Such authorization, according to Luu, could only come from the OGs, who were then incarcerated in Los Angeles. However, if the authorization came, Luu was prepared to kill Kid himself, as any loyal Asian Boys gang member would do.

Ty Pham, a former gang member already serving a Three Strikes sentence for multiple robberies, had become a jailhouse informant in hopes of getting his sentence reduced, and had been transferred to the Los Angeles County jail in 1997. He was living in the cell next to Kid when Kid was rolled up. Pham started hearing rumors that Kid was working with the police and would be testifying against the gang. Sonny, in jail awaiting trial, several times telephoned Hai Nguyen (Chopsticks or Chop), a member of an affiliated gang who was friends with several of the key players in the Asian Boys gang. Sonny was concerned that Kid was cutting a deal with the police and Sonny said he could not get over the fact that Kid might testify against the gang.

It was not long before the OGs put out a "green light" on Kid. However, the trial for the Van Nuys Seven began in late September 1998, and Kid was the first witness. Kid's testimony started on October 12, 1998 and went on for two weeks. Before he concluded his testimony, his father was murdered in San Jose. According to Pham, defendants told him they had gone to Dong Dinh's house looking for Kid. When Dinh answered the door, he recognized Heang and Touch and Heang "didn't want [Kid] to know that he came, so he just sent a message and killed his dad to shut him up."

According to Chris Zahedi, a would-be ex-member of the Asian Boys,² he was out of jail in 1997 and he hung out with defendants and other people who just "show[ed] up" at the Valerio apartments where Asian Boys played basketball and socialized. Heang had been away "tak[ing] care of business" for over a day and when he came back, "we asked him where he was They [Heang and Touch] talked about being up there and how [Heang] lit that bitch . . . referring to . . . Kid, it seemed like." He said, "he went up there to go take care of Kid and his dad. Seeing him, so he let him have it." Zahedi testified that Pham told him Touch was not involved in the Dinh killing. Pham only included Touch in the information he gave to law enforcement to get out from under his Three Strikes sentence.



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Pham, meanwhile, had become a trustee in the jail. This gave him greater freedom of movement and he was able to receive "kites," clandestine notes written by inmates, to pass along to other inmates and people outside. Pham usually read them first. The kite Sonny gave him for delivery to Asian Boys member Jason Ching (Grumpy) instructed Ching to look for Kid when he was released from jail and to find him quickly because their trial date was close. Sonny told Ching to meet with someone in Van Nuys, to be sure to do the job, and "make sure it's clean." Ching was subsequently released, but later was rearrested and returned to jail. Ching then sent a kite to Asian Boys leader Sothi Menh, the top authority in the gang, saying that the job was going to be done. Pham passed this information to Los Angeles County Sheriff's Deputy Michael Soop, with whom Pham had been working on other cases. Pham was also working with different officers on 15 other cases. Pham denied that he had his girlfriend Mimi working for Soop as well.

A couple of months after the killing of Dong Dinh, defendants Heang and Touch were arrested and brought into the Los Angeles County jail. Heang was arrested first in late December 1998 for a parole violation for possessing a machete. He was put in the same module as Pham. Pham remembered that he was nervous and jumpy and walked "back and forth, pacing the cell."

Pham told Heang he was a cousin of OG Tony Ngo so Heang "would trust me more, be more comfortable when we talk." Pham gave Heang "stuff. We smoked cigarettes together, eat [sic] together." Pham said he told Heang he was Cambodian and let Heang speak to Pham's sister over the phone in Cambodian. Pham testified he only spoke "[a] few words" of Cambodian, but that when Heang spoke to him, he could understand "every word he say." Pham admitted he testified to the grand jury that he lied to Hang and Touch about speaking Cambodian but claimed it was all a mistake. He told the grand jury that Heang and Touch did not know that he spoke Cambodian and that he heard them plan an elaborate scheme involving multiple phone calls in order to have someone outside find out if Gooder (Michael Boonthawesuk, who had driven them to Dong Dinh's house) was actually talking to the police. Listening in on defendants' conversations in Cambodian was one of the main ways he gathered information about the instant case.

Once Pham got Heang's trust, Heang began talking to Ty Pham about the parole violation and expressed apprehension that he had been picked up for something that happened in San Jose. Heang said, "it's all `cause of this fucking Kid," referring to the fact that Kid had testified against the gang. A short time later, Touch was arrested and put in the same module. He told Pham he was in jail for allegedly making a terrorist threat to the mother of someone he was trying to initiate into the gang. Pham denied that he had asked Deputy Soop to arrange to have Heang and Touch moved to his module, however he admitted it when he was in the Alhambra City jail. Pham also admitted at trial that he had made the request so that he could get information from Touch regarding the gun used in the Dinh killing.

Pham used a ruse to get Heang and Touch to reveal details of the Dinh murder. Pham told them "the fiction" that "Billy," who is a real person who was connected to card rooms and gambling in the Los



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Angeles area and closely connected to the Asian gang community, had offered to pay \$30,000 for the killing of Kid's family, and that someone had claimed the reward for the murder. Heang responded, "Bullshit." He said he had committed the killing and wanted the money. He swore on his mother's grave that he was telling the truth. Pham told Heang that if he wanted Pham to try to convince Billy to pay Heang instead of the pretender, Heang had to give Pham the details of the murder. Heang wrote on a piece of paper ".380," "five times" pointing to his chest, and "[e]xactly at 8:00." (Heang thereafter flushed the paper down the toilet.)

Heang said he did the crime "from the heart . . . for the homey" and that it occurred on a Friday night at 8:00 p.m. in San Jose near Landess and Coralwood or Camberwood. (Touch told Pham the killing took place on a Thursday.)

Pham reported that Heang said that he and Touch and a couple of other guys drove up to San Jose in Gooder's green Honda Civic. Touch added that they were getting a lot of pressure from gang leaders to do the job.

Heang and Touch stated that when they went to San Jose to kill Kid, they drove around looking for him, but when they could not find Kid they went to his house. The lights were out, so they cruised around and came back and waited. When they were sure someone was home, they told Gooder to get ready with the car. Heang and Touch approached the house wearing postal workers' uniforms. (Zahedi explained, "They wear different outfits like mail outfits, UPS, pizza.") Touch was carrying a package and both were armed. When the door opened, Heang began firing. Heang said that if he had to, he would kill the whole Dinh family to bring Kid out. Heang had people ready to watch for Kid at his father's funeral.

