

COPY

SUPREME COURT COPY

No. S150524

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CARLOS MARVIN ARGUETA,

Defendant and Appellant.

(Los Angeles County
Superior Court No.
BA261252)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

HONORABLE CURTIS B. RAPPE

SUPREME COURT
FILED

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DEATH PENALTY

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Oxford Dictionary of American English (2005 Ed.)
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Westman & Walters (1981) *Noise and Stress: A Comprehensive Approach*, 41 Environmental Health Perspectives, pp. 291-309 149

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CARLOS MARVIN ARGUETA,

Defendant and Appellant.

No. S150524

(Los Angeles County
Superior Court No.
BA261252)

**APPELLANT'S OPENING BRIEF
STATEMENT OF APPEALABILITY**

This is an automatic appeal from a judgment of death. (Penal Code § 1239.)¹

STATEMENT OF THE CASE

On February 1, 2006, a 10-count amended information was filed in the Los Angeles County Superior Court charging appellant Carlos M. Argueta ("appellant") and codefendant Enrique Gonzalez ("Gonzalez") with: Count One, a violation of Penal Code section 187 (first degree murder of Jorge Lua); Count Two, a violation of sections 664/187 (attempted murder of Francisco Amezcua); Count Three, a violation of sections 664/187 (attempted murder of Carlos Zepeda); Count Four, a violation of section 187 (first degree murder of Gregory Gabriel); Count Five, a violation of sections 664/187 (attempted murder of Girnet Hart); Count Six,

¹Unless otherwise specified, all statutory references are to the Penal Code.

a violation of sections 664/187 (attempted murder of Rene Jimenez); Count Seven, a violation of sections 664/187 (attempted murder of Marvin Emmanuel); Count Eight, a violation of sections 664/187 (attempted murder of Camille Johnson); Count Nine, a violation of sections 664/187 (attempted murder of Roberto Carrillo), and Count Ten, a violation of sections 664/187 (attempted murder of Miguel Ramos). As to Counts One and Four, the information alleged the following special circumstances: murder by drive-by-shooting (§ 190.2, subd. (a)(21)); and multiple murder (§190.2, subd. (a)(3)). As to all counts, it was alleged that Argueta personally discharged a firearm (§ 12022.53(d)) and that Gonzalez was subject to the armed principal enhancement (§ 12022, subd.(d)). (3CT 670-676.)²

On February 1, 2006, appellant and Gonzalez were arraigned on the amended information. (3CT 683-684.) Both pled not guilty to all the charges and denied the special circumstances allegations and firearms enhancements. (3CT 683, 691-692.) Notice was given that the death penalty would be sought as to appellant, but not as to Gonzalez. (3CT 684-685; 4CT 887.) Pursuant to stipulation, appellant's and Gonzalez's cases were severed for trial. (4CT 878, 880.)

On August 16, 2006, the prosecutor filed an amended notice of the following factors in aggravation: (1) circumstances of the offense (§ 190.3, factor (a) - (a) victim impact, (b) fire power of automatic weapon (videotaped demonstration); and (2) other violent criminal activity (§ 190.3, factor (b)- (a) arrest of appellant for possession of a firearm, (b) discipline

² "CT" refers to the clerk's transcript on appeal; "SCT" refers to the supplemental clerk's transcript on appeal; and "RT" refers to the reporter's transcript on appeal.

of appellant for assault on another inmate; but no prior felony conviction (section 190.3, factor (c)). (4CT 919-923.)

Appellant's trial commenced with jury selection on September 5, 2006. (5CT 1000.) On September 11, 2006, after hearing argument, the court granted the prosecution's motions-in-limine to admit writings and other evidence recovered from appellant's residence. (15CT 4304-4305.) On September 14, 2006, the court declared a mistrial and discharged the jury pursuant to the stipulation of the parties. (5CT 4312-4313.) Jury selection resumed on September 18, 2006. (5CT 4330.) On September 26, 2006, the jury was impaneled. (28CT 8267-8268.)

On September 27, 2006, the court granted appellant's motion that all evidentiary objections at trial also be considered federal objections. (28CT 8269.) On that same date, the prosecution began presenting its case-in-chief.

The prosecution rested on October 5, 2006. (28CT 8287.) Appellant moved for a judgment of acquittal (§ 1118.1) as to Counts One, Two and Six, and as to the section 12022.53, subdivision (d), enhancements as to Counts Nine and Ten. (28CT 8287-8288.) The court denied the motion in part and granted it in part as to the section 12022.53, subdivision (d), enhancements (Counts Nine and Ten) which it dismissed for lack of proof of great bodily injury. (28CT 8288.)

The defense case began on October 5, 2006. (28RT 8287.) The presentation of evidence concluded on October 19, 2006. (28CT 8306-8307.) Guilt phase jury instructions were given on October 20, 2006. (28CT 8314-8315, 8319-8355; 29CT 8356-8365; 13RT 2704-2761.) The jury retired to deliberate on October 23, 2006. (28CT 8309.) On October 24, 2006, in response to a jury note requesting clarification as to Counts

Nine and Ten, the court allowed the parties to reopen argument. (29CT 8311, 8317-8318.)

On October 25, 2006, the jury found appellant guilty of two counts of first degree murder, as alleged in Counts One and Four (§ 187) and guilty of seven Counts of attempted murder, as alleged in Counts Two, Three, Five-Nine (§§ 664/187). (29CT 8356-8365, 8368-8373.) The jury found the drive-by-shooting and multiple murder special circumstances true. (29RT 8365.) As to Counts Four-Eight, the jury found the allegations of personal discharge of a firearm true. (29CT 8359-8563.) As to Counts One-Three and Nine, the jury found the allegations of personal discharge of a firearm not true. (29CT 8356-8358, 8364.) Finally, the jury deadlocked as to Count Ten, and a mistrial was declared. (29CT 8374; 13RT 2797-2802.)

The penalty phase commenced on October 30, 2006. (29CT 8377.) The jury was instructed on November 2, 2006, and retired to deliberate. (29CT 8384-8406; 15RT 3212-3244.) On November 3, 2006, the jury returned a verdict of life without the possibility of parole (hereafter “LWOP”) as to Count One (Jorge Lua) and a verdict of death as to Count Four (Gregory Gabriel). (29 CT 8432-8433, 8436-8437; 15RT 3252-3254.)

On February 8, 2007, defense counsel filed a sentencing memorandum and motion to set aside the death verdict or grant a new trial. (29CT 8539-8543.) On February 16, 2007, the trial court denied the motions for new trial and to set aside or modify the sentence and sentenced appellant as follows: on Count Four, appellant was sentenced to death; on Count One, he was sentenced to life without the possibility of parole; on Counts Two, Three, Five-Nine, he was sentenced to life plus 25 years, all to run consecutively. (29CT 8568-8550 [Commitment of Death], 8603-8614; 30CT 8619-8627 [Abstract of Judgment]; 15RT 3278-3282.)

STATEMENT OF FACTS

A. Guilt Phase Evidence

1. Prosecution Case

a. February 13-14, 2004 ("February 14")

On February 13, 2004, Francisco Amezcua was hanging out at his house with his cousin, Jorge Lua, and a friend, Carlos Zepeda. (7RT 1275.) At some point that evening, Amezcua agreed to take Lua home. (7RT 1277.) Amezcua drove his white Datsun; Lua was in the front passenger seat and Zepeda was in the back seat. (7RT 1277-1278.)

While traveling westward on Manchester Street, near the Night Moves Social Club, Amezcua pulled over to the curb when he saw some girls near the intersection of Manchester and Raymond.³ (7RT1279.) The girls walked away. (7RT 1279.) Then, gunshots rang out and the crowd of more than 20 people in front of the social club scattered and ran to their cars. (7RT 1280-1281.) Amezcua got scared and tried to drive away. (7RT 1280.) In his haste, Amezcua reversed and backed into a small red car. (7RT 1282.) Amezcua signaled the people in the car to move back because he did not want to move forward into the gunfire. (7RT 1282.)

When Amezcua looked back, he saw two people, a driver and a front seat passenger, in the other vehicle, a small red Honda or Toyota hatchback. (7RT 1283.) Amezcua believed the occupants of the red car were Mexicans. (7RT 1285.) Because the men in the red car looked angry, Amezcua pulled forward. (7RT 1287.) As he drove forward, Amezcua heard more than 10 additional gunshots. (7RT 1290-1291.) He heard glass

³ Unless otherwise stated, all location references are within the City of Los Angeles.

shatter and then realized the shots were going through the rear of his vehicle. (7RT 1291.) Everyone in the car ducked. (7RT 1291.)

The shooting continued as the red car moved parallel with the driver's side of Amezcua's car. (7RT 1292-1294.) Amezcua never saw any one in the red car holding a gun. (7RT 1294.)

After the shooting stopped, Amezcua, Lua and Zepeda checked each other out. (7RT 1294.) Everyone seemed fine and they continued home. (7RT 1294.)

On February 14, 2004, at about 1:28 a.m., Los Angeles Police Department Officer Greg Garcia was called to East 84th Street Place. (7RT 1253.) At the scene, he saw a white Datsun 510 with bullet holes in the rear quarter panel and its rear window shot out. (7RT 1254.) Two male Hispanics were standing on the curb and one male was lying on his back on the ground bleeding. (7RT 1254.) The Fire Department was already at the scene administering CPR. (7RT 1255.) The bleeding victim was transported to the hospital. (7RT 1256.)

Officer Garcia interviewed the two Hispanics standing on the curb – Amezcua and Zepeda. A Scientific Investigation Division (S.I.D.) photographer and the detectives marked the bullet holes in the Datsun and impounded the vehicle. (7RT 1258, 1261.) In addition to the shattered rear window, there were five bullet holes on the driver's side, a bullet hole in the rear bumper, two exit bullet holes on the quarter panel of the passenger side and grazed metal (a skipped round) on top of the trunk. (7RT 1259.)

Deputy Medical Examiner David Whiteman performed the autopsy on Jorge Lua. (7RT 1386.) Lua had been pronounced dead on February 14, 2004 at 1:58 a.m. (7RT 1387.) The autopsy revealed two gunshot wounds. (7RT 1388.) The fatal gunshot wound was to the abdomen. (7RT 1388.)

Death would have occurred within a couple of minutes of the bullet entering Lua's body. (7RT 1390.) The second, nonfatal bullet went through Lua's right shoulder and upper arm and exited, damaging only skin and muscle. (7RT 1390.) Whiteman was unable to determine the caliber of the projectile from the wound. (7RT 1391.) A toxicology screen on Lua showed prior use of marijuana but not that Lua was under the influence on the date he died. (7RT 1398.)

On February 20, 2004, Criminalist Diane Paul, of the S.I.D. firearms unit, performed a bullet path analysis on Amezcua's 1973 Datsun 510. (8RT 1439.) Paul identified five separate bullet entries on the driver's side of the vehicle. (7RT 1440; People's Exhibit No. 48-A-F.) Using trajectory rods, Paul determined that two of the bullets that entered the driver's side passed through the interior of the vehicle from the rear compartment through the driver's and front passenger's seats. (8RT 1447-1451, 1455; People's Exhibit Nos. 49-B, 49-D.)

Additional bullet entries and impacts were located at the rear of the Datsun. (8RT 1456-1462; People's Exhibit No. 50-A -G.) Altogether, Paul concluded that there had been 18 possible primary impacts, not all perforations, and at least nine shots. (8RT 1466.)

Los Angeles Police Detective Michelle Esquivel, the lead detective at the Manchester crime scene, testified that, in addition to Lua, there were five surviving victims and five shooters around the social club that night. (8RT 1471-1472.) Police recovered two revolver handguns from the area. (8RT 1473.)

Police separated the shooting that caused Lua's death from the other shootings based on the interview with Amezcua, as well as the location of the shell casings collected from the crime scene and the bullet recovered

from Lua. (8RT 1475; 10RT 2068-2069.)

Zepeda was never able to identify the occupants of the red car. (8RT 1477.) On February 23, 2004, Amezcua was shown three photo lineups, six packs A, B and C, marked as People's Exhibit Nos. 16, 17 and 18, respectively, which did not include a photograph of appellant. (8RT 1485.) On cards A and B, Amezcua made tentative identifications of two randomly selected individuals who, Amezcua said, looked like the passenger in the red car because they were chubby. (8RT 1486-1487.) Amezcua also was shown a single photograph of Erick Arzola who, he said, also looked "chubby" like the passenger.⁴ (8RT 1488.) None of these were positive identifications. (8RT 1489.)

On March 19, 2004, Amezcua was shown two additional photo-lineups, one of which included a photograph of appellant in position two. (8RT 1493-1494; People's Exhibit Nos. 19 and 20 [black and white copy of No. 19].) In People's Exhibit No. 19, Amezcua said only that photo number 2 looked similar to the passenger, again mentioning the chubby face. (8RT 1495, 1521.) However, in her original report, Esquivel had written that Amezcua remembered the driver's face as chubby. (8RT 1510-1511.)

Amezcua was then shown a six-pack, People's Exhibit Nos. 21 and 22, with a photograph of Gonzalez in position 4. (8RT 1497.) He picked out the persons in positions 1 and 4 as looking like the driver. (8RT 1497.) Amezcua also was shown People's Exhibit Nos. 24, 25, 26, photos of the impounded red Toyota Celica driven by appellant. (8RT 1498.) Amezcua recognized the hood and the front end of the Toyota in the photos as

⁴ Over defense objection, the prosecutor was allowed to eliminate Arzola as a suspect in the Gabriel and Carrillo shootings by informing the jury that Arzola had been killed the same day as Lua. (8RT 1490-1493.)

belonging to the car involved in the shooting. (8RT 1499.)

Amezcuca was interviewed by Los Angeles Police Officer Theodore Hammond and separately by Esquivel and her partner, Linda Ortega. Amezcuca's interview with Hammond was tape recorded. (8RT 1507; Court's Exhibit No. 9.) His interview with Esquivel was not taped because the tape recorder did not work. (8RT 1509-1510.)

b. February 14-15, 2004 ("February 15")

Flyers announcing a Valentine's Day party at a nightclub on February 14, 2004, were passed out at local schools. (8RT 1575-1576.) Gregory Gabriel, then 12 years old, got permission to spend that night with his best friend, Marvin Emmanuel, then 14. (9RT 1648.) Their plan was to wait until Emmanuel's parents went to sleep and then have Marvin Emanuel's 17-year-old brother, Kareem, drive them to the party. (9RT 1650.) They left the Emmanuel house at about 10:30 p.m. and picked up two other school friends: 15-year-old Camille Johnson and her 13-year-old sister, Girnet Hart. (9RT 1650.) Kareem dropped the four off at the corner of 57th Street and Western Avenue. (9RT 1651-1652.) He told them to wait there for him to return with another group of friends. (9RT 1578, 1652.)

While waiting, Emmanuel noticed the people at the club seemed older and largely Hispanic. (9RT 1653.) Emmanuel told Gabriel there were "too many Mexicans." (9RT 1674.) Gonzalez overheard the remark and walked over to Emmanuel, Gabriel, Johnson, and Hart. (8RT 1582; 9RT 1656, 1686.) He asked them "which of you fools was talking about Mexicans." (9RT 1657, 1686.) He seemed angry. (9RT 1686.) They all denied saying anything. (8RT 1582; 9RT 1657.) Gonzalez then asked if they were gangbangers and threw out some letters of his crew "A.T.C" or

“T.C.A.” (8RT 1582-1583; 9RT 1663-1664, 1688, 1689.)

Hart was scared and thought there was going to be a fight. (8RT 1582.) She ran across the street to a phone booth and acted like she was using the phone. (8RT 1582, 1587.)

Meanwhile, Gonzalez called to his friend “Carlos,” who was standing across the street. (9RT 1659, 1690.) Appellant walked over and pulled out a black gun from inside his leather jacket. (9RT 1691.) Appellant held the gun with two hands. (9RT 1695.) Gonzalez told appellant that “These fools was talking about Mexicans,” and something about they “don’t know T.C.A.” (9RT 1694.) Appellant and Gonzalez were angry. (9RT 1666, 1696.) Appellant first pointed the gun at Johnson. (9RT 1695.) When Johnson asked appellant if he was going to shoot her, he smiled and said “no.” (9RT 1697.)

A security guard and another man came over. (9RT 1666, 1698.) The security guard told appellant to put the gun away. (9RT 1666, 1698.)

When the security guard walked away, the group of four followed behind him towards the club. (9RT 1667, 1699.) They walked together with their backs to Gonzalez and appellant. (9RT 1668.) Hart had rejoined the group when she saw Gonzalez and appellant leaving. (8RT 1590-1591.)

Seconds later there were gunshots and everyone ran. (8RT 1592; 9RT 1668-1669, 1700.) Johnson and Emmanuel made it into the club but then got separated. (9RT 1700-1701.) As Emmanuel ran to the bathroom, Hart began pulling on his shirt; Emmanuel saw Hart had a bullet wound in her stomach and was bleeding. (9RT 1670.) Hart collapsed in the bathroom. (8RT 1594.) She had been shot twice in the abdomen. (8RT 1596.) Emmanuel then went to look for Gabriel and saw him lying on the ground bleeding. (9RT 1671-1672.) Gabriel had been shot twice in the

back. (9RT 1636.)