According to Pham, Heang and Touch said they had made three other trips to San Jose to find Kid to kill him. On the first trip, they took Touch's Honda Accord which had a sticker, "got rice?" on the back. On the second trip, they drove Heang's sister's brown Toyota Cressida which overheated and which they left by the side of the road. The Toyota was impounded, but they paid a fine and had it towed home. Nhan Truong (Dreamer) picked them up and drove them to a pool hall and cafe where they found Kid's brother, Johnny. Dreamer talked Heang out of killing the Dinh family on that trip. Seven months later, they made the third trip during which Dong Dinh was killed.

Touch was angry at Paolo Prada for his testimony against the homeboys and had been looking for him, too. Touch and another homeboy had gone to the superior court in Van Nuys to see if Kid would show up. They waited in the parking lot, from which there was a view of the courthouse entrance.

On January 5, 1999, Pham reported what he had heard to Deputy Soop. When he told Soop about the ".380, five times," Soop said, "Bingo." Pham denied that Soop told him what kind of information he wanted. Soop told him not to ask questions. Pham did not remember if he initially provided information as to individuals other than Heang and Touch in regard to the Dinh killing. He denied



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he identified Touch as Touch's brother, Lay Touch.

On April 8, 1999, Pham was interviewed by Detective John Edwards and his partner. Also present were Soop and Los Angeles County Deputy District Attorney Greg Dohi. Pham made statements generally consistent with his trial testimony, but he did deny telling Detective Higgins on February 25, 2000, that Touch and Heang told him they drove to San Jose on Highway 5 in Heang's brother's Camry. Pham also did not remember telling the detective that five people had gone on that trip. Pham also denied telling Higgins that Dong Dinh was shot five times with a chrome .38-caliber gun. Pham had provided information to Higgins before, but not on this case.

At trial, Pham denied trying to bribe a guard in 2000 with the promise of \$80,000 if he helped Pham escape from the Alhambra City jail where Pham was booked under a false name. During his time there, Pham stole \$400 from another inmate, but was not charged. Pham denied obtaining booking and bail information on Taiwanese inmates and using that information to have their personal property stolen from jail.

A grand jury returned an indictment on May 25, 2000, charging Touch and Heang with conspiracy to obstruct justice (Pen. Code, § 182, subd. (a)(5), count 1)³; murder (§ 187, count 2); and conspiracy to commit murder (§ 182, subd. (a)(1), count 3). A gang enhancement was alleged as to each count. (§ 186.22, subd. (b)(1).) On count 2, the special circumstance of lying in wait (§ 190.2, subd. (a)(15)) was alleged, and a section 12022.53, subdivision (d) enhancement was charged against both defendants and a section 12022.53, subdivision (e)(1) enhancement was charged against Touch. Both defendants were charged with four prior assault-with-a-firearm convictions within the meaning of the Three Strikes law and one prior prison term per section 667.5, subdivision (b).

After a three-week jury trial, both defendants were convicted as charged and all enhancements were found true. The murder charged in count 2 was found to be in the first degree. Both defendants were sentenced to life without the possibility of parole (LWOP) as to count 2. In Heang's case, that sentence was consecutive to the 25-year-to-life enhancement for the personal discharge of a firearm causing death alleged in connection with count 1, and consecutive to a term of five years for the prior conviction of a violent felony. In Touch's case, the LWOP sentence was consecutive to a five-year term previously imposed in a Los Angeles County case. Touch's prior-prison-term enhancement was stricken. Sentencing on the conspiracy counts was stayed (§ 654). Both defendants were ordered to pay a restitution fine of \$10,000 (§ 1202.4, subd. (b)) and a parole revocation fine in like amount (§ 1202.45). Defendants were ordered to pay restitution to the victim's family of \$25,152.24 for funeral expenses. This appeal ensued.

ISSUES ON APPEAL

Touch, joined by Heang, claims (1) that the trial court violated their Sixth Amendment right to confront Pham in excluding evidence of a kidnap/extortion plot which would have impeached Pham's



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credibility; (2) that the court erred in admitting evidence of a prior inconsistent statement of Truong Nhan (Dreamer) who claimed a complete memory loss at trial; (3) and (4) that the special circumstance and a parole-revocation fine must be stricken.⁴ (5) Heang argues that his Sixth Amendment right to confront Pham was further violated when the trial court excluded evidence that Pham had expressed willingness to give false testimony in exchange for favors to be rendered to him in the prosecution of Phongsavath Chaleunsouk in Pasadena in May 2001, and (6) that cumulative error requires reversal.

IMPEACHMENT EVIDENCE

Right of Confrontation

Defendants complain the trial court violated their Sixth Amendment right to confront Pham when it refused to allow them to present evidence of a kidnapping/extortion scheme in San Marino orchestrated by Pham while he was in the Los Angeles County jail. Heang also complains of the exclusion of evidence of Pham's manipulations of the prosecution and defense in the Chaleunsouk case. As to both incidents, defendants also claim that the court abused its discretion under Evidence Code section 352 in excluding the evidence as more prejudicial than probative.⁵

In the San Marino matter, just before Pham's May 2000 grand jury testimony in the instant case in San Jose, Pham informed the Los Angeles County Sheriff's Department Asian Crime Task Force about the planned kidnapping for ransom of the then-18-year-old autistic son of a heavily indebted Vietnamese-born businessman and his Chinese-born wife. Pham identified a prime suspect and during the investigation, the sheriff's department moved the family to a safe house, established a command center in the family home with around-the-clock surveillance of the home and surroundings, and placed taps on the family's phones. Deputies recorded numerous phone calls to the victims. They traced the calls to suspects which allowed them, in conjunction with information supplied by Pham, to interrogate the conspirators. It appeared the phone calls were from inmates in the county jail who called at Pham's instigation. Each of the callers identified Pham as the "mastermind" who "put them up [to] making the threatening phone calls to victim's residence," thereby, defendants argued, creating the crime himself.

Heang argued that the incident was relevant and admissible to impeach Pham's character as to honesty and veracity, to show he had a willingness to fabricate, and to demonstrate that he had a motive to lie in order to curry favor with the prosecution. Touch asserted the evidence also demonstrated Pham's modus operandi. Touch wanted to demonstrate that Pham fooled the entire Los Angeles County Sheriff's Department during the San Marino incident in order to demonstrate that Pham did the same thing a year earlier in the instant case. The defense also argued that the San Marino incident could be used to impeach Soop, who testified at the grand jury that he believed Pham was trustworthy and had never lied to him.



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In opposing the motion to introduce the San Marino evidence, the prosecution showed that Soop worked with Pham in 1998 and 1999 when Soop was on the Asian Gangs Task Force, but that he had been transferred to another unit and was no longer working with Pham in 2000 when the San Marino incident occurred. Furthermore, the prosecution stated that although the police reports detailing the San Marino investigation apparently ended with the explanation that Pham had been moved out of Los Angeles to the San Jose county jail, the matter was not dropped. Further investigation by the sheriff's department concluded Pham had not set up the kidnapping and extortion plot and that he "was caught in the middle by accusations from the persons trying to perpetrate the extortion." In the event that the court allowed presentation of the evidence, the prosecution stated that because of the conflicting accounts of Pham's role, the testimony of 15 to 25 witnesses consuming two weeks of time would be necessary.⁶

After the parties argued, the trial court questioned why the San Marino incident was not cumulative of the evidence already offered to show Pham's character for lack of veracity, credibility, and motive to curry favor and obtain a benefit from the prosecution. The court ultimately determined sufficient impeachment evidence was in the record.

As to the Chaleunsouk case, Heang claims that the trial court made "a similar and interlocking error" when it excluded evidence of Pham's machinations in regard to conflicting statements Pham gave to the prosecution and to the defense. Pham was angry with Lane Liroff, the trial prosecutor in the instant case, because he felt that Liroff was not doing enough for him in return for his proposed testimony in this case. Heang was prepared to call a Mr. Shuman, Chaleunsouk's defense investigator, to testify that Pham told Shuman that he spoke to Chaleunsouk while in jail, and Chaleunsouk told Pham he did not commit the alleged murders. When Pham reported this to the investigating officers, they told Pham to go back and get a confession from Chaleunsouk. According to Shuman's report, another individual admitted to Pham that he committed the murders and wanted Chaleunsouk to take the fall for him. The report states that Pham said that the Los Angeles Police Department and the Los Angeles County District Attorney's Office opened an investigation into the two officers who pushed Pham to get a confession.

Pham wrote a letter to Liroff, and mentioned his meeting with Shuman. The portions of the letter that related to the instant case were admitted into evidence, but references to the Chaleunsouk case were redacted. Heang's offer of proof stated that Liroff flew to Los Angeles to talk to Pham, after which Pham recanted the statement he made to the defense and reasserted his original statement favorable to the prosecution.

Heang's attorney estimated that it would take five minutes of cross-examination of Pham and 45 minutes of questioning of Shuman to present this evidence. The trial court, however, pointed out that in order to prove that Pham had changed his story, the defense would first have to prove his original statements and then his subsequent statements. The court also noted that Pham denied giving the reported statements, and stated that the prosecution was likely to want to put on the testimony of at



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least two officers and a deputy district attorney to rebut the defense investigator's testimony.

Prosecutor Liroff agreed with this assessment, and added his own offer of proof. He stated that when he went to Los Angeles, he spoke with Pham for less than a minute and said nothing to induce Pham to change his testimony. He flew to Los Angeles because he was responsible for Pham's transportation to San Jose. Pham was in the jail under an assumed name because of his involvement in the instant case, and Liroff wanted to forestall any problems with Pham's transportation. Liroff stated that if the court allowed the defense to explore Pham's actions in the Chaleunsouk case, he would have to call as witnesses Chaleunsouk's defense attorney, at least two deputy sheriffs involved in the case, Deputy District Attorney Dohi, Sergeant Michael Ponte, and himself. The prosecution claimed that a full hearing on the Chaleunsouk case would not show that Pham changed his story, but rather negligence on the part of both Shuman and Chaleunsouk's attorney.

Furthermore, Liroff stated that in a pretrial hearing on Shuman's report during the Chaleunsouk trial, the trial court concluded that law enforcement had not done anything wrong. Liroff noted that Chaleunsouk had confessed to the murders and was convicted in that case based on his confession.

Heang's attorney argued that the evidence was admissible because it would show that Pham was willing to alter his testimony to curry favor with the prosecution and would thus impeach Pham's veracity and expose his motive and bias. Defense counsel argued that it was particularly relevant in the instant case because Liroff was involved in the change that took place in the Chaleunsouk case, and the evidence would show Pham's attitude toward testimony in court and the questionable truthfulness of the proposed testimony contained in his informant statements.

The trial court found that the evidence was relevant, but excluded it under section 352 because its probative value was outweighed by undue consumption of time and because it would create a substantial danger of confusing the issues and misleading the jury.

Defendants contend that preclusion of the San Marino and Chaleunsouk evidence violated their Sixth Amendment right to confrontation of Pham. Heang argues that without the Chaleunsouk evidence, "Pham was clothed in an undeserved aura of veracity, because he was presented as a person who had a longstanding relationship with law enforcement authorities, and one in which law enforcement was willing to do everything it could to satisfy Pham's demands. Because the relationship was longstanding, and covered so many different cases, jurors might reason, his information must have been reliable."

Both defendants argue that evidence of the San Marino incident "would have given a significantly different impression of Pham's credibility. It would have established once and for all that he had continued to engage in criminal conduct despite his professed transformation to someone who 'wanted to do the right thing,' and would have shown unequivocally his willingness to fabricate to get what he needed, thus completely destroying his reliability and credibility as an informant."



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Heang states that the two incidents "constituted significant impeachment evidence of a very different nature than the evidence actually permitted by the court, and its exclusion resulted in an unfair advantage for the prosecution by unduly truncating [defendant's] planned impeachment presentation."