Rene Jimenez was a DJ at the club that night. (8RT 1612.) As he walked out of the club he saw two Hispanic men, each holding a gun, one a large gun that looked like a machine gun and one a handgun. (8RT 1614-1616.) When he saw the guns, Jimenez turned around and was shot twice in the chest. (8RT 1617.) He then started running and was shot three more times in the back. (8RT 1619.)

Gabriel was taken to the hospital and received treatment. (9RT 1638.) He died that night from bleeding as a result of the two bullets to his back. (9RT 1637.) Jimenez and Hart survived but each required two surgeries and long hospital stays. (8RT 1598, 1622.) The police found 21 nine (9) millimeter shell casings clustered at the scene of the shooting. (8RT 1555-1556.)

c. February 19, 2004

After a preliminary hearing spanning several days, a judge held appellant's younger brother Johnny to answer on a "serious felony" charge unrelated to appellant's case. (9RT 1734-1736, 1739.) Appellant attended several court sessions. (9RT 1739.) He allegedly disturbed the hearing by murmuring remarks about the witnesses as they testified, and by making hand signs. (9RT 1746.) He gave witnesses an intimidating stare. (9RT 1746.) This conduct continued in the hallways outside the courtroom. (9RT 1746, 1750.)

Miguel Ramos testified at the preliminary hearing on February 10, 2004. (9RT 1740.) His friend Robert Carrillo came to court with him for moral support. (9RT 1773.) Detective Carranza observed appellant's behavior toward Ramos and Carrillo. (9RT 1751.)

On the afternoon of February 19, 2004, Carrillo was hanging out

with Ramos and some other friends on Carlin in the Smiley Hauser section of West Los Angeles. (9RT 1775-1776; People's Exhibit No. 107.) While at Carlin, Carrillo saw a red car drive by. (9RT 1778.) Shortly thereafter, Carrillo and Ramos left to run some errands. (9RT 1780.) Ramos drove his Mazda hatchback with Carrillo as his passenger. (9RT 1780, 1781.)

Along the way, Ramos and Carrillo again saw the red car, a two-door Toyota Celica. (9RT 1782, 1803; People's Exhibit No. 25.) After the red car passed the Mazda, it made a couple of U-turns and wound up a few car lengths behind the Mazda. (9RT 1783-1785.) The red car kept up with the Mazda as Ramos accelerated. (9RT 1787.) Ramos and Carrillo believed they were being chased and began to maneuver to try to lose the red car. (9RT 1789, 1792.)

After about 15 blocks of evasive driving, Carrillo felt a sting in the upper right side of his back. (9RT 1792.) When he turned around he saw the back window of the Mazda shattered and thought he had been struck by glass. (9RT 1792, 1793.)

Ramos was not hit and continued driving fast to get away from the red car, which was still following behind. (9RT 1795.) Ramos next made a turn in front of an SUV and lost control of his car. (9RT 1796.) Carrillo and Ramos abandoned the car and took off running down the street toward Carrillo's sister's house. (9RT 1797.) They first hid behind another car but after about five minutes, believing it was clear, went to Carrillo's sister's house. (9RT 1799.) When Carrillo's sister checked Carrillo's shirt, she found a hole where a bullet had entered and burned his skin. (9RT 1806.) Police recovered a single 9 millimeter casing in the roadway where the shot was reported. (9RT 1844.)

Carrillo did not see the red car after he ran into his sister's house.

(9RT 1807.) Carrillo had seen two people in the car, but could not identify them because he never saw their faces. (9RT 1805, 1812, 1813.) Carrillo knew appellant, as they had attended the same high school. (9RT 1810.) After the incident, but before he met with Detective Carranza, Carrillo looked at appellant's picture in a school yearbook. (9RT 1811.)

After receiving a telephone call from Carrillo on the day of the incident, Jesus (Jessie) Molina, Carrillo's brother-in-law, went outside with some friends. (9RT 1849.) A few minutes after he went to his front yard, Molina saw Ramos and Carrillo running up the street toward his house. (9RT 1851.) He then saw a red vehicle pass, collide with the driver's side of his landlord's truck and then speed off. (9RT 1855, 1856.) When Molina approached the truck, he got a closer look at the occupants of the red car, mainly the passenger. (9RT 1857-1858.) At a subsequent photo-lineup, Molina wrote that the person in position two, appellant, best fit the description of the front passenger. (9RT 1863; People's Exhibit Nos. 19, 110, 111.)

d. Ballistics

On about February 19, 2004, Detective Eric Baker, one of the lead investigators of the homicide at 57th and Western, learned that the casings from his crime scene matched casings recovered from the scene of the Lua shooting on February 14, 2004. (9RT 1883-1885.) On February 26, 2004, Baker received further information that a casing recovered from the crime scene of the Carrillo shooting also matched the casings from 57th and Western. (9RT 1887.)

A firearms analyst, Rafael Garcia, later examined the cartridge casings, bullets and bullet fragments from the Lua, Gabriel and Carrillo shootings. (10RT 2066.) Garcia and his coworkers determined that some

of the 9 millimeter casings from the Lua crime scene, casings from the Gabriel crime scene and a casing from the Carrillo crime scene were all fired from the same gun. (10RT 2072, 2080; People's Exhibit No. 136.) Garcia also compared a bullet recovered by the coroner from Gabriel with a bullet and bullet fragments from the Lua crime scene and determined these also were fired from the same gun. (10RT 2082.)

The weapon used in the three shooting incidents was never recovered. Nevertheless, based upon a photograph of a gun and a gun stock recovered from appellant's residence, John Thompson, a senior investigator for the District Attorney's Office, concluded that the weapon used was a Sten Mark III. (10RT 2093, 2098; People's Exhibit No. 118.) The Sten Mark III was designed in the United Kingdom during World War II. (10RT 2101.) It combined the automatic firing capabilities of a machine gun with the ammunition of a pistol. (10RT 2099.) The operator of the gun can select between a fully automatic or a semi-automatic mode of firing. (10RT 2105-2106.) In automatic mode, with the trigger held down, the gun can fire 500 rounds per minute. (10RT 2114.) In semi-automatic mode, the firing rate is determined by how fast the shooter can pull the trigger. (10RT 2124.) It is generally not possible to tell from the rate of firing or the layout of ejected shell casings whether the gun was fired in automatic or semi-automatic mode. (10RT 2118-2119.) If the shooter stands in one place, shell casings are more likely to cluster in one area. (10RT 2119; see People's Exhibit No. 59.)

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e. Search of Appellant's Residence

(i). The Search

On about February 26, 2004, Detectives Baker and Carranza, with a team of Los Angeles police officers, executed a search warrant at the Argueta family residence. (9RT 1890.) During their pre-search surveillance, officers saw appellant and Gonzalez leave the residence. (9RT 1893.)

Once inside, officers searched a room believed to be appellant's bedroom. (9RT 1894-1897; 10RT 1939.) Officers seized various writings and a paintball mask from the room. (9RT 1895; People's Exhibit Nos. 124, 125.) In an occupied, converted garage at the back of the house, officers found some writings with the letters "T.C.A." and a digital photograph of a gun, magazine clips and a paint ball mask, as well as a gun stock. (9RT 1897-1900; People's Exhibit Nos. 118, 121.)

(ii). The Writings⁵

The writings seized from the bedroom were in two envelopes containing assorted notepaper and cards (10RT 1925, 1934; People's Exhibit Nos. 125, 128.) The writings were violent "gang style" "lyrics," referring, among other things, to "lil bro," "world War 3," "bullets flying," snitches and T.C.A. (10RT 1926-1939.) In addition, there was a list of names which included victims and witnesses in appellant's brother's case. (9RT 1752-1755; People's Exhibit No. 125.)

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⁵ Over defense objection, the writings were exhibited and read to the jury. (See Argument I, *post.*)

f. Appellant's Statement

After completing the searches of their residences, detectives interviewed appellant and Gonzalez, who had been taken into custody and placed in separate rooms. (9RT 1901.) Appellant's interrogation began at 12:15 a.m. (February 27, 2004) and lasted into the morning of that day. (9RT 1901; People's Exhibit Nos. 29, 30, 31, 32; III-Supplemental Clerk's Transcript 112.) Detectives Baker and Williams interviewed appellant while Carranza and other detectives interviewed Gonzalez. (9RT 1902.) Carranza was brought in later to assist with appellant's interview. (9RT 1905; 10RT 1920.) Appellant was familiar with Carranza from his brother's case. (9RT 1734-1737,1905.)

Baker and Williams first focused on the shooting at 57th and Western. (9RT 1883.) They confronted appellant with a photograph of Gabriel taken by the police at the hospital and the photograph of a gun seized from his residence. (9RT 1902-1903.) They told him that both his cousins had told police the gun was appellant's. (III-SCT 20; People's Exhibit No. 130.) They also told appellant that two witnesses had identified him as present at the 57th and Western shooting. (III-SCT 33-34; People's Exhibit No. 130.)

Initially, appellant admitted being at 57th and Western, but denied that he was the shooter. (10RT 1919; III-SCT 30, 51-56; People's Exhibit No. 130.) Before he went further, appellant wanted a guarantee that if he told the truth, he could go home. (III-SCT 24, 44; People's Exhibit No. 130.) Appellant was also concerned that if he "snitched" there would be retaliation against his brother in jail. (10RT 1948; III-SCT 38; People's Exhibit No. 130.)

After Carranza took over the interview and changed its focus to the

Smiley Hauser shooting, appellant continued to deny any connection to the gun in Exhibit 118. (III-SCT 72-73; People's Exhibit No. 130.) He admitted that he was the driver of the red car involved in that incident and that Gonzalez was the passenger and shooter. (III-SCT 75-88, 103; People's Exhibit No. 130.) When told by Carranza that he been identified as the passenger and Gonzalez as the driver, appellant disputed the identifications because Gonzalez "can't even drive." (III-SCT 86-89; People's Exhibit No. 130.) Appellant then offered to "tell everything" if he could see his family face-to-face. (III-SCT 96-98; People's Exhibit No. 130.)

Carranza arranged a face-to-face meeting between appellant, his parents and his sister.⁶ (CT 825-829.) The interview resumed after the meeting with all three detectives present. (III-SCT 98 et seq.; People's Exhibit No. 130.)

Carranza and Baker suggested to appellant that he did not intend to kill anyone, that he was just a scared kid when he heard shots and "some jackasses" backed into him. (III-SCT 98-99.) Baker urged appellant to give his version of events right then if he "ever hope[d] to hug his mother again." (III-SCT 100.) Appellant responded that he was driving the night of the shooting on Manchester and that he did not shoot at the other car. (III-SCT 100-101 ["there was a lot of shootings that day"].) Appellant was not sure whether the occupants of the other car had a gun. (III-SCT 100, 104.)

Appellant said that he and Gonzalez had run back to the car after

⁶ The court denied a defense motion to play a tape of the family meeting to the jury. (See Argument II, *post.*) The family meeting was excised from the tape and transcript.

someone at the party pulled a gun and started shooting at them. (III-SCT 104.) As they were leaving, the white car backed into them. (III-SCT 104.) Gonzalez grabbed the gun and started shooting at the white car. (III-SCT 101, 104.) Appellant stated that both he and Gonzalez had been drinking that night. (III-SCT 99, 103.)

The next night, before the 57th and Western shooting, appellant had also been drinking and getting high. (III-SCT 107.) He was with Gonzalez and his cousin Luis. (III-SCT 107.) Gonzalez had crossed the street to find out how much the [Valentine's Day] party cost when a "black guy" said something racial to him, like "There's too many Mexicans here." (III-SCT 107.) Words were exchanged and then Gonzalez told appellant to "bring the strap [gun]." (III-SCT 107.)

Appellant did not know why he listened to Gonzalez, who kept saying "Do it fool, do it." (III-SCT 108.) Gonzalez was his best friend and he always listened to him. (III-SCT 109.) Appellant did not know if the gun was automatic because he had not handled one like it before. (III-SCT 108.) He just pressed the trigger and the bullets came out flying until he let go. ((III-SCT 108.) Appellant believed he had aimed in the air. (III-SCT 108.)

A few days later, appellant was driving with Gonzalez in the Smiley Hauser area when he saw some "white guy" running away from him. (III-SCT 110.) Appellant was following in his car, when Gonzalez fired a shot. (III-SCT 110-111.) Appellant recognized the white guy, Carrillo, from court and thought he had testified against appellant's brother. (III-SCT 111.)

When asked whether he ever meant to kill anybody, appellant answered "no." (III-SCT 112.) When asked why he took the gun out,

appellant answered because Gonzalez told him to. (III-SCT 112.) Finally, when told at the end of the interview that he was going to be booked, appellant said “I thought you said I was going home, man.” (III-SCT 113.)

A redacted version of the interview was played to the jury toward the end of the prosecution’s case-in-chief. (9RT 1907-1908, People’s Exhibit Nos. 129, 130; 10RT 1922, People’s Exhibit Nos. 131, 132.) Thereafter, the seized writings were projected on the screen and read verbatim by Detective Baker. (10RT 1926-1940.)

2. Defense Case

The defense case had multiple objectives. The first, in order of presentation, was to demonstrate that appellant was the driver of the car and not the passenger – that is, not the shooter – on either February 14 or 19. As appellant had stated, he was always the driver when he was with Gonzalez because Gonzalez did not drive. (III-SCT 89.) Appellant’s sister, Jennifer Argueta, testified that Gonzalez spent almost every day at appellant’s house, and she had never seen him drive. (11RT 2157, 2160.) Appellant’s cousin, Ronnie Argueta, the owner of the red Toyota Celica, regularly left his car with appellant; he had never seen Gonzalez drive the car. (10RT 2206, 2209.) A nearby neighbor, William Harris, had never seen Gonzalez drive to appellant’s house. He had always seen Gonzalez get off at the bus stop at the corner of 38th and Western. (12RT 2478.)

Further, while the Department of Motor Vehicles had driving records for appellant, it had none for Gonzalez. (12RT 2432.) For example, on February 23, 2004, appellant had been cited for driving without a license and the red Toyota Celica had been impounded. (11RT 2342.)

Appellant’s family members also testified that appellant was left-handed and Gonzalez right-handed. (11RT 2161, 2250.) Patricia Fant, a

forensic firearms expert, explained that it would be more challenging for a left-handed person to shoot from the passenger seat of a vehicle because the window frame would be in the way. (11RT 2228 [the farther the target vehicle, the more difficult the shot for a left-hander].)

Sandra Claiborne, a forensic print specialist for the Los Angeles Police Department, testified that she compared eight prints lifted from the impounded Toyota Celica with prints of appellant, Gonzalez and others. (11RT 2373-2379.) She found no prints matching appellant's; she found prints on the front passenger window matching Gonzalez and a third person, Javier Perez. (11RT 2377-2379.)

The defense also challenged the testimony of prosecution witnesses Amezcua and Molina, specifically, their identification of appellant as the passenger. In addition to cross-examination of these witnesses highlighting inconsistencies in their successive statements, the defense presented extrinsic evidence casting doubt on their veracity. On cross-examination, the defense had already elicited an admission from Amezcua that he had a "bad memory" because he had smoked marijuana since he was a "little toddler" and was smoking every day at the time of the incident. (7RT 1314, 1323, 1324.) Amezcua also acknowledged that he had viewed the driver and passenger of the red car for only a few seconds during the shooting, but had looked at them for a long time at the preliminary hearing. (7RT 1328, 1329.)

In its case-in-chief, the defense called Carlos Zepeda, the third occupant of the car driven by Amezcua on February 14. (11RT 2284-2290.) Zepeda saw no one making gestures and heard no one, including Amezcua, say "what the fuck" after Amezcua backed into the red car. (11RT 2289.)

Los Angeles Police Detective Theodore Hammond also testified for

the defense. Officer Hammond tape recorded his interview with Amezcua on February 14, 2004, right after the shooting. (12RT 2452-2453.) Hammond testified that, at the time of the interview, Amezcua was not able to identify or give a description of the occupants of the red car. (12RT 2453-2354 [when asked, Amezcua said he thought the occupants of the car were Mexican, but that was all he could remember about them].) There was no mention in the report of Amezcua describing either the driver or the passenger as having a “chubby” face. (12RT 2454.) Apart from the rough sequence of events, Amezcua stated that he could not remember anything else because “it happened so fast.” (12RT 2454.)

The defense also challenged Molina’s veracity based on multiple inconsistencies in his statements. For example, contrary to his trial testimony, Molina never told Detective Carranza that either he or his friend Alex had received a phone call from Carrillo during or following the chase and shooting. (10RT 2052.) Molina also never told Carranza that “everybody said that’s them.” (10RT 2053.) According to Carranza, Molina said that it was only later that he learned the occupants of the red car had shot at Carrillo. (10RT 2053.)

Molina told Carranza that there had been a collision between the red car and his landlord [Vernon] Hunter’s truck, but never told him he had run out to help Hunter after the collision. (10RT 2052; see also 12RT 2436.) Molina told a district attorney investigator that he had called 911 but then testified that he had not made the call. (10RT 1976.) Finally, Molina admitted looking at appellant’s photo in Carrillo’s high school year book, but stated that he did so after he had described the passenger to Carranza. (9RT 2007-2008.)