Both the federal and the state Constitutions guarantee criminal defendants the right to be confronted with the witnesses against them. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15, cl. 2.) "[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [declarant's] statement.' [Citation.]" (Dutton v. Evans (1970) 400 U.S. 74, 89.) "Any denial or significant diminution of this right deprives the accused of an essential means to test the credibility of his accusers and thus 'calls into question the ultimate 'integrity of the fact-finding process.' " . . . [Citations.]" (People v. Louis (1986) 42 Cal.3d 969, 983.)

The test for a violation of the right to confrontation is "whether 'a reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination.' [Citation.]" (United States v. Davis (D.C. Cir. 1997) 127 F.3d 68, 70- 71.) " 'The Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." ' . . . [S]uccessful cross-examination is not the constitutional guarantee. . . . [¶] . . . when a hearsay declarant is present at trial and subject to unrestricted cross-examination, . . . the traditional protections of the oath, cross-examination, and the opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements." (United States v. Owens (1988) 484 U.S. 554, 559-560.)

In the instant case, as shown by the impeachment evidence we recount below which was properly before the jury, Pham's character for reliability and credibility was clearly exposed. The jury was told that Pham had five prior felony convictions.⁷ When Pham was housed in the Alhambra City jail after he testified before the grand jury in the instant case, he offered \$80,000 to a civilian correctional officer at the jail, Hoa Chang, to help him escape. Pham asked Chang where the outside surveillance cameras were and stated that he knew the other two guards were away getting food. He asked Chang to give him a spare uniform. Pham was not charged with any crime for this incident. Pham denied this incident at trial, but admitted that he stole \$400 from another inmate in the Alhambra City jail and was caught and made to return the money, but, again, he was never charged. Chang was called by Heang to prove the attempted bribe and escape.

In addition, Pham had received a number of benefits for being an informant. He had received the 25-year-to-life sentence on other offenses before being sentenced on the 1997 robbery. Pham normally could have received an additional, consecutive 25-year-to-life term for that robbery, but was given seven years, for a total sentence of 32, rather than 50, years to life. In imposing the seven-year sentence, the court struck one of the prior strikes in recognition of a letter written by the Los



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Angeles Sheriff's Department explaining his cooperation with law enforcement in other cases. Pham also became a trustee in the jail which allowed him more "freeway" time outside his cell. He was granted additional shower and telephone privileges and Deputy Soop occasionally brought him food. These benefits stemmed from past cases and were not related to his involvement in the instant case.

In addition, the court admitted the following: letters Pham wrote to Liroff, in which Pham complained that Liroff was not doing enough to help him get out from under the three strikes sentence;⁸ two phone calls Pham made to Deputy District Attorney Greg Dohi a few weeks prior to his grand jury testimony in this case making the same complaints about Liroff; and a videotape of an interview with Deputy Soop in February 1998, well before Dinh's murder, in which Soop tells Pham that they needed him to provide information about a crime that had not happened yet so they could confirm that Pham was a valuable informant. Pham was unable to provide the requested evidence.

Finally, the defense was allowed to elicit testimony that Pham's former girlfriend had been raped by two Asian Boys gang members, and that Pham would like the perpetrators punished. However, Pham denied that that incident affected his desire to testify against Heang and Touch. He stated that he had already given the names of the perpetrators to Soop to investigate.

This evidence showed that Pham continued to engage in criminal conduct (stealing, attempting to bribe and escape) despite his pious assertion to the jury that he "wanted to do the right thing" by testifying. His negotiations and threats to Liroff and Dohi showed that his desire for a reduced sentence was a major component of his desire to do "the right thing." Pham's credibility and veracity on the witness stand were further impeached by his denial of the escape attempt which the defense was allowed to prove. This impeachment evidence, which indicated Pham was lying on the witness stand when giving sworn testimony, was far more probative than a past instance of lying to a defense investigator during an unsworn interview in the Chaleunsouk case or the seriously conflicting evidence on Pham's role in the San Marino incident. Since the evidence would not "reasonably have produced 'a significantly different impression of [the witness's] credibility' " (People v. Rodriguez (1986) 42 Cal.3d 730, 751, fn. 2), there was no denial of the right of confrontation.

Section 352

Next, defendants claim the trial court erred in excluding the evidence of both incidents under section 352. Section 352 allows a court to exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." This discretion " `is not absolute and must be exercised reasonably in accord with the facts before the court.' [Citation.]" (People v. Taylor (1986) 180 Cal.App.3d 622, 633.) The trial court's exercise of discretion will not be overturned on appeal unless it is arbitrary, capricious, or patently absurd and results in a miscarriage of justice. (People v. Rodriguez (1999) 20 Cal.4th 1, 9-10.) Section 352 " `requires that the danger of the evils [danger of prejudice, confusion and undue time consumption]



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substantially outweigh the probative value of the evidence.' " (People v. Roehler (1985) 167 Cal.App.3d 353, 386.) "Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable `risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (People v. Waidla (2000) 22 Cal.4th 690, 724.)

The potential for undue confusion and excessive time consumption were substantial if the defense had been allowed to explore the details of either the San Marino or Chaleunsouk incidents. Defendants claim that even if the evidence of both incidents required multiple witnesses and if Chaleunsouk took a day or two of testimony and San Marino two weeks, that would not be a large amount of time in the context of a three week trial. Heang states that the evidence was "unquestionably more important to the defense case than the evidence actually presented in [Heang's] case in chief."⁹

The discretion to exclude collateral impeachment evidence based on the consumption of time needed to prove it up when similar impeachment evidence has already been admitted is the trial court's. (See, e.g., People v. Brown (2003) 31 Cal.4th 518, 545.) Even though defendants assert San Marino was not collateral because "it was relevant to the existence or non-existence of a fact attested to by Pham, specifically[,] that his testimony was motivated by his desire to do the right thing," both the San Marino and the Chaleunsouk evidence were, as we shall explain, collateral matters.