Melecio Spain testified for the defense that he was outside on the

sidewalk on February 19, 2004 when he saw a red car, with three occupants, speed by and almost hit Hunter's truck which was parked at the curb. (11RT 2303-2306.) Los Angeles Police Officer Leonardo Olea testified that he responded to a shot-fired incident on February 19, 2004, and took statements from witnesses on the scene. (11RT 2388.) Molina was not mentioned in Olea's report because he did not approach officers to tell them he was a witness. (11RT 2388; 10RT 2050.)

Finally, the defense presented the testimony of Robert Shomer, a forensic psychologist and expert on eyewitness identification. Dr. Shomer was asked to review materials regarding two incidents – the Lua shooting and the Carrillo shooting. – including photo lineups and photos of the crime scene at Manchester. (12RT 2489.) Dr. Shomer stated that his role was not to render an opinion as to the accuracy of the identifications, but rather to provide information on how the identification process works. (12RT 2490.)

Dr. Shomer explained a number of factors that affect the accuracy of eyewitness identifications. These included the impact on facial recognition of high stress and the related phenomenon of weapons focus, suggestiveness of the identification procedures, after-acquired information from media or other sources and normal memory decay. (12RT 2492-2498, 2507-2509.) Dr. Shomer also discussed the process of transposition. (12RT 2500.) In trying to reconstruct their memories of unexpected, violent events, witnesses will piece together observations and assumptions. (12RT 2500.) As a result, it is easy for witnesses to mix up, or transpose, the actions of one person to another, the face of one person to another. (12RT 2500.)

Dr. Shomer further stated that research showed no relationship between the vividness of the memory or the witness's level of confidence

and the accuracy of the identification. (12RT 2500, 2511.) In response to a hypothetical based mainly on the Lua shooting, Dr. Shomer discussed the inadequacy of overhead lighting for accurate identification, as well as the visual distortions produced by overhead lighting on a slanted surface, such as a windshield. (12RT 2514-2516.)

3. Prosecution Rebuttal

Vernon Hunter testified that on February 19, 2004, as he was getting ready to back his truck into his own driveway from a neighbor's driveway, a near-collision occurred. (11RT 2323.) The incident happened too fast for him to see the occupants of the other vehicle, but he believed there were three of them. (11RT 2325, 2339.) Afterward, Hunter spoke to his neighbor, Spain, about the near-collision. (11RT 2325.) He also spoke to Molina, but does not know whether Molina was on the street at the time of incident; Spain was there. (11RT 2323-2328.) Hunter encountered Molina when he walked back to close the gate after parking his truck. (11RT 2328.) Molina told him he had been on his cellphone with his cousin. (11RT 2328, 2338). Molina also told Hunter that he had seen the people in the speeding car, but did not given any description of them. (11RT 2331, 2332, 2339.)

B. Penalty Phase

1. Aggravation Evidence

a. Factor A - Circumstances of the Crime

John Thompson, the firearms expert, laid the foundation for a video (DVD) he made of a weapons demonstration using a Stenmark III, the type of gun but not the actual gun used in this case. (14RT 2840; People's Exhibit 142.) In the DVD, Thompson fired the gun twice, first in semi-automatic mode and then in automatic mode. (14RT 3841.) There were 21

bullets in the clip each time. (14RT 3841.) The demonstration took four seconds in the semi-automatic mode and two seconds in the automatic mode to empty the clip. (14RT 2843.)

Yunue Ramirez testified as a victim impact witness for Jorge Lua. She stated that she was the only family member to testify because Lua's parents were affected so badly by his death that they could not come to court. (14RT 2849.) However, no one in the family had gotten counseling.

Ramirez described Lua as a friendly person, who joked, loved his mother and was very caring toward children. (14RT 2845.) When Lua died, his first son was four years old and his girlfriend was seven months pregnant with his second son. The sons, both named Jorge, were eight and two at the time of the trial. The jury was shown a collage of family photographs of Lua and his sons. (14RT 2853-2854; People's Exhibit 143.)

Marvin Emanuel testified that he had known Gregory Gabriel for about one year from the time Gabriel moved across the street. (14RT 2855.) He and Gabriel were close. (14RT 2855-2856.) They were together whenever Gabriel's mother would let him go out. (14RT 2856.) Gabriel called Emmanuel's mother "Mom." (14RT 2857.) Gabriel spent Friday and Saturday night (February 13 and 14) at Emmanuel's house. (14RT 2857.) It was Emmanuel's older brother Kareem's idea to go to an adult party that Saturday night. (14RT 2862.)

Since that night, Emmanuel had nightmares and had not wanted to communicate about Gabriel at home. (14RT 2858.) He had spoken to a counselor, but nothing helped. (14RT 2858.) Gabriel's death had affected his relationship with his mother, formerly his best friend; but he could not speak to her about Gabriel. (14RT 2858-2859.) Emmanuel no longer listens to his mother. (14RT 2859.) He has not been going to school and

his grades have dropped; he just wanted to be by himself. (14RT 2859.)

Emmanuel had admitted at the guilt phase that he made the comment about there being “too many Mexicans.” (14RT 2860.) As a result, he felt guilty, and that Gabriel’s death was his fault. (14RT 2861.)

Gabriel’s older sister, Charlene Myers, described the many ways Gabriel was helpful to his family; she then went on to describe the effect of Gabriel’s death on their parents. (14RT 2864-2870.) Her parents were very strict raising their older children – the Belizian way – but were more lenient with Gabriel. (14RT 2866.) The family has never been the same since Gabriel’s death. (14RT 2689.) Myers thought her mother was going to die. She stopped eating and cut off her hair. (14RT 2869.) Her father would not express his feelings. His life centered around his dreams for his son. (14RT 2870.) Her parents’ relationship has not been good because her father blames her mother for letting Gabriel sleep over at Emmanuel’s.

Myers last saw her brother on February 11, her birthday. (14RT 2871.) Gabriel showed Myers the motor scooter he had gotten for Christmas, and she promised to teach him to drive when he was 16. (14RT 2872.)

Gabriel’s older brother, Lennox R. Crawford, had moved to the East Coast but returned to the West Coast when Gabriel was six years old. (14RT 2875.) Crawford described Gabriel’s college aspirations. Gabriel wanted to go to Verbum Dei, a Catholic high school and then to U.S.C. (14RT 2875-2876.) Crawford described his activities with Gabriel. Crawford had a seven year old son, who had a good relationship with Gabriel and missed him a lot. (14RT 2877.)

Crawford was informed by his mother that Gabriel had been gunned down. He went with the family to bury Gabriel in Belize. (14RT 2877-

2878.) Crawford's stepfather's (Gabriel's father) village came to the burial. (14RT 2879.) It was very hard for Crawford to watch Gabriel being put in the tomb. (14RT 2879.)

Gabriel's father, Gregorio, testified that Gregory was his only son.⁷ (14RT 2881.) He also had an older daughter. (14RT 2881.) Although Gregorio had only recently married Gregory's mother, he had been with his son since birth. (14RT 2881.) He was very proud of his son, who was smart and very good with computers and electronics. (14RT 2884-2885.)

Gregorio was very strict and the family was more protective of their son than most families. (14RT 2884-2885.) Gregory was not out "running the streets." (14RT 2883.) The family had a rule that Gregory should never "need to go sleep anywhere else." (14RT 2883.)

On Friday, February 13, 2004, Gregorio returned home after work, at about 1 a.m., and learned that Gregory's mother, Ella Crawford, had allowed Gregory to spend the night with the family across the street. (14RT 2886-2887.) Gregorio worked the evening shift and did not know the family where Gregory was staying that night. (14RT 2887.) Although Gregory's mother assured him that the family members were nice, church-going people, Gregorio was still upset; the couple argued until 4:00 a.m. (14RT 2887-2888.) But Gregory returned home the next morning at 7:00 or 8:00 a.m., and he and his father worked on house renovations. (14RT 2888.)

⁷ Although all persons, except appellant, have consistently been referred to by their last names, because the father and the son have the same last name, for clarity's sake, in this section of the statement of facts limited to the father's and mother's testimony, the father will be referred to as "Gregorio" and the son as "Gregory."

That evening, Gregorio and Ms. Crawford had plans to go out for Valentine's Day. (14RT 2889.) Gregory wanted to go to the neighbor's house instead of going with his parents; Gregorio said no, but Ms. Crawford prevailed and Gabriel was again allowed to go across the street. (14RT 2890.) Gregorio heard Gregory leave the house at about 8 p.m.; he heard nothing further until he received a call at about 3:00 a.m. informing him that his son had been killed. (14RT 2890.) About 15 minutes later, the neighbors came over and told Gregorio that his son had been shot but that he was going to survive. (14RT 2891.) Gregorio and Ms. Crawford went to the location of the shooting at 57th and Western and saw Gregory's clothing on the ground. (14RT 2892.) They were told by a police officer that Gregory had been taken to the hospital. (14RT 2893.) When they arrived at the hospital, they were told that Gregory had died. (14RT 2890, 2893.)

Gregory's mother, Ms. Crawford, testified next. Ms. Crawford had three children, Lennox Crawford, Charlene Myer and Gregory, her youngest. (14RT 2903.) Ms. Crawford described Gregory's good qualities, specifically his helpfulness to others and at home, and the activities he enjoyed. (14RT 2904-2907.) She repeated Gregorio's testimony that the family had been very protective of Gregory, but then explained the reasons she trusted Emmanuel's family and allowed Gregory to spend the night at their house. (14RT 2910-2912.)

After briefly restating the events of the early morning hours of February 15, Ms. Crawford detailed the impact of Gabriel's death on her. She told the jury that "Nothing is the same. America is not the same When Gregory died, I died with him. . . . I always tell people my son didn't die, he was murdered." (14RT 2919-2920.) She stated that she felt sadder

for her husband than for herself because of the many plans, hopes and dreams he had for Gregory. (14RT 2920.) She next described the family's and her own sad existence since Gregory's death. (14RT 2921.) Since his death, Ms. Crawford just went to work and went home; she no longer cooked or wanted to eat. (14RT 2923.)

The family received an outpouring of support from family members and friends, including about 1000 condolence cards. (14RT 2923.) Ms. Crawford described some exhibits, including collages made by Gregory and photographs of him that Ms. Crawford wanted the jury to see. (14RT 2924-2925.) When invited by the prosecutor to "share with the jury," Ms. Crawford again described the terrible impact of Gregory's death and then, in the name of justice, urged the jury "I just want you guys to give the defendant the maximum punishment that the law allows. . . ." (14RT 2927.)

b. Factor B - Violent Criminal Activity

Three police officers testified regarding appellant's arrest on January 15, 2004, for possession of a handgun.⁸ Officer Juan Pereida, formerly with the West Los Angeles Bicycle Patrol, testified that on January 15, while he and his partner, Officer Mendoza, were patrolling an area south of the 10 Freeway in West Los Angeles, they encountered three individuals, including appellant, in a parking structure adjacent to an apartment. (14RT 2932-2933.) When Officer Mendoza approached and asked "what's up," one of the individuals, Javier Perez, reached for his waistband. (14RT 2934-2935.) Believing that Perez was reaching for a weapon, officers Pereida and Mendoza drew their guns and ordered the three individuals to

⁸ The testimony concerning the handgun was admitted over appellant's objection. (See Argument VII, *post.*)

put their hands up. (19RT 2935.) All three complied, and the officers conducted a pat-down search of each one. (14RT 2935-2936.) The officers recovered a sawed-off shotgun from Perez's front waistband. (14RT 2936.) Officer Mendoza searched appellant and recovered a handgun, with one bullet in the chamber and no clip, and a single black glove. (14RT 2936-2937, 2956.)

Pereida also was allowed to testify that he observed nothing about appellant on the date of arrest that would have led him to believe that appellant was under the influence of any controlled substances. (14RT 2939-2951.) Pereida performed none of the physical tests used to determine intoxication, and he acknowledged that it was possible to have drugs in one's system without showing any symptoms. (14RT2953-2954.)

Officer Noel Macpoc of the Los Angeles Police Department Gang Detail confirmed that he found one bullet in the chamber of the handgun recovered from appellant. (14RT 2962.) Officer Paul Correjo of the West Los Angeles Division Patrol testified that he found five rounds of Double OO buckshot in the shotgun (sawed-off Mossberg) recovered from Perez. (14RT 2966.)

2. Mitigation Evidence - Factors D, G, H and K

Appellant's aunt, Martha Calderon, testified that she had known appellant since birth and that he had always been a good boy, with a good heart and a lot of love and affection towards everybody. (14RT 2975-2976.) He was respectful to adults, did well in school and participated in family church gatherings. (14RT 2976, 2978.) Ms. Calderon never saw appellant involved in any violent crime. (14RT 2977.) She concluded that she had known appellant to be good and just wanted the jury to be

compassionate to him.⁹ (14RT 2981.)

Appellant's younger sister, Jennifer Argueta, first described the difficult circumstances of her and appellant's childhood. Because the family was poor, Mrs. Argueta and the children lived for many years with relatives.¹⁰ (14RT 2987.) Ms. Argueta could not recall whether their father was then in El Salvador or living with the family, but did recall that only their mother was working at the time. (14RT 2988.) Their mother had always worked, sometimes several jobs. (14RT 2989.)

When their father worked, it was in construction. (14RT 2989.) He was home in the afternoon while their mother worked late. (14RT 2989.) Their father had emotional problems and became an alcoholic when Ms. Argueta was about five, appellant about eight. (14RT 2990.) Their father had been attending Alcoholics Anonymous meetings for the past two years and no longer drank. (14RT 2990.) Prior to that, he was violent toward their mother. (14RT 2991.) The last incident was the most violent; Ms. Argueta saw her father on top of her mother beating her in the face. (14RT 2990.)

Appellant was shocked by his father's behavior. (14RT 2991.) The two were distant and did not get along. (14RT 2991.) Their father left for

⁹ The trial court sustained the prosecutor's objection to defense counsel's question, identical to the one the prosecutor asked her own witnesses, as to whether the witness wished to say anything to the jury regarding penalty. (14RT 2978-2979.) The court also sustained the prosecutor's objection to defense counsel's referring to appellant by his first name "Carlos," although the prosecutor consistently referred to the victims by their first names. (14RT 2980.)

¹⁰ To avoid confusion, appellant's sister will be referred to as "Ms. Argueta," his father as "Mr. Argueta," and his mother as "Mrs. Argueta."

El Salvador more than once, one trip lasting eight months. (14RT 2992.) In his absence, their mother was responsible for discipline. (14RT 2992.) But she could not discipline appellant or his brother Johnny because she was not around, always working double shifts. (14RT 2992.)

From the time she was four or five, Ms. Argueta and appellant were always together. (14RT 2992.) He was her perfect role model and smart. (14RT 2993.) He helped Ms. Argueta and their cousins with their homework; he loved children. (14RT 2993-2994.) But when appellant was 17 or 18, he started using drugs. (14RT 2995.) Ms. Argueta knew appellant was using marijuana; she could smell it and appellant was sleeping and eating a lot. (14RT 2995.) His drug use increased after his arrest on January 15; he was smoking almost all the time. (14RT 2996.)

Ms. Argueta observed another change in appellant after their brother Johnny was arrested in April, 2003. (14RT 2996.) He became really depressed and just stayed at home. (14RT 2996.) He and his brother had always been together, and appellant no longer wanted to go out after his brother's arrest. (14RT 2996.)

Ms. Argueta testified that she had often seen co-defendant Gonzalez at her house. (14RT 2997.) After observing Gonzalez's interactions with her brother, she concluded that Gonzalez was a bad influence. (14RT 2997.) She acknowledged that her opinion of her brother had changed after he was convicted of murder. (14RT 2997.) Before then, she did not think he was capable of such a crime. (14RT 2997.)

Appellant's father, Carlos Argueta, Sr., testified next. Mr. Argueta confirmed that he had periodically returned to El Salvador, his birthplace, for several months at a time. (14RT 3008.) His longest stay in El Salvador was for eight months when he was trying to move his family back there

because he no longer wanted to be in the United States. (14RT 3009.) Mr. Argueta admitted that he had an alcohol problem. (14RT 3010.) His brother had all kinds of drug problems. (14RT 3017.) Currently, Mr. Argueta was attending AA and had stopped drinking. (14RT 3011.) Before then, drinking was problem. When he drank, Mr. Argueta would become violent; he yelled at his wife and children and became physical with his wife. (14RT 3011.) Appellant observed the violence and became angry; he wanted his father to stop drinking. (14RT 3011.)

Mr. Argueta described appellant as a child. (14RT 3012.) He was calm, attended church and had a lot of friends. (14RT 3012.) Appellant and his brother Johnny got along very well. (14RT 3012.) Mr. Argueta saw no major changes in appellant after Johnny was arrested; appellant looked normal. (14RT 3013.) But then, appellant's behavior changed. (14RT 3013.) According to Mr. Argueta, the problems began when appellant's friends, namely, Gonzalez, started arriving at the house. (14RT 3013.) After that, appellant changed a lot; he began sleeping a lot, smoking cigarettes and drinking beer. (14RT 3013.) Mr. Argueta believed these changes were largely Gonzalez's fault. (14RT 3020.)