A "collateral matter" is one that has no relevancy to prove or disprove any issue in the action. (People v. Douglas (1990) 50 Cal.3d 468, 509.) The collateral nature of evidence is not evaluated in relation to whether it proves the existence or nonexistence of any fact attested to by a witness, it is tested by its ability to prove or disprove any issue pertaining to the criminal case itself, namely the guilt or innocence of the defendants. (People v. Rodriguez, supra, 20 Cal.4th at p. 9.) The issue for the jury in the instant case was whether Heang and Touch were guilty of the killing of Dong Dinh. Pham's credibility--his truthfulness, his ability to recall and narrate, and his motive to curry favor with the prosecution by testifying against the defendants--was relevant, but it did not pertain directly to the defendants' guilt or innocence. It was necessarily collateral to the main issues at hand, and therefore was less probative than evidence pertaining directly to guilt or innocence. "While collateral matters are admissible for impeachment purposes, the collateral character of the evidence reduces its probative value and increases the possibility that it may prejudice or confuse the jury." (People v. Lavergne (1971) 4 Cal.3d 735, 742.) Pham's motivation for testifying was not directly relevant to the ultimate question of guilt or innocence. Thus the evidence was collateral and of reduced probative value and properly subject to the trial court's determination under section 352 that it was more prejudicial than probative and would unduly consume time.

"`Undue consumption of time' refers not only to the time used to try the case, but also the time lost to the court by giving one case more time than needed, to the prejudice of other cases which could have productively used the time wasted." (People v. Vargas (2001) 91 Cal.App.4th 506, 544.) The instant case was confusing and time- consuming enough without injecting trials of two collateral and



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complicated criminal enterprises into the trial of the instant case, for the sole purpose of undermining the credibility of a prosecution witness whose credibility and character for truth and veracity were already seriously damaged.

Further, we note that, Touch, not the prosecution, elicited Pham's testimony that he was motivated to testify against defendants by a desire to do the right thing rather than to curry favor with the prosecution. "A party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted." (People v. Lavergne, supra, 4 Cal.3d at p. 744.) The thing to be contradicted here was Pham's desire to do the right thing. That had nothing to do with the guilt or innocence of defendants and was properly excluded.

Furthermore, there was no direct evidence of Pham's motivation vis- ...-vis the prosecution in the San Marino incident. Consequently, for the jury to have concluded that Pham's motive in the San Marino plot was the same as in testifying in this case, it would have had to conclude that Pham planned and carried out the kidnapping/extortion plot for disclosure to prosecutors in order to obtain a reduction of his Three Strikes sentence and that Pham made up evidence about the participation of defendants in the killing of Dong Dinh also for purposes of disclosure to the prosecution in order to obtain a reduction of his Three Strikes sentence. There is no evidence in the record to support the latter inference. On the contrary, there is ample evidence that Pham's account of defendants' participation was based on actuality.

A comparison of what Pham told police and the evidence elicited at trial shows that Pham's testimony was corroborated by independent witnesses. Pham said that defendants stayed at a hotel in the San Jose area with five stars on the sign when they first went looking for Kid. Detective John Edwards located the Inns of America in Milpitas which had five stars on its sign and a record of a room rental to Heang and another person on December 20, 1997. Phone records showed that Heang and his confederate placed two calls to Touch's sister-in-law, two calls to Heang's sister, and one call to Asian Boys gang member Richard Tran.

Pham said Touch told him the first time he and Heang went to San Jose they took Touch's Honda Accord. There was a sticker on the back that said, "Got rice?" Sergeant Michael Ponte verified that the "got rice?" car was financed for and first registered by Touch's sister Leda Touch on August 2, 1998. A Department of Motor Vehicles document showed that Leda Touch also owned the vehicle as of December 1, 1997. However, Touch's brother-in-law testified he and his wife bought the car in June 1998, at a Van Nuys Honda dealership. They did not own the car as of December 1997.

Pham told police the second trip was taken in Heang's sister's brown Cressida which overheated and broke down. The car was impounded and defendants had to pay a fine and tow it out. Touch told him they hitchhiked to San Jose but Heang said someone came to pick them up and they went to a motel in San Jose somewhere. (Touch said the motel was in San Francisco.) They were able to get out of San Jose because they called "Dreamer" (Nhan Truong). While they were waiting for Dreamer, somebody



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gave them a ride to drive around the San Jose area and look for Kid. They went to a pool hall and "a different kind of cafe" but they only found Kid's brother, Johnny.

The broken-down car was corroborated by CHP records showing that a brown 1985 Toyota Cressida belonging to Heang's sister Somaly Heang was tagged as abandoned property on U.S. 101 north of Jolon Road in Monterey County on December 20, 1997, and was impounded four days later. The tow truck operator who removed the car, Art Mendez, stated that Heang came by several days after the car was impounded, paid the fine, and asked Mendez to tow the car back to Los Angeles. Heang rode with him and signed for the car on December 31, 1997.

Police questioned Asian Boys gang member Dreamer¹⁰ who confirmed that defendants called him to say that their car had broken down and they wanted him to drive to San Jose to pick them up. Dreamer called a friend in San Jose, Hai Nguyen (Chop), and asked him to give defendants a ride. Dreamer testified that he went to the Inns of America hotel in Milpitas where defendants were staying to pick them up on Sunday, December 21. Heang told Dreamer that he and Touch had come to San Jose to kill Kid.

Touch waited in the hotel room while Dreamer drove Heang to Kid's house where they parked on the street. Heang said, "I'm going to do it now," and added that he was going to "kill Kid and everyone in the family." Dreamer reminded Heang that he did not have the okay yet to kill everyone in the family and advised Heang not to do anything until they got confirmation from "the guys in county [jail]." Then Dreamer said he had to get the car back to his sister, and talked Heang out of committing murder at that time. They then returned to the hotel and picked up Touch.

Chop and Patricio Dancel (Punky) testified that Dreamer called them and asked them to pick up defendants and drive them to a hotel. Chop and Punky told police they knew that defendants were Asian Boys and they had heard rumors that Kid had become a snitch. Both had received calls from Sonny from jail saying that Kid was a snitch and that Kid was going to get it. Chop stated that Heang told him they were looking for Kid and were going to "kick his ass." Punky told police that defendants said they were looking for Kid and were going to "fuck him up" and possibly kill him. Chop and Punky drove defendants around town looking for Kid. The next day, they had lunch with defendants who continued to ask where they could find Kid.