Mr. Argueta described one incident of appellant's abnormal behavior. (14RT 3014.) When Mr. Argueta arrived home from work that morning, appellant was in the street wearing his boxer shorts. (14RT 3014.) When Mr. Argueta asked him what was going on, appellant answered that he saw animals in the trees. (14RT 3014.) This happened twice, once two or three days before appellant was arrested. (14RT 3021.) Another time, after he went on a trip with his girlfriend, appellant did not sleep for two days. (14RT 3014.) In the days before he was arrested, appellant spent the whole day sleeping and would not leave his room except to drink milk.

(14RT 3015.)

Finally, when asked if there was anything sympathetic about appellant, Mr. Argueta responded that appellant had been good all his life, but then in a month “everything got out of control.” (14RT 3016.) Mr. Argueta knew about appellant’s marijuana use and arrest with a weapon, but did not know about T.C.A. (14RT 3016.) Mr. Argueta felt he did not do a good job as a father, that “I did not care for him enough.” (14RT 3017.)

Defendant’s mother, Dora Argueta, also testified. Mrs. Argueta described appellant as a normal, well-behaved child who got along well with other children. (14RT 3028.) But as appellant approached adolescence, Mrs. Argueta noticed that he became “depressive.” (14RT 3029.) From 14 on, appellant showed signs of depression such as sleeping a lot. (14RT 3030.)

Mr. Argueta was often not home and did not spend much time with appellant. (14RT 3031.) Mr. Argueta would spend time with the children weekday evenings, but he would leave on the weekends to drink. (14RT 3031.) In addition, Mr. Argueta went frequently to El Salvador and was away for many months. (14RT 3031-3032.) Mr. Argueta had no financial responsibilities in the home. (14RT 3032.) Mrs. Argueta supported the family on her small income. (14RT 3032.) Mr. Argueta would become violent when under the influence of alcohol. (14RT 3032.) He spoke loudly and hit Mrs. Argueta once or twice. (14RT 3032.) Appellant saw his mother hit at least once, the last time three or four months before the shootings. (14RT 3032.) Appellant was very angry at the violence against his mother. (14RT 3033.)

Appellant’s depression worsened when his brother was incarcerated.

(14RT 3033.) Mrs. Argueta began observing signs of drug use when appellant was about 14 years old. (14RT 3034.) One time, Mrs. Argueta found a small bag of marijuana and took appellant to a clinic to be tested. (14RT 3034.) She never returned for the results because she already suspected he was using drugs. (14RT 3034.) When appellant was 16 or 17, she took him to a psychologist to get help with his depression. (14RT 3034-3035.) Appellant refused to return for further treatment. (15RT 3035.) Mrs. Argueta also tried for a month or month and a half to get appellant into a drug rehabilitation program. (14RT 3046.) She took him to the rescue and prevention program at a church. (14RT 3046-3047.) Appellant promised he would go but then was arrested. (14RT 3047.)

In the months before his arrest in February, Mrs. Argueta observed more symptoms of drug use. At times, appellant slept a lot and at other times he went for long periods without sleep and did not want to eat. (14RT 3035.) Appellant's behavior was abnormal. (14RT 3035.) About a month before his arrest, appellant was behaving as though he were seeing things and told his mother that he had raped his sister. (14RT 3035, 3043.) Appellant thought there were police in front of the house and he was shaking and trembling. (14RT 3036.) Mrs. Argueta did not call the police because the sister told her the rape was a lie, and appellant was crazy. (14RT 3045.) Ms. Argueta was recalled as a witness and confirmed that appellant never did anything sexual to her, and that was what she had told her mother. (14RT 3049.)

Mrs. Argueta tried unsuccessfully to separate appellant from Gonzalez. (14RT 3037.) She knew Gonzalez had been in jail and that he and appellant did drugs together. (14RT 3037.) Appellant's arrest on January 15, 2004, for gun possession was his first arrest. (14RT 3037.)

When asked for a reason to be sympathetic to appellant, Mrs. Argueta offered that he was a good son and very sweet, and “what happened with drugs, well, I don’t know anymore.” (14RT 3037.)

Julie Prado, appellant’s very good friend during their teenage years, described him as a great person, always polite and respectful, very family-oriented. (15RT 3070-3072.) Prado never saw appellant commit any acts of violence. She knew of T.C.A. as “just a bunch of kids,” who hung around after school and did “tagging,” i.e., graffiti or spray-painting. (15RT 3072.) She and appellant had never discussed violent gang activity. (15RT 3072.) Prado had occasionally seen appellant under the influence of alcohol and marijuana. (15RT 3073.) When asked whether she had ever seen signs that appellant might be using other drugs, she responded that at times appellant was very talkative,” real hyper,” and at other times very depressed; “it was a really rapid change.” (15RT 3074.)

Prado also knew Gonzalez; he was the “bigger one of the group,” that is, he had more of an influence on appellant and his friends. (15RT 3074.) Prado did not like Gonzalez’s “vibe” and did not like hanging around with him; she would leave if he was there. (15RT 3074.)

After high school, Prado went to college and the group of friends she and appellant shared in high school separated. (15RT 3075.) Even after moving away, Prado continued to have contact with appellant and noticed, when she visited him, that Gonzalez was always around. (15RT 3075.) She also noticed that appellant seemed more lonesome and, after his brother’s arrest, “more angry, more depressed, more sad” because of what his family was going through; but he wouldn’t talk much about it. (15RT 3075-3076.) Even so, based on their close friendship, Prado found it hard to believe that appellant had been convicted of two murders and several attempted

murders. (15RT 3077.)

Oscar Romero, a Youth Minister at the Holy Spirit Catholic Church, testified that he had met appellant in 2000 when appellant attended the church's confirmation program. (15RT 3090-3091.) The religious program lasted two years and included a social component with speakers from the police department, the local hospital and high schools. (15RT 3091.) During those two years, appellant attended the religious program once a week and the social program also once a week. (15RT 3092.)

There was a natural progression within the program from participant to volunteer. (15RT 3092.) After completing the two-year program, appellant continued to volunteer for six or seven months until his family moved out of the area. (15RT 3092.) Romero remembered appellant as a "wonderful teenager" who was very responsible and helpful to the witness and young people in the community. (15RT 3093, 3095.) Romero recalled no unusual behavior or signs of drug use during appellant's participation in the program. (15RT 3096.)

The final defense witness was Dr. Frank Gawin, a psychiatrist and neuro-pharmacologist. (15RT 3106.) Pharmacology is the study of the effects of medications, including illicit drugs. (15RT 3106.) Dr. Gawin's professional focus was on psychomotor stimulants such as cocaine and methamphetamine. (15RT 3107.) Dr. Gawin testified generally regarding the effects of alcohol, marijuana, psychomotor stimulants and Ecstasy. Overall, he noted that all major drugs, if consistently used prior to maturity, can produce a profound "developmental arrest." (15RT 3109 ["maturation ends at the point in time at which substantial drug use occurs in adolescence"].) Further, while all drugs enhance pleasure, this is coupled with disinhibition and diminution of judgment. (15RT 3108.)

Defense counsel did not elicit any opinion from Dr. Gawin regarding appellant's personal drug use. Instead, he posed hypotheticals based largely on the testimony of appellant's family. The first hypothetical posited that an individual alternated between hyperactivity or hypermobility and hypoactivity or markedly diminished movement. When asked if the described activity would be indicative of a particular drug, Dr. Gawin expressed the opinion that such a pattern occurred classically with psychomotor stimulants. (15RT 3111.) When asked, in a second hypothetical, whether not sleeping for a few days and then sleeping for the following couple of days would be indicative of drug use, Dr. Gawin again opined that this sleep pattern would be associated almost exclusively with psychomotor stimulant drugs. (15RT 3111.) He explained that psychomotor stimulants are most commonly used in binges, which can last several days, during which time the user remains awake. (15RT 3112.) When the binge stops, usually because the drug supply has run out, the user will "crash" in mood, from euphoria to depression, and will then finally sleep for a longer period than normal to make up for the lost sleep. (15RT 3112-3113.) Typically, after restorative sleep and several days of abstinence, the individual will again use the stimulant to recapture the euphoria. (15RT 3113.) This binge cycle can continue for years. (15RT 3113-3114.)

Defense counsel next asked if any particular classes of drugs were associated with hallucinations. (15RT 3114.) Dr. Gawin first explained the characteristics of the family of drugs known as hallucinogens. (15RT 3114.) However, when the subject was narrowed to paranoid hallucinations, Dr. Gawin testified that, apart from psychiatric disease, such hallucinations are produced almost exclusively by psychomotor stimulants.

(15RT 3115.) When asked to classify the drug Ecstasy, Dr. Gawin explained that it was a methamphetamine-like agent that also acted like a hallucinogen, except that it did not produce visual or auditory hallucinations, but rather, produced “a sort of hallucination that is emotional, a feeling of closeness . . . of being connected to one’s friends.”

(15RT 3118.) This kind of “social hallucination,” as well as the increased suggestibility produced by all euphoric drugs, including psychomotor stimulants, can result in heightened vulnerability to the suggestions of others. (15RT 3118-3119.)

Dr. Gawin also testified to the risk factors for drug use, including fights within the home and other life stresses, the availability of various drugs and their modes of ingestion. (15RT 3116, 3120-3123.)

The prosecutor’s cross-examination of Dr. Gawin elicited more testimony regarding the observable physical symptoms of alcohol, marijuana and other drug use, as well as the doctor’s agreement that it was rare, but not unheard of, for violence to be associated with marijuana use. (15RT 3123-3126, 3132-3134.) Dr. Gawin reiterated on cross-examination that while alternating hyper- and hypoactivity did not necessarily result from drug use, alternating periods of wakefulness and sleep had a stronger connection to the use of drugs. (15RT 3127-3128.) Dr. Gawin clarified that some, but not all, substances of abuse produce withdrawal symptoms. (15RT 3129.) Specifically, withdrawal from methamphetamine and cocaine produces no gross physiological, as opposed to psychological, effects. (15RT 3130-3131.) Finally, he described the paraphernalia associated with snorting or intravenous injection of methamphetamine, which, however, could also be smoked when rolled in a cigarette or marijuana joint. (15RT 3133, 3135.)

3. Prosecution Rebuttal

Daniel Mendoza, the defense investigator, testified that when he interviewed the Argueta family, appellant's sister told him that appellant's friends looked nice. (15RT 3137.) She never mentioned any issues with Gonzalez, and stated that she had only seen appellant using drugs one time. (15RT 3137.) Appellant's mother said she had considered, but had never taken appellant for psychological treatment, and that she believed appellant was sad and depressed because of his weight and that he stopped going to church because he was lazy. (15RT 3137-3138.) Appellant's father also told Mendoza that he had no problems with appellant's friends and never mentioned not wanting Gonzalez to hang around with appellant. (15RT 3128.)

Detective Kirby Carranza testified that his first contact with appellant was on April 3, 2003, when he arrested appellant's brother. (15RT 3140.) He next had contact with appellant on January 15, 2004, when he interviewed appellant following his arrest for gun possession. (15RT 3141-3142.) Carranza also observed appellant in February, 2004, on each of the four days of his brother's preliminary hearing. (15RT 3143-3145.) On February 26, 2004, Carranza arrested appellant and interrogated him at length the following day. (15RT 3146.) He observed no signs that appellant was under the influence of drugs on any of those occasions. (15RT 3141, 3144-3145, 3146.) Carranza also conducted a search of appellant's residence incident to his brother's arrest and a search of appellant's impounded car. No drugs or drug paraphernalia were found during these searches. (15RT 3140, 3145.)

ARGUMENT

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL BY ADMITTING INFLAMMATORY, MARGINALLY PROBATIVE WRITINGS SEIZED FROM APPELLANT'S RESIDENCE

A. Introduction

The murder and attempted murders alleged in Counts Four through Eight (February 15) were the most serious charges in the case, those with the greatest potential to produce a death verdict. With respect to the murder and attempted murders alleged in Counts One through Three, there was a question as to whether appellant or Gonzalez was the actual shooter. The jury ultimately resolved that question in appellant's favor by finding not true the personal use enhancements as to those counts. No such question existed, however, with respect to Counts Four through Eight where appellant admitted that he was the shooter. On the other hand, while the motivation for the shootings alleged in Counts One through Three and Counts Nine and Ten were fairly obvious, appellant's motivation and intent in relation to Counts Four through Eight were and remain unclear.

As to those counts, appellant denied that he intended to kill anyone, and his explanation for his actions, that he did whatever Gonzalez told him to do, was not inherently incredible in light of appellant's youth, immaturity and his attachment to the older Gonzalez as a surrogate brother. Certainly, the prosecution had no evidence to rebut this explanation. Instead, it seized on some violent rap lyrics found at appellant's residence to argue that on the night of February 15 appellant was acting in accordance with the threats and indiscriminate homicidal predisposition expressed in his "own words."

That was not the stated purpose for which the prosecutor had sought and gained admission of the lyrics, which was as evidence of gang affiliation. However, the evidence always presented an overwhelming risk that it would be misused as homicidal propensity evidence and, with the court's sanction, the prosecutor maximally exploited this inflammatory potential. In erroneously admitting the rap lyrics and allowing their misuse, the trial court denied appellant a fair trial, and the right to due process. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 15 and 17.) Appellant's convictions of Counts Four through Eight must therefore be reversed and the judgment set aside.

B. Factual and Procedural Background

On September 26, 2004, Los Angeles Police Department officers executed a search warrant at appellant's house. (9RT 1891.) From a bedroom believed to be appellant's, officers seized various writings. (9RT 1895.) On August 24, 2006, the prosecutor filed an in limine motion to admit the writings as gang evidence under Evidence Code section 1101, subdivision (b), as to all counts, and as generic threat evidence pursuant to Evidence Code section 1250 only as to Counts Nine and Ten. (4CT 940-961.) The writings, submitted in support of the motion, were separated into two collective exhibits – Exhibit Nos. 38 and 45.¹¹ Exhibit No. 38 included 11 pages of writings – plainly, rap lyrics – about snitches, guns and “T.C.A.,” appellant's tagging crew. (4CT 948; see 11RT 2267.) Exhibit

¹¹ These collective exhibits were modified, by omitting some writings and adding others, and then renumbered for trial as People's Exhibit Nos. 125 and 128. Because the prosecutor's arguments apply to this entire category of exhibits, appellant does not address the differences between the motion and the trial exhibits herein.

No. 45 consisted of a note card with a list of names, believed to be witnesses or victims in appellant's brother's case. (4CT 948.)

In her moving papers, the prosecutor argued that the writings were admissible as evidence of gang membership with respect to Counts Four through Eight (the February 15 incident) because defendants, referring to appellant and Gonzalez, had injected the issue into the case by accusing the victims of disrespecting T.C.A. (4CT 950.) The prosecutor cited some authority for the proposition that evidence of gang membership and the like could help prove "identity, motive, modus operandi, specific intent." (4CT 950-951; see e.g., *People v. Williams* (1977) 16 Cal.4th 153, 193 ["in a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect"].) Additionally, the prosecutor argued that the writings, specifically the list of names and references to "snitches," were admissible pursuant to Evidence Code section 1250 (hereafter "section 1250"), as "generic threats" to prove identity and state of mind *only* in relation to Counts Nine and Ten (February 19).¹² (4CT 955-956; see e.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 756-757 ["a generic threat is admissible to show the defendant's homicidal intent where other evidence brings the actual victim within the scope of the threat"].) The prosecutor also filed a separate in limine motion, based on these same arguments, to admit gang evidence in the form of expert opinion testimony. (4CT 925-939.)

Appellant filed an opposition to the prosecution's motions to

¹² Evidence Code section 1250, subdivision (a)(2), provides, in gist, that an out-of-court statement of a declarant's then existing state of mind, including intent, plan, motive and design, is not barred by the hearsay rule when offered to prove or explain conduct of the declarant.

introduce evidence related to alleged gang affiliation. (4CT 988-997.) Appellant maintained that the evidence was inadmissible pursuant to Evidence Code sections 352 (Discretion to Exclude Evidence) and 210 (Relevance). (4CT 990-991.) First, appellant noted that the purported gang – “T.C.A.” – comprised, at most, a small group of people and could just have been a party or a tagging crew. (4CT 991.)¹³

For each of the three incidents (February 14, 15 and 19), appellant argued that the probative value, if any, of the proffered gang affiliation evidence as to any genuinely disputed fact was substantially outweighed by its prejudicial effect. (4CT 991-993.) Because the central contested issue with respect to the February 14 and 19 incidents was the identity of the actual shooter – appellant or Gonzalez – evidence that the two supposedly belonged to the same gang would not help the jury resolve that question as to either of those incidents. (4CT 991-993.) As to the February 15

¹³ A “criminal street gang” is defined as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of [specified] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (*People v. Valdez* (2012) 55 Cal.4th 82, 131; Evid. Code §, 186.22, subd. (f).) On the evidence, T.C.A. was a “tag-banging crew,” not a criminal street gang, and had only *two* self-identified members, appellant and Gonzalez. (4CT 991; 9RT 1886, 1897; 11RT 2255, 2265.)

It should be noted that the information contained no gang allegation. On October 20, 2004, the prosecution stated that it intended to file an amended complaint with a gang allegation by the next court appearance. (1CT 133D.) However, when the case was called for preliminary hearing, the prosecution indicated that it was not going to be filing an amended complaint because “there is no gang allegation because there were no predicates.” (2RT 183-184.)

incident, appellant had admitted he was the shooter. (4CT 993.)