Pham also told police that Heang told him Sonny called Jason Ching to pass on messages to Heang. Ching's phone records show that in September 1998, he received calls from Sonny and then promptly made calls to Heang. Pham also said when defendants did the "deed," they drove up to San Jose in Gooder's Honda Civic. Pham thought it was dark green. When they got there, they had to wait for a while at the house. The car was parked on the street across from the house. Members of a bible study group assembling to meet in a nearby home observed a blue or teal Honda Civic parked on the street after 7:00 p.m. Several members of the group saw a group of three to five Asian males standing around it. The witnesses identified a photo of Gooder's car.



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The evidence recounted above does not support the inference that Pham made up the story of defendants' participation in the Dong Dinh killing in order to curry favor with the police.

An additional reason to exclude the San Marino evidence was that although defendants asserted it was persuasive on the theory that Pham masterminded the plot for a personally beneficial result that was true only to the extent that the defense could prove that Pham masterminded the plot. The sheriff's department's investigation had already rejected that theory and the prosecution was prepared to disprove it. Exclusion of the San Marino and Chuleunsouk evidence did not deprive the jury of evidence showing Pham's veracity and credibility in their true colors. The trial court's determination that it would consume undue amounts of time and was more prejudicial than probative was supported by the record. There was no error.

PRIOR INCONSISTENT STATEMENT

Next, defendants argue that the trial court's finding that Dreamer was feigning nonrecollection during his testimony at trial and in allowing the prosecution to play a tape of his interview with Detective Edwards was not supported by substantial evidence. Dreamer testified that he did not remember if he used to know defendants and other Asian Boys gang members, did not remember his testimony before the grand jury, and did not remember being interviewed by Edwards.

When first called to testify, Dreamer stated that he was 27 years old, a data entry clerk, currently lived in Southern California, and that he had previously been convicted of burglary. He acknowledged that he had testified at the grand jury proceedings but could not remember when that was. He admitted that he used to be a member of the Asian Boys gang, but stated he no longer was. He had been going straight for a few years and had a hard time remembering his past. His memory was bad because two months earlier he had taken Ecstasy and had been in a car accident in which his neck and back had been injured. He could not remember if he knew Dumper (defendant Heang), Widget (defendant Touch), Sothi, Johnny, and Paolo Prado. Dreamer stated he felt as if he was being harassed by the questioning. He could not remember if he told the grand jury he received a phone call from Heang who said his car had broken down and he needed to be picked up in San Jose. He did not remember being interviewed by Edwards, but did recall talking to an "officer" named Dohi.

Dreamer reiterated he was frightened and said that that was because he felt he was being harassed. People were trying to pressure him to "name stuff that I don't remember." He denied that he was afraid to testify against the Asian Boys. Dreamer testified that he did not know anything about the murder of Kid's father, that he had talked to a defense investigator in Los Angeles but he did not know anything, and that he had told the prosecutor he could not remember but the prosecutor said it was "okay to appear to the court [as a witness]." He was not afraid of getting into trouble if he testified, but he was worried about being "set up." Worry about being set up was not affecting his memory; it had been affected a few years ago. He did not need an interpreter. He could understand the questions and had attended a trade or technical school before he got his current job. He could not



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remember when people asked him about the past. He recalled being questioned by the police "years ago," but did not remember what they asked him about. He stated that when the police came to ask questions, it meant one had problems, but he was not worried about that today. He was unable to tell the truth now about events he was involved with a few years ago because he did not remember.

When the prosecutor asked permission to play the tape of the interview with Edwards, defense counsel objected. After argument whether a proper foundation would require the prosecutor to ask Dreamer question by question whether he remembered the interview, the court found that Dreamer was feigning nonrecollection and allowed the playing of the tape.

On the tape, Dreamer stated that in December 1997 defendants drove to San Jose. Dreamer knew they were going because Heang had told him so. Shortly before the trip, Dreamer met Heang at either a coffee shop or a pool hall. Heang said he had gotten money, either \$700 or \$1000, and asked Dreamer if he knew anyone in San Jose in case they needed any help. Dreamer gave him Chop's phone number. Defendants' car broke down. On a Sunday, Heang called Dreamer in Southern California and asked to be picked up at their hotel. Heang also called Chop.

Dreamer arrived early Sunday evening in San Jose. Heang wanted to go see Kid's house and check it out. Dreamer knew that Heang wanted to kill Kid because of his potential testimony against fellow gang members. Heang told him he had received a call from a "homie" in county jail concerning this. Touch stayed in the hotel room while Heang, who had a gun, and Dreamer drove to the Dinh house. Once there, Heang wanted to kill the entire Dinh family, but Dreamer talked him out of it because he did not have the proper authority.

After the tape was played Dreamer stated he was not sure the voice on it was his; he honestly could not remember Dumper; he remembered going to San Jose to pick up some guy four or seven years ago, but he did not remember anything more or who Kid was. He could not remember Heang telling him he wanted to kill Kid. Dreamer reiterated that he had forgotten a few years because of his past drug use and because of his many problems including having been in an accident.

"A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770. The 'fundamental requirement' of section 1235 is that the statement in fact be inconsistent with the witness's trial testimony. [Citation.] Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness.' [Citation.] When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior



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statements is proper. [Citation.]" (People v. Johnson (1992) 3 Cal.4th 1183, 1219-1220, fn. omitted.) On appeal a reviewing court must take into consideration that the trial court had the opportunity to observe the witness's demeanor and evaluate his credibility. (People v. O'Quinn (1980) 109 Cal.App.3d 219, 224-225.)

Here the court reasonably concluded from Dreamer's testimony that he was deliberately evading questioning by feigning memory loss. Before trial, he expressed a desire not to be a witness and not to be part of the proceedings. At a bench conference, counsel for Touch declared that he had a defense investigator try to contact Dreamer. The investigator was unable to reach Dreamer and he left his card for him. Dreamer responded by going to the public defender's office, then calling Touch's counsel (an alternate public defender) and saying that he did not want to be part of the proceedings and that he was being harassed. Finally, the prosecutor informed the court that he had played a portion of the tape for Dreamer, and Dreamer claimed he did not recognize his voice on the tape.

In addition, Dreamer was evasive. When the prosecutor asked if he had been "a member of a gang at one point," he responded that he was not currently a member of a gang. The prosecutor repeated the question and Dreamer repeated the evasive answer. The third time, Dreamer responded that he used to hang out with Asian Boys but reiterated that he was not a gang member right now and asserted he was trying to go straight. He then immediately volunteered without questioning that "I have had a hard time to remember and I don't remember my past, you know."

When asked about his memory loss, he stated, "Right now I have no memory. I told you I can't remember. One day I took Ecstasy what people call Ecstasy. I don't know how many I took and I don't know what kind I took, but I have a hard time remembering now." He then added, "and I got into a car accident." He stated the accident occurred a few months earlier and affected his memory although he was not hospitalized for the accident.

The prosecutor asked Dreamer if he knew Heang. Dreamer said he did not know him and then said he could not remember. The prosecutor then asked, one by one, if Dreamer knew several of the other key figures in the Asian Boys gang who were connected to the case, and Dreamer said no to each name, denying that he knew them rather than saying he could not remember. At one point, Dreamer said "no" even before the prosecutor said the name of the person he was asking about. The assertion of a witness that he or she did not remember even before the prosecutor had finished the question is evidence the witness was feigning memory loss. (People v. O'Quinn, *supra*, 109 Cal.App.3d at p. 224.)

Dreamer was argumentative. When asked if he was able to answer these questions when he testified before the grand jury, Dreamer said "yes," but when asked how long ago the grand jury proceeding was, he stated he felt like he was being harassed by the prosecutor. When asked if he remembered testifying at the grand jury proceeding, Dreamer asked when it was. When told it was May 2000 (the trial was in March 2003), Dreamer said he had been through "a lot of problems," that his brain was



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"messed up" and he could not remember anything. After a few more questions, Dreamer asked, "Do I get the same judge? The last time was a different judge?" A couple of questions later, Dreamer ignored the prosecutor's question and told the court, "You sound like--so were you the same judge that I appeared [sic] the last time?" After responding a few more times that he could not remember, Dreamer again stated he was being harassed, this time saying that people were calling his house, and he felt he was being pressured "to name stuff that I don't remember."

Finally, when the defense asked Dreamer if he was worried that he would be charged with the murder of Kid's father, he responded, "No. I have no idea what is that. I don't know what the story, what you're talking about." When asked if he felt pressure to testify, Dreamer stated he had been trying to go straight and could not remember anything and did not deserve to be pressured by questions from the prosecution. When asked if he had a hard time remembering everything from his past, he responded, "Well, I don't know. I think I just can't say I can believe whatever happened a long time ago happened." When asked if he remembered being questioned by the police, he stated, "No, I don't even bother to remember what they were asking me. I have my life, stuff to do. I can't remember what everyone needs or trying to give me a hard time. I can't remember." When asked if he would tell the truth, Dreamer responded, "If you ask me I'll tell you the truth, but I can't remember, so I can't tell you the truth." Finally, when asked if he remembered where he worked a few years earlier, he responded, "I remember I worked for a few companies, but I don't remember what time of day and stuff." On redirect examination, Dreamer acknowledged that before getting his current job, he went to a trade school. He then asserted it was a "technician school," and then said it was not a technical school, but was a trade school.

On this evidence, the court's ruling was entirely reasonable. The court had the opportunity to observe Dreamer's demeanor first hand and to view his evasiveness. He expressed reluctance to testify and claimed he was being pressured when there was no evidence of pressure in the record. He dodged questions by asking questions of the prosecutor and the court. He volunteered answers to bolster his assertion that he had no memory. At one point, he responded that he did not remember before the prosecutor said the name of the individual he was asking about. Finally, he testified that he was not afraid to testify against the Asian Boys at defendants' trial, but when he was interviewed by the police, he asked the officers several times not to use his name in the investigation and not to let it out that he was cooperating. The court's finding that Dreamer's memory loss was feigned is supported by substantial evidence.

Next, defendants claim that they were denied the right to confront and cross-examine Dreamer because of his insistence he could not remember and were denied a fair trial because of the use of the tape. The statement on the tape was hearsay, an out-of-court statement introduced for the truth of the matter asserted. (Tennessee v. Street (1985) 471 U.S. 409, 413-414.) Defendants assert "[t]he trial court's ruling as to [Dreamer] gave California evidentiary rules precedence over the Sixth and Fourteenth Amendments. State evidentiary rules must be interpreted where reasonably probable to satisfy due process. If not subject to such an interpretation, the evidentiary rule must give way to the



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defendant's right to a fair trial. That did not occur here, and [defendants were] denied a trial in accord with fundamental standards of due process."

Defendants were not denied the rights of confrontation and cross-examination. "[I]n *United States v. Owens*, supra, 484 U.S. 554, the United States Supreme Court . . . [stated], "the Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " [Citation, italics added in *Owens*.] "The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." [Citation.] When the declarant "is present at trial and subject to unrestricted cross-examination," "the traditional protections of the oath, cross-examination, and the opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements." [Citation.] [¶] *Owens* was anticipated in California by *People v. O'Quinn*, supra, 109 Cal.App.3d 219, 226-228, which concluded there was no violation of the constitutional right to confrontation when, "although [the witness] was ostensibly unable to remember the circumstances of the crime or her statements to the police, she was nevertheless on the stand and available for cross-examination." [Citation.] *Owens* has been followed by the California Supreme Court. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1292, fn. 32 [also applying its rationale to the confrontation clause in the California Constitution].)" (*People v. Perez* (2000) 82 Cal.App.4th 760, 765-766.)

Finally, the due process claim is unavailing. The Confrontation Clause is a procedural rule, rather than a substantive guarantee of reliability of testimony. As a procedural rule, all the Confrontation Clause requires is that the witness be available and subject to cross examination, regardless of the effectiveness of that cross examination. (*Crawford v. Washington* (2004) 541 U.S. 36, 61.) Sections 1235 and 770 fully comport with the Sixth Amendment right to confront and cross-examine witnesses. The court's application of those sections did not violate defendants' right to a fair trial and nor did the court give "California evidentiary rules precedence over the Sixth and Fourteenth Amendments." There was no error.

"LYING IN WAIT" SPECIAL CIRCUMSTANCE

Lastly, defendants contend that the special circumstance of lying in wait must be stricken because it fails to satisfy the constitutional requirement of sufficiently narrowing the class of capital offenses from non-capital first degree murders. The definition of lying in wait used in this case, which fails to require actual physical concealment, "is so broad so as to include within its reach nearly all intentional killings. Indeed, any killer whose presence is known to his victim for more than a few minutes before killing him and who fails to announce his preconceived intent to kill to said victim falls within the net of the lying in wait special circumstance. Such an expansive definition clearly violates the Eighth Amendment to the United States Constitution."