On the other side of the balance, appellant urged the court to consider the inherent prejudicial effect of gang affiliation evidence. (4CT 993-994, citing *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.)

The prosecution's gang evidence motions were heard on September 11, 2004. (3RT 255 et seq.) Initially, the prosecutor proffered that she intended to withdraw the gang expert motion in the belief that defense counsel had agreed not to cross-examine on prior misidentifications in exchange for the prosecution forgoing a gang expert. (3RT 256; see Argument III., *post.*) When defense counsel stated that he was leaning toward the stipulation but needed a little more time to think it through, the prosecutor sought rulings on both of the in limine gang motions, but only argued the admissibility of the motion seeking admission of the seized writings as gang evidence. (3CT 257-258.) The prosecutor again argued that the writings were admissible as gang affiliation evidence as to all counts under Evidence Code section 1101, subdivision (b) (hereafter "section 1101(b)") and as generic threats as to Counts Nine and Ten under section 1250 to prove intent, deliberation and premeditation and aspects of appellant's state of mind related to gang culture. (3RT 256-258.)

Defense counsel restated his opposition to the introduction of the seized evidence on foundational, relevancy and prejudice grounds. While agreeing that his "conceding a lot" did not entirely relieve the prosecution of its burden of proof, defense counsel argued that his concessions, nonetheless, reduced the probative value of and rendered cumulative most, if not all, of the proffered evidence. (3RT 260.) With particular reference to Count One, but equally apposite to all the other counts, defense counsel

argued that the seized writings “paint[] Mr. Argueta to have a predisposition for murder.” (3RT 262, 266 [“If the jury hears all these terrible things about killing snitches and hit lists and all that they’re not going to give him a fair trial They’re going to be thinking and they’re going to say, oh, he’s a gangster, he had a machine gun, end of story.”].) In the end, the court ruled that the seized writings were admissible, concluding generally that the relevance was not substantially outweighed by undue prejudice, and that the jury would not misuse the evidence. (3RT 270.)

In her opening statement, the prosecutor was allowed to argue, over defense objection, that the “defendant’s words” were a declaration of a personal “war on society.” (7RT 1220-1223.) During the trial, right after playing appellant’s interview with the police, Detective Erik Baker read all the writings in People’s Exhibit Nos. 125 and 128, which were also enlarged and shown to the jury on the courtroom screen. (10RT 1926-1940.) In closing, the prosecutor again opened her argument with what she described as appellant’s “declaration of war . . . on society”:

We saw that he declared war on society with these words.
World War III just started cuz I’m go out like a G blastin’
anyone. Bullets gonna fly everywhere. Some will live only to
die another day. Many will fear me.

Those were his words when he declared the war that resulted
in the death and destruction that you have seen in this case.

(10RT 2589.) The prosecutor also quoted the rap lyrics to explain why “he’s filled with so much rage, so much violence, so much hatred, that he would go out and declare war on society, shooting at innocent people, shooting at innocent children.” (10RT 2590.) She concluded:

The only issue for you really to discuss when you look
at these counts of murder and attempted murder with respect
to Western Avenue is whether or not there is deliberation and

premeditated (*sic*).

And when you look at whether or not there was deliberation begin with his words. His words declare his intent to kill. His words declare that he premeditated. He had murder on his mind before he ever stepped out of his house to go to that party on Western Avenue.

(13RT 2595.)

In so arguing, the prosecutor exposed her real, unsanctioned purpose in seeking admission of the writings with respect to Counts Four through Eight, which was not, as proffered, for gang affiliation under Evidence Code section 1101(b), but instead, as a universal generic threat and direct evidence of appellant's allegedly murderous predisposition and intent as to those counts. The prosecutor thereby encouraged the precise prejudicial misuse of this evidence that defense counsel had predicted and that should have led to the exclusion of the writings in the first place.

C. The Applicable Legal Standards

Whether the trial court erred in allowing gang evidence under Evidence Code section 352¹⁴ is reviewed for an abuse of discretion. (*People v. Gonzalez* (2012) 210 Cal.App.4th 724, 736, citing *People v. Brown* (2003) 31 Cal.4th 518, 547.) Even so, courts have recognized that evidence of a criminal defendant's gang membership or affiliation can create a grave risk that the jury will improperly base its verdict on an inference that the defendant was criminally disposed. (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Luparello* (1986) 187 Cal.App.3d 410, 426.) Evidence of gang affiliation is not admissible to show a defendant's character or criminal disposition. (*People v. Hernandez* (2004)

¹⁴ All further statutory references are to the Evidence Code unless otherwise indicated.

33 Cal.4th 1040, 1047.) “Gang evidence should not be admitted at trial where its sole relevance is to show a defendant’s criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense.” (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) Evidence of gang membership and activity is admissible only if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) “Evidence of the defendant’s gang affiliation – including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like – can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.) Nonetheless, even if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury. (*People v. Williams, supra*, 16 Cal.4th at p. 193; *People v. Carter* (2003) 30 Cal.4th 1166, 1194 [evidence of defendant’s gang membership, although relevant to motive or identity, creates a risk the jury will improperly infer defendant has a criminal disposition and is therefore guilty of the charged offense and thus must be carefully scrutinized].)

Section 1101, subdivision (a), prohibits the admission of evidence of a person’s character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Section 1101(b), provides an exception to this rule when such evidence is relevant to establish some fact other than the person’s character or disposition such as motive, opportunity, intent, preparation, plan, knowledge or identity. (*People v. Ewoldt* (1994) 7

Cal.4th 380, 393.)

Before the trier of fact may consider evidence of an uncharged act pursuant to section 1101(b), the prosecution must prove by a preponderance of the evidence that the defendant in fact committed the uncharged act in question. (*People v. Carpenter* (1997) 15 Cal.4th 312, 382.) Moreover, [e]vidence of uncharged offenses is so prejudicial that its admission *requires extremely careful analysis*. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 715, quoting (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404 (italics in *Lopez*) [internal citations omitted].) Evidence is prejudicial within the meaning of section 352 if it uniquely tends to evoke an emotional bias against a party as an individual,” or if it would cause the jury to prejudg[e] a person or cause on the basis of extraneous factors. (*People v. Foster* (2010) 50 Cal.4th 1301, 1331, citations omitted.)

The admissibility of a statement as a “generic threat” under section 1250 is guided by two principles. First, in general, the proponent of the evidence has the burden of establishing its relevance and the foundational requirements for its admission under an exception to the hearsay rule. (*People v. Morrison* (2004) 34 Cal.4th 698, 724; *People v. Woodell* (1998) 17 Cal.4th 448, 464.) Evidence must be excluded where the proponent fails to make an adequate offer of proof. (See *Morrison, supra*, 34 Cal.4th at p. 724.) Second, with specific reference to “generic threat” evidence, where the prosecution seeks to introduce a defendant’s statement regarding possible future criminal conduct, “the content of and circumstances in which such statements are made must be carefully examined in determining whether the statements fall within the state-of-mind exception, as circumstantial evidence that defendant acted in accordance with his stated intent, and in assessing whether the probative value of the evidence

outweighs [its] potential prejudicial effect.” (*People v. Karis* (1988) 46 Cal.3d 612, 636.)

In its motion in limine to admit the seized writings as “gang evidence,” the prosecutor clearly distinguished its use of the writings as section 1101(b), evidence with respect to Counts Four through Ten from its more limited use of the “snitch” writings as “generic threats” evidence with respect to Counts Nine and Ten. Appellant does not contest the use of the writings to prove his intent as to Count Nine, where he admitted following Carrillo because he believed Carrillo had testified against his brother. Appellant maintains, however, that the writings were wrongly admitted under section 1101(b), as to Counts Four through Eight, because their probative value on the issues of motive and intent was substantially outweighed by their prejudicial impact as evidence of purported homicidal propensity and as universal generic threats.

D. The Slight Probative Value of the Cumulative Writings with Respect to Counts Four Through Eight Was Substantially Outweighed by Their Prejudicial Effect

People’s Exhibit Nos. 125 and 128 comprised 13 pages of assorted writings, mainly rap lyrics, and a few drawings. The writings, none of which were dated, were seized more than a week after the February 15 shooting and about a week after appellant’s brother was held to answer. Based on obvious differences in handwriting, the rap lyrics could have been authored by two or three different people. (See, e.g., People’s Exh. No. 128, pp. 1, 2, 5, 7; 4CT 964, 968, 970, 978.) In addition to the alleged “snitch” or witness list, four other pages included language threatening snitches. (People’s Exh. No. 125, p. 1; Exh. No. 128, pp. 2, 6, 7, 8; 4CT 964, 968, 970, 972, 981.) With respect to T.C.A., the only nominally

relevant subject as to Counts Four through Eight, those three letters appeared on only two of the pages. (People's Exh. No. 125, p. 4; Exh. No. 128, p. 2.) The rest of the jottings were mainly typical "gangsta" rap lyrics which, like the snitch references, had, at best, minimal probative value on the issue of appellant's motive or intent on the night of February 15.

The prosecutor's representation to the court – the basis for its ruling – was that the writings reflected appellant's and Gonzalez's affiliation with T.C.A. which was relevant under section 1101(b), because "when the appellant and Gonzalez announced their gang to the victims (Counts Four through Eight), they also stated their motive and intent behind their confrontation with the victims." (4CT 952.) This was a marginal theory of admissibility as to Counts Four through Eight when proffered and it was discarded by the prosecutor along the way.

There were no gang allegations, scant evidence that any of the charges were gang-related and no prosecution argument that the February 15 shootings were gang-motivated.¹⁵ (See, e.g., 13RT 2597 [The prosecutor: "When Gonzalez got offended *for whatever reason* and he summoned this defendant over. . . ."].) Hence, the writings had virtually no probative value as gang evidence, their proffered purpose, but had overwhelming prejudicial effect as purported proof of propensity to kill and free-floating homicidal intent. From the outset, the prosecutor was allowed to argue, over defense objection, that by his own words, appellant had

¹⁵ The only reference to T.C.A., appellant's alleged tagging crew, in the prosecutor's closing argument was in relation to Counts Nine and Ten where the prosecutor quoted from the seized writings to argue that "he was expressing homicidal intent towards people he calls snitches. . . ." (13RT 2622.)

declared war on society and “on three separate days he went into the community with a submachine gun []to wage that personal war.”¹⁶ (7RT 1220-1223.)

By overruling the defense on this point, the court licensed the prosecutor to shift its theory of admissibility as to Counts Four through Eight from gang evidence to, in effect, generic threats without engaging in the analysis prescribed by *Karis, supra*, and other controlling cases. (See, e.g., *People v. Karis, supra*, 46 Cal.3d at p. 636.) Before admitting a defendant’s statement as a generic threat under section 1250, the “content and circumstances in which such statements were made must be carefully examined” in determining whether (1) the statements fairly support the inference that the defendant acted in accordance with his stated intent; (2) the probative value of the evidence outweighs its prejudicial effect; and (3) the victims fall within the class of individuals that was the subject of the alleged generic threats. (See *Id.* at pp. 636-637.) The trial court examined none of these factors before sanctioning the prosecutor’s use of the writings as propensity or indiscriminate generic threat evidence with respect to Counts Four through Eight. The court’s failure to apply the appropriate test for generic threats was, in itself, an abuse of discretion. (See *Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239 [trial court’s application of wrong test or standard constitutes an abuse of discretion].)

Before permitting the use of the rap lyrics as generic threat evidence, the court should have scrutinized the content and circumstances in which

¹⁶ The prosecutor’s opening and closing statements began exactly the same way with displays of and quotations from the seized writings, specifically, People’s Exhibit No. 125, pages 2-3. (7RT 1220-1223; 13RT 2589-2595.)

the proffered lyrics were written to determine whether the threshold relevancy criteria were met. Had it done so, the court would have found that the majority of these writings – i.e., those allegedly threatening snitches – would instantly have failed the generic threats relevancy test because the victims of the February 15 shooting were not snitches or prosecution witnesses. Although perhaps not as obvious, the so-called “declaration of war” lyrics also failed the test for generic threats because the date and circumstances of their writing could not be fixed and their language was too stylized, typical “gangsta” rap, and melodramatic to establish a definite, concrete threat to anyone, much less the whole world.

The writings in Exhibit 128 do not mention appellant’s brother or any other person or event that would assist in dating them. Exhibit 125 is, to some degree, time-bracketed because of references to the brother’s legal situation. The latter exhibit includes the list of names, some identified as victims or as witnesses in the brother’s case. (9RT 1752-1755.) These writings, though undoubtedly expressing appellant’s anger at the incarceration of his brother, could have been written at anytime between the brother’s initial arrest in early 2003 and the search of appellant’s residence on February 26, 2004.

Johnny Argueta was arrested in April 2003. (9RT 1734.) His preliminary hearing took place on February 9, 10, 11 and 17, 2004, and he was held to answer on February 17. (9RT 1736-1739.) Nothing in Johnny Argueta’s case occurred between February 12 and February 16. There was no evidence that appellant made any attempt to locate alleged victims or preliminary hearing witnesses prior to February 19. It follows from this sequence of events that the “World War 3” lyrics used as a refrain in the prosecutor’s closing argument could have been written anytime over a ten-

month period. Without any way to pinpoint when those lyrics were written, their probative value with respect to appellant's mental state and intent on February 15 was negligible.

The uncertain timing and targets of the lyrics are in marked contrast to the proximate and particularized statements this Court has accepted as generic threats. (See, e.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 757 [prior to killing two officers, defendant repeatedly expressed his hatred of police officers and his intent to kill any officer who tried to arrest him]; *People v. Karis, supra*, 46 Cal.3d at pp. 625-626, 634 [three days prior to charged rape and shootings, defendant volunteered to a friend that he would not hesitate to kill anyone who might send him back to prison]; *People v. Cruz* (2008) 44 Cal.4th 636, 650-651 [three months before killing sheriff's deputy while resisting arrest, defendant threatened another sheriff's deputy under similar circumstances].) The court never engaged in this analysis with respect to Counts Four through Eight, but nevertheless allowed the prosecutor, and by her express invitation, the jury, to misuse the rap lyrics as actual threats expressing appellant's preconceived motive, intent and homicidal plan – which he supposedly carried out on February 15.

Thus, irrespective of the precise theory of admissibility, the writings should have been excluded under the section 352 balancing test because the prejudicial impact of the evidence and its probable use as proof of a predisposition to and threat of indiscriminate homicide substantially outweighed its marginal probative value as either section 1101(b) or section 1250 evidence. In admitting this evidence without correctly assessing its relevance or its inevitable prejudicial effect, the trial court abused its discretion.

E. The Error in Admitting the Writings Was Prejudicial

**and Requires Reversal of Appellant's Convictions of
Counts Four Through Eight and the Judgment of Death**

The erroneous admission and consequent misuse of the seized writings as a universal, homicidal threat was prejudicial in effectively foreclosing any jury consideration of appellant's denial that he intended to kill on February 15. Appellant's explanation that he shot that night only because he was told to do so by his best friend Gonzalez, while not fully exculpatory, was not inherently incredible in light of appellant's youth, misplaced loyalties and lack of personal animus toward any of the victims. But, after being read a score of repetitive, ultra-violent rap lyrics and hearing the prosecutor's closing argument exploiting that evidence, no juror could possibly have kept an open mind with respect to appellant's intent, or other relevant mental states, in deciding Counts Four through Eight.

The prosecutor offered only two arguments for finding deliberation, premeditation and the specific intent to kill as to these counts: (1) the writings, specifically, the violent rap lyrics, seized in the search of appellant's home; and (2) the characteristics of the gun. (13RT 2595.) Neither argument was particularly strong when viewed through the lens of reason, rather than inflamed emotion.

The prosecutor used the writings to fill a major gap in the chain of proof, namely, the absence of evidence as to appellant's motive for the shooting on February 15. Although motive is not itself an ultimate fact put at issue by the charges or the defense, it is important, often central, to proving such elements as premeditation, deliberation and intent. (See, e.g., *People v. Fuiava* (2012) 53 Cal.4th 622, 668 [evidence of the defendant's parole status important to proving a critical issue of the trial, the defendant's motive for shooting at the officers]; *People v. Demetrulias*

(2006) 39 Cal.4th 1, 14 [evidence that defendant was motivated by a strong need for money probative of two ultimate issues, the defendant's intent and lack of justification for the stabbing]; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550 [because motive is ordinarily the incentive for criminal behavior, gang activity or membership admissible if important to motive]; *In re Jones* (1996) 13 Cal.4th 552, 588 [absent eyewitness testimony, important for the prosecution to establish the defendant's motive].)

Recognizing the importance to her case of supplying the jury with a motive for the February 15 shooting, the prosecutor initially pressed for the admission of the writings as evidence that the shooting was gang-motivated. (4CT 925-982 [People's Notice of Motion and Motion in Limine to Admit Gang Evidence].) In gist, with respect to Counts Four through Eight, the prosecutor's position was that "gang disrespect" was relevant as a motive for the shooting and was central to the ultimate issues of intent, deliberation and premeditation. (10CT 1004, 1006-1007; 3RT 256.) But, as her summation showed, once the evidence was admitted for gang motivation, the prosecutor abandoned that argument because it was not supported by the evidence. Instead, she used the rap lyrics to inflame the jurors against appellant and persuade them that the shooting was the product of pre-existing, indiscriminate aggression and an intent to kill that literally extended to the whole world. Thus, as a result of the prosecutor's argument, the prejudice inherent in the erroneous, essentially unlimited admission of the writings was maximized. (Cf. *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments. . . ."]; *People v. Roder* (1983) 33 Cal.3d 491, 505 [error not harmless where the prosecutor relied on it in

his closing argument]; *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131 [the prosecutor’s “actions demonstrate just how critical the State believed the erroneously admitted evidence to be”].)

Without the erroneously admitted writings, any inference of premeditation and deliberation, as well as intent to kill, necessarily rested on the automatic nature of the weapon and the large capacity of its magazine. (13RT 2595-2596.) The prosecutor emphasized the number of steps that needed to be taken to fire the weapon in automatic mode. (13RT 2956.) Her argument presupposed that appellant had been the shooter the night before so that it could be inferred that he, not Gonzalez, or someone else, decided to switch the gun from the semi-automatic to the fully automatic position. The jury, however, rejected this supposition in finding “Not True” the allegation as to Counts One through Three that appellant personally discharged the gun.

Because the prosecution did not prove appellant had previously shot the Sten Mark III, it also failed to prove that he knew a single pull of the trigger would result in the almost instantaneous release of 21 bullets or that he knew the range of the gun. Even with fast reflexes, appellant could not have prevented the emptying of the magazine under the prosecutor’s theory that the gun was set in its fully automatic position.¹⁷

The circumstances of the Manchester shooting (Counts One through

¹⁷ According to the prosecutor’s firearms witness, John Thompson, the cycling (firing) rate of the Sten Mark III in its automatic setting is 500 bullets per minute, or approximately 8 bullets per second. (10RT 2114.) Thus, it would have taken only two to three seconds to release all 21 rounds that remained in the magazine on February 15. (See 24RT 2842 [demonstration took four seconds in semi-automatic mode; two seconds for automatic mode to empty magazine containing 21 bullets].)

Three), appellant's only proven prior observation of the operation of the Sten Mark, actually contradicted, rather than supported, the inference of intent to kill. The earlier incident showed that many rounds could be fired from the gun at close range into a confined space without, as far as appellant knew, causing any injuries. When appellant drove away from the scene he had no reason to believe that anyone in the other car had been shot. Indeed, neither Amezcua nor Zepeda, the driver and one of the passengers in the other car, realized that Lua, the second passenger, had been fatally wounded until they arrived at Lua's home. (7RT 1294.) In short, because there was no evidence appellant had previously used the gun, and because the one prior use of the gun appeared to have injured no one, the evidence that appellant harbored the specific intent to kill on February 15 is not compelling.

Ordinarily, state court error in admitting evidence is subject to the *Watson* test, that is, whether it is reasonably probable the error affected the trial result. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13 [citing *People v. Watson* (1956) 46 Cal.2d 818, 836]; *People v. Partida* (2005) 37 Cal.4th 428, 439.) However, the erroneous admission of evidence under state law results in a federal due process violation if it is "of such [inflammatory] quality as necessarily prevents a fair trial." (*Jamal v. Van Der Kamp* (9th Cir. 1991) 926 F.2d 918, 920; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [inflammatory evidence that is irrelevant may work a due process violation]; *People v. Partida, supra*, 37 Cal.4th at p. 439 [erroneous admission of evidence under state law results in a due process violation if it makes the trial fundamentally unfair].) Federal constitutional error will not be found harmless unless the state can show beyond a reasonable doubt that the error did not contribute to the

verdict. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Here, the erroneously admitted writings were so inherently inflammatory as to irrevocably prejudice the jury against appellant and render his trial fundamentally unfair. By the same token, it cannot be doubted, in light of the prosecutor's argument inviting the misuse, that the jury must have used the writings for the invited improper purpose in violation of appellant's federal due process rights. (See *Jamal v. Van de Kamp, supra*, 926 F.2d at p. 920 [due process violated only under such circumstances that it "can be inferred that the jury must have used the evidence for an improper purpose"].) Under these circumstances, the state cannot show beyond a reasonable doubt that the error did not contribute to appellant's convictions of Counts Four through Eight; in short, the error was not a harmless violation of the federal Constitution.

Nor was the error harmless under the applicable state law standard because it is reasonably probable, indeed incontestible, that the erroneous admission of the inflammatory writings contributed to the verdicts at the guilt phase of the trial. Accordingly, appellant's convictions of Counts Four through Eight must be reversed.

Further, error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error. (*People v. Brown* (1988) 46 Cal.3d 432, 466.) Here, the erroneously admitting writings inevitably and irrationally skewed the jury's perception of appellant's moral culpability by portraying him, unfairly, as posing an undifferentiated homicidal risk to the entire world. As such, the error denied appellant a fair penalty determination and the heightened reliability required by the Eighth Amendment.

Accordingly, it is reasonably possible that, had the writings been excluded, at least one juror would have come to a more favorable conclusion regarding appellant's future dangerousness and voted for life without the possibility of parole instead of death. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 137 [any error which may have reasonably led one juror to impose the death penalty is substantial and prejudicial].) After all, appellant had no prior felony convictions and no history of violent acts. As such, one or more jurors could have concluded that appellant's acts of violence in February were aberrant for the reasons presented by the defense, and not a reflection of a fixed predisposition toward homicide. These mitigating inferences were negated, however, by the writings which again, as argued by the prosecutor, would have led the jury to believe that appellant had the propensity to kill indiscriminately at any time. Thus, it is reasonably possible, indeed highly probable, that the erroneous admission of the writings contributed to the judgment of death, which therefore must be reversed.

II.

THE TRIAL COURT'S EXCLUSION OF A CRITICAL PORTION OF APPELLANT'S POLICE INTERVIEW WAS ERRONEOUS UNDER EVIDENCE CODE SECTION 356 AND A VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS

Appellant's statements following his arrest were a centerpiece of the prosecutor's proof and closing argument. The prosecutor used appellant's admissions to fill gaps in the proof of the charged crimes, most importantly, as purported direct evidence of intent to kill. And she used his denials of involvement to argue consciousness of guilt and lack of remorse. The post-arrest interrogation, in which several officers participated, was roughly divisible into two parts. During the first part, appellant denied participation in the three shooting incidents. During the second part, after a very emotional meeting with his family, appellant made forthright and damaging admissions.

Over defense objection, the prosecutor was allowed to present a redacted version of the interview from which the family meeting had been deleted. The trial court's ruling, permitting the redaction, was erroneous under Evidence Code section 356 and, in denying appellant a viable counter-argument to the inference of intent to kill, lack of remorse and consciousness of guilt, the ruling violated appellant's federal and state due process rights. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I., §§ 15 and 17.) Because the error was prejudicial, it requires that the judgment be reversed.

A. Factual Background

1. The Interview

Appellant was arrested on February 27, 2004, following the search of his family's residence. (9RT 1901.) At about 12:15 a.m., Detectives Baker and Williams began their hours-long, tape-recorded interrogation of appellant. (9RT 1902; People's Exhibits 129, 130, 131, 132.) Baker and Williams first focused on locating the gun used in all the shooting incidents and then turned to the shooting on February 15, 2004. (IISCT 18-21.) Appellant initially denied knowledge of that incident, but when shown his own photograph identified by witnesses and a postmortem photograph of Gabriel, appellant admitted that he was present the night of that shooting. (IISCT 51.) Appellant stated that he was inside the club drinking when one of his friends got into a verbal argument and bullets started flying. (IISCT 51-53.) Appellant claimed he ran away when the commotion started. (IISCT 66.) Appellant then began to cry. (IISCT 54.) When he regained his composure, appellant again denied that he had the gun or that he was the shooter. (IISCT 56.) He identified Gonzalez and appellant's cousin Luis as his companions that night. (IISCT 57.) Soon after, Williams and Baker brought in Detective Carranza to help with the interview. (9RT 1905; IISCT 67.) Appellant and Carranza knew each other, as Carranza had been the lead investigator in appellant's brother's case. (9RT 1905; IISCT 71-72.) Appellant asked to speak with Carranza alone; Williams and Baker left temporarily. (9RT 1905; IISCT 71.)

Carranza began by questioning appellant about the Smiley/Hauser incident. (IISCT 74.) Appellant insisted that he was the driver and not the shooter. (IISCT 73-74, 77.) After going back and forth about the identity of the passenger, appellant finally stated that Gonzalez was the passenger –

“he can’t even drive” – and that he (Gonzalez) shot the gun. (IISCT 88-89.) Carranza then returned to the shooting at 57th and Western, telling appellant that he was facing a “firing a gun” charge. (IISCT 91-92.) When Carranza would not give him any assurances that he would go home, appellant repeated that he did not know the whereabouts of the gun used in the shootings. (IISCT 93-95.)

Appellant then asked Carranza how his (appellant’s) mom felt, and Carranza responded that she was sad and hurt, but still would want appellant to be honest. (IISCT 96.) Appellant asked if he could see his mother face-to-face if he “cleared the air.” (IISCT 96.) Appellant promised to tell the truth if he could just hug his family. (IISCT 97.) Carranza stated he could “make these happen,” and then left the interview room. (IISCT 97.)

After more questioning about the location of the gun by Carranza, appellant repeated that he wanted to see his mother and, if possible, his brother. (IISCT 98.) He agreed that, if he could see them, he would tell “word-for-word what happened outside the party.” (IISCT 98.) After a short break in the interview, appellant’s mother, father and sister were brought into the interview room. (4CT 825.)¹⁸

Following the meeting with his family, Detectives Baker and Carranza continued the interview. They began by observing that appellant was only 18 and that he was like a kid playing a video game and never intended to kill anyone. (IISCT 98.) Baker then turned his attention to the

¹⁸ A rough transcript of appellant’s interview, including the family meeting, was prepared for the Los Angeles Police Department and submitted as an exhibit in support of co-defendant Gonzalez’s motion for severance. (See 4CT 796-850.)

Manchester shooting. (IISCT 99.) Appellant stated that he was drinking that night. (IISCT 99.) Baker prodded appellant to give his version of what happened at Manchester “if you ever hope to hug your mom again like that in person.” (IISCT 100.) Appellant responded that there were a lot of shootings that day, a lot of people running; he was not sure whether the occupants of the white car were armed. (IISCT 100.) Appellant stated there were two persons in his car, that he was the driver, and the passenger was the shooter. (IISCT 101-102.) Appellant added that he could not remember why he did it; he was drunk. (IISCT 103.)

When asked about the following night (the shooting at 57th and Western), appellant stated that he was again drinking and getting high. (IISCT 107.) The incident started when a black person said “something racial like ‘There’s too many Mexicans here.’” Gonzalez is Mexican; appellant is not. (IISCT 107.) Appellant could hear a heated exchange of words but could not make out what was said. (IISCT 107.) Appellant walked out in the street with the gun, a Sten Mark, in his hand after Gonzalez told him to “bring the strap.” (IISCT 107.)

Appellant did not know why he listened to Gonzalez. (IISCT 108.) Appellant believed he aimed the gun in the air, and pressed the trigger once, sending a bunch of bullets flying. (IISCT 108.) Appellant had not previously handled a gun like the Sten Mark. (IISCT 108.) He heard Gonzalez urging him to “do it, do it fool.” (IISCT 108.) Appellant said Gonzalez was his best friend, and he always listened to him. (IISCT 109.)

Finally, appellant admitted chasing Carrillo a few days later. (IISCT 111-112.) Appellant wrongly believed the “white guy” (Carrillo) had testified at his brother’s preliminary hearing. (IISCT 111.) Appellant reiterated that he was the driver and the passenger was the shooter. (IISCT

110.)

When asked whether he ever meant to kill anyone, appellant answered, "no." (IISCT 112.) When asked why he took the gun out, appellant again answered that Gonzalez told him to. (IISCT 112.)

Appellant then asked if his mother was still there. (IISCT 112.) He was told that his mother was not in the lobby and could not be reached by telephone. (IISCT 112.) Detective Baker then explained that, if appellant had not yet been booked, the family could visit him downstairs during visiting hours. (IISCT 112.) Appellant was surprised that he was going to be booked. (IISCT 112.) He thought he had been told he was going home; Detective Baker denied telling him that. (IISCT 112.)

2. The Redacted Tapes and Transcripts

The prosecutor sought leave of the court to play a redacted version of the tape recording of appellant's interview, which deleted appellant's approximately 10-minute meeting with his family. (9RT 1625.) She had prepared redacted transcripts of the interview for the court and defense counsel so that any objections to her redactions would be litigated in advance of her playing the tapes. (9RT 1625, 1709.) She also provided the court with a copy of the unredacted tape recording for comparison purposes. (9RT 1627, 1713-1714.) The prosecutor stated that she had redacted the meeting between appellant and his family only because it was sympathetic to appellant. (9RT 1712.)

Defense counsel objected to any redaction of the tape under Evidence Code section 356, which allows a whole statement to come in when a portion of the statement has been introduced by the opposing party. Defense counsel argued that the entire tape recording should be admitted under section 356. (9RT 1715.) Defense counsel cited *People v. Arias*

(1996) 13 Cal.4th 94 for the proposition that if a party's oral admissions are introduced, that party may introduce other portions of the admissions as long as those other portions have some bearing or connection with the admission. (9RT 1716.) Counsel argued that the family meeting provided the explanation for appellant's changed attitude. Before the meeting with his family, appellant had denied involvement in the three shootings. When accused of lying, appellant promised he would tell the truth if he could just see and hug his family. (IISCT 97-98.) Immediately after the meeting, appellant admitted his involvement and role in all three incidents.

Because the prosecutor intended to argue that appellant had lied throughout the interviews, defense counsel maintained that the redacted portion met the *Arias* test in that it would help the jury assess whether appellant kept his part of the bargain and was truthful after speaking with his mother. (9RT 1720.) Defense counsel represented, without contradiction by the prosecution, that appellant's mother was telling him to cooperate and tell the truth. (9RT 1726.)

Having listened to the tape, the court stated that its "general sense right now is that most of this that's in the transcript, if not all of it, just don't see how it comes within the test here, that *it's necessary to make it understood.*" (9RT 1721, 1727, italics added.) The court acknowledged that, because appellant's complete truthfulness was going to be an issue for the jury, it would probably be sufficient to support admission of the redacted portion if the family were making comments about telling the truth. (9RT 1729.) Nevertheless, the court stated that its tentative ruling was to allow the prosecutor's proposed redaction because it did not have a perfect transcript of the meeting (9RT 1726, 1728), and because it had found no case with similar facts. (9RT 1727). The tentative ruling became

final after defense counsel informed the court that he also had found no case directly on point. (9RT 1731.)

Ultimately, the redacted tape recordings were played for the jury and the jury was provided with conforming transcripts. (10RT1922.) Although the family meeting was deleted, appellant's requests to see his family and promises to then tell the truth were left in. (IIISCT 96-98.) The jury was instructed on CALCRIM No. 362, consciousness of guilt based on false statements. (13RT 2729.) And the prosecutor relied on the redacted tape recordings in her closing argument to drive home her theme that appellant was "without any conscience" because he "lied and bargained" during the police interrogation. (13RT 2604-2611, 2622-2623.)

B. The Applicable Law

A trial court's determination whether evidence is admissible under Evidence Code section 356 is reviewed for an abuse of discretion. Section 356 provides, in pertinent part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party. . . ." In applying this provision of section 356, courts "do not draw narrow lines around the exact subject of inquiry. 'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with,* the admission or declaration in evidence' [Citations]." (*People v. Zapien* (1993) 4 Cal.4th 929, 958, citing *People v. Hamilton* (1989) 48 Cal.3d 1142, 1179, italics in original.)

Thus, if a party's oral admissions have been introduced in evidence,

he may present other portions of the same interview or conversation, even if they are self-serving, so long as the other portion has some bearing or connection to the admission in evidence. (*People v. Arias, supra*, 13 Cal.4th 92, 156.) Further, a jury is entitled to know the context in which the admission was made. (*People v. Harris* (2005) 37 Cal.4th 310, 334 [where defense counsel introduced the victim's admission he was a loan shark, prosecution entitled to present the *entire context* in which the victim made the admission]; *People v. Sanders* (1995) 11 Cal.4th 475, 520; *People v. Crowl* (1938) 28 Cal.App.2d 299, 307-308 [where prosecution witness testified to incriminating statements by the defendant, reversible error to exclude evidence placing the defendant's confession in context].)

Applying these well-settled principles to this case establishes that the court abused its discretion, to appellant's substantial detriment, by excluding crucial evidence which uniquely placed his pre- and post-meeting statements in context.

C. The Trial Court Abused its Discretion and Misapplied Evidence Code Section 356 in Excluding the Family Meeting Which Had a Significant Bearing on Appellant's Interrogation

The trial court rejected appellant's challenge under Evidence Code section 356 and granted the prosecution's request to redact appellant's meeting with his family on the ground that it was "not necessary to make [the interview] understood." (9RT 1731.) This, however, is not the applicable test under section 356. Under the correct test, the family meeting should have been admitted because it had some bearing upon, or connection with, the statements and admissions put in evidence by the prosecution.