Defendants recognize that the California Supreme Court and the Ninth Circuit Court of Appeal have



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rejected this claim and affirmed the constitutionality of California's lying in wait special circumstance. (See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149; *Morales v. Woodford* (9th Cir. 2003) 336 F.3d 1136; *Houston v. Roe* (9th Cir. 1999) 177 F.3d 901.) Defendants also "acknowledge[] the limitations of this Court's power in terms of the issue raised (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455)." In accordance with *Auto Equity Sales*, we reject this claim.

DISPOSITION

The parole-revocation fines are ordered stricken. The clerk of the superior court is directed to prepare a corrected abstract of judgment and transmit it to the Department of Corrections. In all other respects, the judgments are affirmed.

WE CONCUR: Rushing, P.J., Elia, J.

1. Convenience, not disrespect, is intended by use of first names (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 280) and, where it makes identity clearer, gang monikers.
2. Zahedi testified the only way one could leave the gang was to survive the bullet.
3. Further statutory references in this and the following paragraph are to the Penal Code unless otherwise stated.
4. The People agree that the parole- revocation fines must be stricken because defendants are serving sentences of life without the possibility of parole. (*People v. Petznick* (2003) 114 Cal.App.4th 663, 687; *People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1183.) It will be so ordered.
5. Further statutory references from this point are to the Evidence Code unless otherwise stated.
6. The prosecution also argued that Touch's attempt to use the San Marino plot as a specific instance of Pham's conduct on one occasion to prove similar conduct on another occasion was an impermissible use of character evidence to show conformity with prior conduct which was precluded by section 1101, subdivision (b). The prosecution argued there was an insufficient similarity between the two incidents to warrant admission as modus operandi evidence. The trial court agreed that the defense had to establish sufficient similarity between the two incidents but had failed to do so. In their briefs, defendants argue that section 1101 does not apply to impeachment evidence. They cite *People v. Stern* (2003) 111 Cal.App.4th 283, 296, for the proposition that section 1101, subdivision (c), "is not intended to refer to character trait evidence offered to prove a fact relating to credibility of a witness: `Nor is Section 1101 concerned with evidence of character offered on the issue of the credibility of a witness; the admissibility of such evidence is determined under Sections 786- 790.'" The quoted Law Revision Commission's comment to Evidence Code section 1101 points out unmistakably that the admissibility of character trait evidence on the issue of credibility of a witness is governed by Evidence Code sections 786 to 790 and not by section 1101." However, the People note that the modus operandi theory of admission was dropped during the trial and defendants focused solely on its impeachment value under section 788. Since



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the parties are in agreement in their briefs that the basis for admissibility of the San Marino incident at trial was as character trait evidence on the issue of credibility, there is no need to discuss section 1101, subdivision (b).

7. Pham was convicted in 1987 for assault with a deadly weapon and robbery, in 1990 for two robberies, and in 1997 for robbery.

8. On January 3, 2001, Pham wrote Liroff that he expected leniency in his three strikes sentence in exchange for his testimony in the instant case and he demanded a written agreement before he would provide the testimony. Pham was not offered a deal to reduce his three strikes sentence. In his two- page, single- spaced letter with a half- page single-spaced "P.S." to Deputy District Attorney Liroff, Pham stated, "as to this date, you have done nothing to help me as I've asked you to. [An opposition investigator] promised me that he will get the attorney he works for to help me with the three strikes conviction as I asked you to do. You have made promises yet have done nothing to help at all. [¶] . . . [¶] It seems that every time I speak to you, whether it be on the phone or in person, all you want to do is discuss the case, and not what I need done. That needs to change if you expect me to cooperate." (Underscoring original.) Pham added, "I have done my duty. It is your duty however to protect my interestes [sic] as I have expressed to you on numerous occasions." In his phone calls to Dohi, Pham said in response to Dohi's statement that the only way the Los Angeles County District Attorney's Office would offer him a deal would be if he testified, Pham stated that if they could find "a way to work on the strike," he would testify in the Los Angeles cases. Later Pham added, "that's why I'm saying you know, if you, if you say there's a thing like that [a way to strike a strike], that's what I want. . . . [¶] . . . You slow? I want is the strike. Okay? And I work everything, you know? Whatever. You know what I mean?" Dohi responded that the Santa Clara County District Attorney and he could not find a way to strike Pham's strike, and Pham said, "they couldn't get no strike off? I don't wanna [sic] do nothing no more. [¶] [Dohi]: I hear you. [¶] . . . [¶] Look. That's what you; that's your price and uh, I won't say that's your price but that's what you want. [¶] [Pham]: Yeah. [¶] . . . [¶] This is the best I could, I could think. You know what I mean? [¶] [Dohi]: Because you've done so much for law enforcement already. [¶] [Pham]: Yeah, I've done so . . . [¶] [Dohi]: It seems a reasonable thing to ask. Okay? [¶] [Pham]: Uhm hum. That's why I did so much; well not much, but so much." Near the end of the conversation, Pham said, "But you say you gonna try [to get rid of the strike]. . . . [¶] . . . [¶] But I'm telling thing you know [sic], I told him, you know? Trying is not good enough, but see, I'm doing thing every day is not try [sic]. I'm doing real; you know what I mean? [¶] [Dohi]: I know. [¶] [Pham]: And this thing is not moving no more." Dohi then acknowledged that Pham did not want empty promises; he wanted something from Dohi for his cooperation. Dohi reiterated that the Los Angeles County District Attorney's Office only gave deals for testimony.

9. Heang presented testimony from a grade- school friend who had kept in touch that they planned for Heang to drive to Pacifica to visit her when he got out of jail which she thought was sometime in 1996. Heang also called Soop to testify he never determined the identity of "Billy," and Correctional Officer Hoa Chang to testify to Pham's attempted bribery and escape.

10. Dreamer claimed a total memory loss at trial (see *infra*). The court allowed the recording of his interview with police to be played for the jury.