Evidence Code section 356 has three separate provisions. The first provision applies to evidence that is part of and on the same subject as the

act, declaration or conversation presented by the other side. The second provision provides that when a letter is read, the answer may be given. And the third provision applies to “*any other*” evidence – i.e., not part of the same act, declaration or conversation – that is necessary to make a “detached” act, or declaration understood. (Evid. Code, § 356, italics added.) The latter two provisions are inapplicable to this case because the family meeting was an integral part of the interrogation process. Thus, as a matter of law, the court erred in applying the more stringent “necessary to make it understood” requirement for extrinsic evidence, rather than the proper “some bearing on or connection with” standard applicable here.

Under the correct standard, the family meeting falls squarely within both the letter and the rationale of Evidence Code section 356. At one point during the interview, appellant asked Detective Carranza, who knew the Argueta family, how his mother felt. (IISCT 95.) Carranza answered that appellant’s mother was sad and hurt, but that she wanted appellant to be “honest.” (IISCT 96.) Appellant then asked if he could see his mother ‘if he clears the air.’ (IISCT 96.)

The family meeting was thus intertwined with statements made during the interview that were not redacted from the tape played to the jury. The heightened emotional tone of the meeting, not just the words spoken, provided the context for the requests, promises and admissions the jury was allowed to hear. (9RT 1725 [trial court’s recognition that the defense wanted to argue that meeting was “cathartic and caused [appellant] then to tell the truth”].) Under this most basic theory of admissibility, the trial court’s demand for an “absolute perfect” transcript, while ultimately desirable, was not a valid prerequisite for admitting appellant’s pivotal interaction with his family.

The redacted portion of the interview showed appellant to be an immature, frightened 18 year old who was still deeply attached to his family and still needed his mother's direction and support. The meeting, in supplying the emotional context for appellant's conduct throughout the interview, would have allowed defense counsel to counter the prosecutor's portrayal of appellant as a liar without a conscience. Defense counsel briefly touched on appellant's vulnerability in closing argument but was confined to generalities in the absence of the specific contextual information that only the family meeting supplied. (13RT 2657.)

The prosecutor's opposition to the meeting was that it showed appellant in a more sympathetic light. That, however, is not a valid objection under Evidence Code section 356, especially when, as here, the prosecutor played lengthy, repetitious, and pointless sections of the interrogation which were irrelevant to the jury's "objective determination of guilt." (Cf. *People v. Martinez* (2010) 47 Cal.4th 911, 957 [prosecutorial misconduct to appeal to jury's sympathy for the victim during guilt determination].) The prosecutor's only purpose in playing these sections was to intensify the jury's antipathy to appellant so that she could repeatedly vilify him in her closing argument.

The court simply did not understand how the "sobbing and a bunch of Spanish [and 'whether somebody can pull at somebody's heartstrings'] would add anything." (9RT 1718, 1720.) First, that the family conversation was in Spanish was no impediment to its admission. Tape recorded statements in Spanish are routinely translated and admitted in trial courts. (See, e.g., *People v. Guizar* (1986) 180 Cal.App.3d 487, 490 [tape recording of interview in Spanish and transcript admitted without objection]; *People v. Barajas* (1978) 81 Cal.App.3d 999, 1004

[conversation, entirely in Spanish, was monitored and tape recorded; recording was translated, transcribed and played to jury].)

Second, contrary to the court's misconception, the heightened emotion of the conversation actually enhanced its contextual relevance in negating the prosecutor's inferences of lack of conscience and consciousness of guilt. The jury heard appellant's statement that, if allowed to see his mother, he would "clear the air." However, having redacted the ensuing interaction between mother and son, the prosecutor was able to characterize appellant's request to see his mother as just more remorseless bargaining. With the meeting before the jury, defense counsel could have argued more effectively that appellant's denials and apparent bargaining were not a reflection of a callous nature, but rather of his overwhelming anxiety about separation from his family.

In sum, the court abused its discretion in excluding the tape-recorded family meeting. The court's first and overarching error was its failure to apply the correct provision of Evidence Code section 356. The court erroneously used the standard applicable to extrinsic evidence, ruling the meeting inadmissible on the ground that it was not necessary to the understanding of the balance of the tape recording. (See *Nichols v. City of Taft, supra*, 155 Cal.App.4th 1233, 1239 [trial court's application of wrong test or standard constitutes an abuse of discretion].) The court then compounded the error by discounting the relevancy of the meeting on the grounds that it did not have a completely accurate translation of what was said, and that the meeting was extremely emotional. The error was prejudicial and affected appellant's substantial rights under the state and federal Constitutions. (U.S. Const., Amends 6th, 8th & 14th; Calif. Const, art I, §§ 1, 7, & 15.)

D. The Exclusion of the Tape-Recorded Family Meeting Was Prejudicial and Requires Reversal

Although a state court's erroneous application of state law does not, standing alone, violate the federal Constitution, state law errors that render a trial fundamentally unfair violate the Due Process Clause. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70.) Because the court's erroneous ruling under Evidence Code section 356 unfairly skewed the jury's assessment of appellant's statements during his interrogation, his rights to a fair trial and due process of law were denied.

It has long been recognized that there is virtually no evidence more damning than a defendant's police confession. (See, e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 296; *People v. Neal* (2003) 31 Cal.4th 63, 84.) In the present case, the damaging impact of appellant's admissions was heightened by their juxtaposition with his equally damning denials. This unexplained alternation of denials and admissions was crucial to the prosecution's case and central to its successful attack on appellant's character in closing argument.

Focusing on the most serious charges – the murder and attempted murders alleged in Counts Four through Eight – appellant truthfully admitted that he shot the firearm that caused the death and injuries alleged in these counts. His only defense to these charges would be that he lacked the specific intent to kill. Appellant's statements supported this defense in two ways. First, appellant stated that he was intoxicated, "drinking" and "high," the night of the shooting. In addition, when asked whether he intended to kill, appellant unequivocally answered, "no."

Appellant's emotional interaction with his mother, by revealing his immaturity and vulnerability, would have lent credence to his childlike

explanation that he shot the gun because he did whatever his best friend, Gonzalez, told him to do. With a more balanced, and truer picture of appellant's emotional state, the jury would have been open to the officers' explanation that appellant was like a kid playing a video game and did not mean to kill.

At the least, appellant's statements supported the conclusion that he decided to shoot the gun, not that he decided to kill anyone. There was no evidence appellant had any personal animosity toward anyone at the scene. There also was no evidence that he aimed at any particular person when he shot the gun. As appellant stated, he pulled the trigger once and then released it. Within the few seconds required for that action, 21 bullets flew off in the direction of the club. The clustering of the casings showed that appellant stood in place and did not move toward the club in pursuit of anyone. (10RT 2119; see People's Exhibit No. 59.) The evidence further showed that the bullets were scattered randomly in the area around the club. (See e.g., 10RT 2143; People's Exhibit No. 59, 64, 65, 67.) Thus, none of the ballistic evidence contradicted appellant's denial of an intent to kill.

As such, the inference of intent to kill necessarily rested on the automatic nature of the weapon and the capacity of the magazine. As discussed in Argument I, *ante*, and incorporated by this reference herein, because of the absence of convincing evidence that appellant had previously operated the weapon or any evidence that he switched the gun to automatic mode, knew the effect of doing so or aimed the gun at anyone, the inference of intent to kill in this case was relatively weak. (See Argument I, *ante*, pp. 56-57.)

In lieu of proof of the requisite intent to kill, the prosecutor substituted the inflammatory refrain that appellant was without conscience

and a liar. Because the “sympathetic” family meeting was excluded in its entirety, defense counsel had no meaningful rejoinder to the prosecutor’s argument. The meeting supported a more favorable view of appellant’s behavior during the interrogation, and would have given credibility to appellant’s statements regarding his intentions and actions on the night of the 57th and Western shooting.

The erroneous exclusion of the family meeting most clearly deprived appellant of a fair opportunity to defend against the first degree murder and attempted murder charges in Counts Four through Eight, as discussed above. These were the most serious charges at both the guilt and the penalty stages of the trial. A death verdict was returned solely as to the fatal shooting alleged in Count Four. But the effect of the exclusion was not limited to those counts. Because the intent to kill was an element of all the charges in the information, evidence that affected the jury’s determination of intent as to one incident would have affected its determination of intent across the board. Indeed, in constructing her argument around the seized writings and the interview, the prosecutor expressly promoted the inference of a common mind-set in all three incidents. As such, the court’s error in permitting the redaction of the interview process was prejudicial, and requires reversal of all appellant’s convictions and the death sentence under both the state prejudice standard (*People v. Watson, supra*, 46 Cal.2d at p. 836), and the stricter federal harmless error standard (*Chapman v. California* (1967) 386 U.S. 18, 24).

III.

APPELLANT'S ACQUIESCENCE IN A STIPULATION AND WAIVER OF HIS RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES WERE INVALID WHERE THE TRIAL COURT ABANDONED ITS ROLE AS A NEUTRAL ARBITER AND MISADVISED APPELLANT REGARDING THE CONSEQUENCES OF HIS WAIVER IN VIOLATION OF APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. Introduction

The murder and attempted murders alleged in Counts Four through Eight were the most serious charges with the highest probability of producing a death verdict. Nevertheless, in his opening and closing statements, defense counsel stressed to the jury that the only charges he intended to defend against were those alleged in Counts One through Three.¹⁹ In keeping with his apparent concession of guilt as to all of the other counts, defense counsel entered a stipulation to forgo cross-examination regarding prior misidentifications of the shooter by two of the principal witnesses to the incident at 57th and Western (Counts Four through Eight) in exchange for the prosecutor's forgoing the testimony of a gang expert.

The trial court recognized that, because the stipulation foreclosed a major avenue of confrontation and cross-examination, appellant's personal waiver of these rights was required. However, instead of providing a wholly neutral admonition, the court improperly influenced the ensuing waiver by appellant by directly advising him that he was "not really giving

¹⁹ The issue of adequate representation of counsel is not expressly or impliedly raised herein. Rather, appellant notes that the effect of certain of the court's rulings was to effectively preempt possible lines of defense, particularly as to Counts Four through Eight.

up anything” in exchange for keeping out a gang expert since appellant had already admitted he was the shooter. (8RT 1564-1565.) That advice was misinformed and, as will be demonstrated below, appellant, in fact, gave up a lot. Appellant had repeatedly denied that he acted with the intent to kill. Nevertheless, defense counsel only seriously contested intent in relation to Counts One to Three when that element could also have been challenged as to Counts Four through Eight. Specifically, by bringing out the witnesses’ prior misidentifications, defense counsel could have cast doubt on the reliability of their subsequent reconstruction of the night’s events.

In contrast, the prosecutor gave up nothing by way of the stipulation. The prosecutor’s stated reason for proffering a gang expert was to explain the concepts of respect and disrespect in gang culture. (5RT 632-635; Compare *People v. Enrique Gonzalez* (Cal.App.2 Dist. 2008) 2008 WL 1874431, * 3.)²⁰ The prosecutor directed her proffer solely to appellant’s motive and intent in the shootings alleged in Counts Four through Eight. (5RT 634.)

In fact, the prosecutor did not need expert testimony regarding broad, generic gang concepts when the court had already admitted the far more inflammatory, case-specific “gang” writings seized from appellant’s residence. (5RT 632; 10RT 1923-1934.) Thus, on balance, contrary to the court’s misleading characterization, appellant gave up a complete defense

²⁰ Appellant cites to the unpublished decision in codefendant Gonzalez’s case for factual background, not as legal authority. (Cal. Rules of Court, Rule 8.1115; cf. *Pacific Gas and Elec. Co. v. City and County of San Francisco* (2012) 206 Cal.App.4th 897, 200, fn. 10. Alternatively, by separate motion, appellant will request that the Court take judicial notice of the statement of facts in the Gonzalez decision. (Evid. Code, §§ 452 and 459.)

and valuable cross-examination rights in exchange for nothing.

Because the court impermissibly influenced appellant's decision-making by stating its own favorable view of the stipulation, the resulting waiver of rights was invalid and hence a violation of appellant's fair trial, due process and confrontation rights. (U.S. Const., 6th, 8th and 14th Amendments.; Cal. Const., art. I, §§ 15 and 17.) Appellant's convictions of Counts Four through Eight must therefore be reversed and the judgment of death set aside.

B. The Applicable Legal Standards

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, [410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 [] (1967); *Davis v. Alaska*, 415 U.S. 308 [] (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' *California v. Trombetta*, [467 U.S. 479, 485 (1984)]; cf. *Strickland v. Washington*, 466 U.S. 668, 684-685 [] (1984) ("... 'The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment'...") [parallel citations omitted]." (*Crane v. Kentucky* (1986) 476 U.S. 690-691.)

This right may be waived in whole or in part by the defendant – either by personal assertion of waiver or by acquiescence in a waiver undertaken by counsel; it may also in some circumstances be waived in part by counsel as when counsel makes a tactical decision not to cross-examine a particular witness. (*People v. Mosley* (1970) 1 Cal.3d 913, 924, citing *Brookhart v. Janis* (1966) 384 U.S. 1, *People v. Wheeler* (1968) 260

Cal.App.2d 522, 526.) The right cannot, however, be waived in its entirety by counsel by entering into a stipulation, over the defendant's objection, which under the circumstances of the case, is tantamount to a plea of guilty. (*Id.* at p. 924.)

In soliciting a waiver, as in all other matters, a judge must be, and be perceived to be, a neutral arbiter rather than an advocate for any side or position in the pending case. (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 910.) A judge may not, by his or her comments, expressly or impliedly induce a waiver of a fundamental right because “ ‘[t]he unequal positions of the judge and the accused . . . raise a question of fundamental fairness’ regardless of the degree of judicial involvement.” (*United States v. Gonzalez-Melchior* (9th Cir. 2011) 648 F.3d 959, 964.) A judge's advisement regarding the advantages of a waiver may be an inducement which negates the voluntariness of the resulting relinquishment of rights and requires reversal. (*People v. Collins* (2001) 26 Cal.4th 297, 305-309; see also *People v. Dixon* (2007) 153 Cal.App.4th 985, 991-994.)

In this case, by seemingly endorsing defense counsel's decision to forgo a viable defense to the gravest charges appellant faced, the court exchanged the role of neutral arbiter for that of an advocate and adviser to the parties. Because of the inherently “unequal positions of the judge and the accused,” the court's implicit endorsement was a potent inducement to appellant to acquiesce in the proposed stipulation and to waive his rights. (*United States v. Gonzalez-Melchor, supra*, 648 F.3d at p. 965.) As a result, appellant's acceptance of the stipulation and waiver were invalid.

C. The Trial Court's Improper Participation in Advising Appellant Regarding a Critical Tactical Decision Contravened the Requirement of Judicial Neutrality and Invalidated Appellant's Acquiescence in the Stipulation and Waiver of his Trial Rights.

Early in the proceedings, the prosecutor approached defense counsel with a stipulation by which the prosecutor would forgo a gang expert if the defense would forgo cross-examination of two key prosecution witnesses, Camille Johnson and Marvin Emmanuel, regarding their prior misidentifications of the shooter at 57th and Western. (3RT 256; 8RT 1563.) Specifically, the prosecutor explained that she was prepared to forgo expert testimony regarding disrespect and motivation but still planned to introduce evidence of affiliation with T.C.A. as bearing on appellant's state of mind. (3RT 256.) Defense counsel stated that he needed more time to think about the stipulation; the court agreed. (3RT 256.) Defense counsel then articulated his trial strategy, which was that "the defense is going to be conceding a lot of issues . . . from opening statement, through [his] manner of cross-examination and through [his] closing argument." (3RT 256.)

Meanwhile, the prosecutor filed a comprehensive motion in limine to admit gang evidence. (4CT 925-938, 948-961.) The motion sought admission of numerous items seized during the respective searches of Argueta's and Gonzalez's homes. These included writings seized from a room believed to be Argueta's bedroom such as note cards with names of alleged witnesses and victims in Johnny Argueta's case and other writings about killing snitches and enemies of "T.C.A." (4CT 963-983.) The prosecutor argued that these writings were evidence of gang membership admissible to prove motive, intent or other relevant mental states. (4CT 934-937, 949-950.) The motion also indicated that the prosecutor did not

intend to elicit testimony from a gang expert regarding prior bad acts by T.C.A. members or prior contacts with appellant and Gonzalez evidencing gang membership. (4CT 937.)

At the hearing on the motion, defense counsel indicated that he still was not prepared to enter the misidentification/gang expert stipulation. (5RT 631.) The court then ruled on the prosecutor's in limine gang motion, allowing in all the writings and physical evidence that related to alleged gang issues. (5RT 632.) The parties and the court also discussed in some detail the limited purposes for which a gang expert's testimony would be used. (5RT 632-636.)

Finally, before the start of her case regarding the 57th and Western incident, the prosecutor informed the court that defense counsel had accepted the misidentification/gang expert stipulation. (8RT 1529.) Both the prosecutor and the court agreed that acceptance of the stipulation required appellant's personal waiver of his confrontation rights. (8RT 1530.)

First, the prosecutor recited the terms of the agreement. In exchange for not calling a gang expert, appellant would give up his right to cross-examine witnesses Camille Johnson and Marvin Emmanuel or present other evidence regarding their prior misidentifications of the shooter.²¹ (8RT 1563.) The stipulation would bind defense counsel during both the guilt and penalty phases. (*Ibid.*) The court then asked appellant whether he understood the stipulation. (8RT 1564.) Appellant answered "yes" to this

²¹ The stipulation also foreclosed confrontation and cross-examination of Emmanuel regarding his earlier statements that he saw appellant hand a gun to Gonzalez, who, according to Emmanuel, was last seen with a gun when the shooting began. (8RT 1563; 2CT 322.)

query, but “no” to the court’s next question, whether appellant had as much time as he needed to discuss the reasons for and against the stipulation with his counsel. (*Ibid.*) Before appellant had an opportunity to speak with his counsel, the court offered its own explanation of the pros and cons of the agreement, while advising appellant of his cross-examination and confrontation rights. (8RT 1564.) After asking defense counsel whether appellant had made statements that he did the shooting, the court offered the tactical advice that appellant was giving up nothing he had not already admitted, and in return was keeping out evidence from a gang expert. (8RT 1565.)

Appellant was then given a few minutes to confer with his attorney, after which he agreed to give up his right to confront and cross-examine witnesses on the issue of prior misidentification. (8RT 1566.) By that point, however, appellant’s waiver was inevitable since, despite its repeated statements that there were pluses and minuses to the stipulation, the court articulated only the pluses, leaving appellant with the impression that there were no minuses – i.e., that he was “not giving up anything.” That conclusion was based, in the first instance, on an inaccurate assessment of the relative probative value of the misidentifications versus the gang expert’s limited testimony.

In contesting Counts One through Three, and secondarily Counts Nine and Ten, the entire focus of the defense was on the identification of the shooter. This was not an issue as to Counts Four through Eight because, as the court observed, appellant had admitted shooting the gun. Consequently, any defense to those counts would necessarily be based on the absence of an intent to kill and other relevant mental states. Contrary to the premise of the court’s statements that the misidentification evidence was

probative only on the question of identity, that same evidence could have been used to discredit the witnesses' testimony as it related to appellant's demeanor and intentions.

First, the fact that appellant was the admitted shooter did not, in itself, compel a first degree murder conviction on Count Four. Actual shooters have been convicted of second degree murder under circumstances as egregious, if not more so, than those here. (See, e.g., *People v. Thomas* (2012) 53 Cal.4th 771, 814 [evidence supporting second degree murder conviction compelling where defendant put the gun between the victim's eyes and threatened to "blow his brains out"]; *People v. Ramirez* (2006) 39 Cal.4th 398, 464 [second degree murder conviction affirmed where, after shooting one victim and murdering another, the defendant forcibly removed the third victim, a stranger, from her car and as she pleaded for help, shot her twice as she struggled, then pushed her away and fled]; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 678 [defendant convicted of only second degree murder although the evidence showed "a full week of careful preparation, rehearsal and execution," that the defendant who "fired 10 shots at close range from an assault weapon and fired at least three of four shots into the victim's head as he lay on the pavement," and that he carried out the crime with "planning, sophistication or professionalism"]; *People v. Hach* (2009) 176 Cal.App.4th 1450, 1453-1454 [second degree murder conviction affirmed where the defendant was angry at victim, searched for victim's whereabouts and shot victim in his car from close range but where the defendant testified that he shot the gun in the air to scare the victim]; *In re Lowe* (2005) 130 Cal.App.4th 1405, 1414 [second degree murder conviction where defendant purchased a gun shortly before the murder, entered his victim's bedroom in the middle of the night while victim was

asleep and unsuspecting, and “shot him five times execution style]; *In re DeLuna* (2005) 126 Cal.App.4th 585, 643 [second degree murder conviction where, after confronting the victim in a bar, the defendant left and retrieved a rifle, shot the victim in the mouth and, as the victim bled and walked around the parking lot, followed him and continued firing until he died].)

Second, there was no direct evidence and scant circumstantial evidence, apart from the nature of the weapon, that appellant fired with the intent to kill; and he denied harboring such an intent.

Of the four percipient witnesses who testified at trial, none saw appellant aim the gun at anyone; three had their backs to him when the shooting began, and the fourth turned to run away. (8RT 1591-1592, 1618; 9RT 1668-1669, 1699.) Two of the witnesses, Hart and Jimenez, offered no testimony regarding appellant’s affect prior to or during the shooting. The two other witnesses, Johnson and Emmanuel, to different degrees, offered testimony regarding appellant’s purported emotions and mental state. Emmanuel testified that he never heard Gonzalez call out a gang name, and that Gonzalez seemed normal when he called appellant over from across the street. (9RT 1663-1665.) But, according to Emmanuel, Gonzalez later looked mad and appellant also looked mad when he came over holding the gun. (9RT 1657, 1658, 1665-1666.) Emmanuel did not recall anyone pointing a gun at the group. (9RT 1666.) Because of the stipulation, the jury did not hear that, as he had testified at the preliminary hearing, Emmanuel believed he had seen appellant hand the gun to Gonzalez. (2CT 322.)

Of these witnesses, Camille Johnson provided the most detailed and damaging testimony regarding appellant’s behavior and demeanor during

their encounter. First, although she testified that appellant was so far away that Gonzalez had to yell pretty loud when he called him over, she claimed that Gonzalez told appellant that “these fools are talking about Mexicans” and, after having her memory refreshed, “something about they don’t know about T.C.A.” (9RT 1694.) She next testified that appellant pointed the gun at her, coming within six inches of her face. (9RT 1696.) She claimed he looked “real angry,” but smiled when he denied that he was going to shoot her. (9RT 1697.) Due to the stipulation, the jury did not hear that, in contrast to her confident description of appellant’s facial expression, Johnson had initially misidentified the “shooter.”

Absent this impeachment, the jury had no reason to apply Dr. Shomer’s expert testimony regarding the fallibility of eyewitness perception and recollection to Emmanuel or Johnson whose reliability went unchallenged. It would have been important to contest their testimony describing appellant as “angry,” because anger, as a motivation and particularly as argued by the prosecutor, could support the inference of intent to kill, as well as premeditation and deliberation. (See, e.g., *People v. Felix* (2009) 172 Cal.App.4th 1618, 1627 [reasonable for jury to infer premeditation, as well as intent to kill, where appellant armed himself in response to his anger over earlier events].)

As a direct result of the court’s unduly favorable explanation, appellant had no reason to know that, by agreeing to the stipulation, he was forgoing a vital component of his only defense to Counts Four through Eight – lack of intent to kill. Thus, notwithstanding that it had taken defense counsel nearly two-and-a-half weeks (half the trial) to finally agree to the prosecutor’s stipulation, appellant did so in a minute or two because the court had led him to believe that “he was not really giving up anything.”

Moreover, having ruled that the “gang” evidence seized from appellant’s home was admissible for all purposes stated in the prosecution’s comprehensive in limine motions, the court should have known that appellant gained nothing and the prosecutor lost nothing by way of the stipulation.

Even assuming the trial court meant well and that it wished, among several objectives, to help appellant decide whether to personally accept the stipulation and waive his confrontation rights, it overstepped the bounds of neutrality when it spoke for defense counsel in explaining the illusory tactical value of the stipulation. (Cf. *People v. Collins*, *supra*, 26 Cal.4th at pp. 311-312 [error caused by trial court’s assurances of a benefit not corrected by fact that these assurances were provided in the course of otherwise appropriate explanations and advisements].)

Because of the court’s superior, presumptively neutral position, there is no question that its articulation of the tactical benefits of the stipulation influenced both appellant and his counsel. The brevity of the waiver colloquy supports this inference. The court conveyed the tactical advantages of the stipulation in response to appellant’s statement that he had not had sufficient time to discuss the matter with his attorneys, who, the record shows, had struggled with the decision for weeks. (8RT 1564.) Prior to defense counsel explaining the pros and cons of the stipulation to appellant, the court did it for them. The court then gave appellant a few minutes to speak with counsel – a minimal amount of time allowing for probably little more than the repetition of what the court had already said. (8RT 1564-1566.) Based on this sequence of advisement and agreement to the stipulation, it is reasonable to conclude that appellant’s waiver was not the result of adequate, independent consultation with counsel, but rather

was induced by the court's explicit endorsement of the stipulation. The court's impermissible involvement in counsel's tactical advice to appellant was an abuse of discretion which nullifies the resulting waiver and appellant's acquiescence in the stipulation. Further, because the court's error affected appellant's exercise of his due process and confrontation rights, it violated both the state and federal Constitutions.

D. The Trial Court's Misleading, One-Sided Advisement Regarding the Tactical Benefits of the Stipulation Was Reversible Error Under State and Federal Law

The court's improper inducement of appellant's agreement to the stipulation and consequent waiver of his rights was not harmless under state or federal standards. Because appellant's waiver of his right to cross-examine witnesses regarding prior misidentifications was based, in whole or large part, on the court's misleading recitation of the tactical advantages of the stipulation, and because such cross-examination would have aided a viable intent defense to Counts Four through Eight, the court's error was prejudicial and requires reversal of appellant's convictions and the death verdict based on these counts.

Violations of federal constitutional rights are subject to the harmless beyond a reasonable doubt standard of prejudice set forth in *Chapman v. California, supra*, 386 U.S. 18, i.e., such errors will be found prejudicial unless the state can show beyond a reasonable doubt that the error did not contribute to the verdict. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279. [state has burden to show that the verdict rendered at trial "was surely unattributable to the error].) The state cannot meet that burden here.

As discussed more fully in Argument I, *ante*, the evidence that appellant had the specific intent to kill on the night of February 15, 2004,

was far from overwhelming. Accordingly, because the court's erroneous promotion of the stipulation effectively precluded a potentially viable avenue of defense, reversal is required under federal constitutional standards applicable to both the guilt and penalty phases of the trial.

Reversal also is required under the state's harmless-error standard of prejudice. For violations of state law, reversal is required where it is reasonably probable that the error affected the trial result. (*People v. Zambrano, supra*, 41 Cal.4th at p. 1135, fn. 13; *People v. Watson, supra*, 46 Cal.2d at p. 836.) "Reasonably probable" is defined as a probability sufficient to undermine confidence in the outcome. (*In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.) Johnson and Emmanuel provided critical, highly damaging evidence bearing on appellant's intent on February 15. Only these two witnesses had sufficient contact with appellant to claim to recollect his exact words and exactly what he heard, as well as his demeanor and affect. They portrayed him as nonchalant and smiling when he came over and angry when he pointed the gun at them. (9RT 1665, 1693-1697; 13RT 2597.) As a result of the stipulation, the jury was given no reason to question the reliability of Johnson's and Emmanuel's testimony. Their account fit very neatly with the prosecutor's theory that the shooting on February 15 occurred because appellant had declared war on society out of anger at his brother's case, or alternatively out of gang loyalty. (13RT 2589.)

It is fair to assume from the jury's rejection of the personal use enhancements as to Counts One through Three and Nine that it gave some weight to Dr. Shomer's testimony regarding the fallibility of witnesses' observations and recollections of traumatic events, especially those involving weapons. Had the court not erred in inducing appellant's waiver

of rights, defense counsel could have effectively confronted Johnson and Emmanuel with their prior misidentifications, and used them to raise the same doubts about the accuracy of their testimony as Dr. Shomer's expertise had achieved regarding witnesses Amezcua and Molina. In short, because it is reasonably probable that challenging Johnson's and Emmanuel's testimony based on their prior misidentifications would have raised a valid doubt as to appellant's intent, it is also reasonably probable that the improperly induced waiver of this line of cross-examination affected the verdicts on Counts Four through Eight. Appellant's convictions of these counts must be reversed.

Even if appellant's conviction of Count Four is sustained, the death verdict must be overturned. Prejudice is established at the penalty phase if "there is a reasonable probability that at least one juror would have struck a different balance" between life and death. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537.) Here, appellant's apparent moral culpability was impermissibly enhanced, and the reliability of the death verdict correspondingly diminished, by the erroneously obtained stipulation and waiver. By failing to contest Johnson's and Emmanuel's damning descriptions of appellant's mental state, the defense conceded that appellant possessed the worst, most culpable intent. On the other hand, had Johnson and Emmanuel been subjected to meaningful cross-examination regarding the reliability of their reported observations, it is reasonably probable that at least one juror would have concluded that appellant had reduced culpability based on his credible denial of an intent to kill. Under this more mitigating moral calculus, that juror may have been inclined to refrain from voting for a capital sentence. Accordingly, penalty phase prejudice has been demonstrated and the judgment of death must be vacated.

IV.

THE STATE'S PATTERN KILL ZONE INSTRUCTION VIOLATES DUE PROCESS IN USING AN INFLAMMATORY BATTLEFIELD METAPHOR, CONNOTING MASS CASUALTIES, WHICH COMPROMISES INSTRUCTIONAL NEUTRALITY AND THEREBY LIGHTENS THE PROSECUTION'S BURDEN OF PROOF, REQUIRING REVERSAL OF COUNTS FIVE THROUGH EIGHT AND THE JUDGMENT OF DEATH

A. Introduction

In instructing on the crime of attempted murder as alleged in Counts Two, Three, Five through Eight, Nine and Ten, the trial court read appellant's jury a version of CALJIC No. 8.66.1 (2004) regarding the kill zone theory of attempted murder. (13RT 2559, 2742-2743.) In this argument, appellant asserts that this instruction was constitutionally defective in the following respects: first, the use of the military expression "kill zone," which gives rise to the image of massive wartime casualties, is both highly inappropriate and inherently inflammatory.²² Second, as a corollary vice, its use of this military terminology unduly favors the prosecution and thereby lightens its burden of proof. Furthermore, in Argument V, *post*, appellant challenges the legal sufficiency of the kill zone instruction²³ as given in this case, and in Argument VI, *post*, the application

²² "Kill Zone" is *commonly* defined as "[t]he area of a military engagement with a high concentration of fatalities." (Oxford Dictionary of American English (2005 Ed.). <<http://www.oxforddictionaries.com/us/definition/american-english/kill-zone>> [as of December 18, 2013.]

²³ As a convenient shortcut, appellant uses the "kill zone" label since that is how courts and counsel generally refer to the concurrent intent instruction. By doing so, appellant does not intend to waive or compromise his challenge to the use of this expression in the instruction.

of that instruction to Counts Five through Eight. These significant and prejudicial instructional defects, individually and cumulatively, relieved the prosecution of its burden to prove the element of specific intent to kill for attempted murder and hence denied appellant a fair trial and due process of law in violation of both the federal and state Constitutions. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 15 and 17; *In re Winship* (1970) 397 U.S. 358, 364.

B. Legal Standards Applicable to Arguments IV, V and VI

“The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. [Citation.] Jury instructions relieving States of this burden violate a defendant's due process rights. [Citations.] Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases.” (*Carella v. California* (1989) 491 U.S. 263, 265.)

“Instructions regarding the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review.” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503; see generally *People v. Valdez* (2012) 55 Cal.4th 82, 151 [because defendant's claims – erroneous instructions affecting his substantial rights – are “of a kind . . . that required no trial court action” to be preserved for appeal (citation)]; Pen. Code, § 1259.)

The mental element required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill; implied malice – a conscious disregard for life – suffices. (*People v. Lasko* (2000) 23 Cal.4th 101, 107.) Implied malice cannot, however,

support a conviction of attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 327-328 [citations].) “[T]he crime of attempted murder requires a specific intent to kill” (*People v. Guerra* (1985) 40 Cal.3d 377, 386.)

Courts have generally cautioned that,

In instructing upon the crime of attempt to commit murder, . . . nothing less than a specific intent to kill must be found before a defendant can be convicted of attempt to commit murder, and the instructions in this respect should be lean and unequivocal in explaining to the jury that only a specific intent to kill will do.

(*People v. Santascio* (1984) 153 Cal.App.3d 909, 918.)

Adhering to this requirement is more complicated when the state seeks to “transfer” the mens rea of specific intent from an intended victim to an *unintended* victim in relation to an inchoate homicide. (*People v. Bland, supra*, 28 Cal.4th at p. 326, citing *Harvey v. State* (1996) 111 Md.App. 401 [681 A.2d 628, 639].) In the context of murder, the doctrine of transferred intent applies when the defendant intends to kill one person but mistakenly kills another. The intent to kill the intended target is deemed to transfer to the unintended victim. (See generally *People v. Scott* (1996) 14 Cal.4th 544.)

In *People v. Bland, supra*, this Court held that the doctrine of transferred intent does not apply to attempted murder, which requires that the defendant specifically intended to kill the alleged victim, not someone else. (28 Cal.4th at p. 328.) Nevertheless, although transferred intent does not apply to attempted murder, a person who attacks a group of people may still be punished for the actions towards everyone in the group, even when the person primarily targeted is only one of them. (*Id.* at p. 329.) As to the

nontargeted members of the group, the defendant might be guilty of crimes such as assault with a deadly weapon or firing at an occupied vehicle.

(*Ibid.*, citing *People v. Czahara* (1988) 203 Cal.App.3d 1468, 1471.)

Further, the defendant might still be guilty of the attempted murder of others in the group under a theory of concurrent, not transferred, intent.

(*Bland, supra*, 28 Cal.4th at p. 329.)

In adopting the concept of concurrent intent, this Court relied heavily on the analysis in *Ford v. State* (1992) 330 Md. 682 [625 A.2d 984], a Maryland Court of Appeals decision. The Court adopted the explanation in *Ford* court that, “although the intent to kill a primary target does not *transfer* to a survivor, the fact that the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what the court described as the “kill zone.” (*People v. Bland, supra*, 28 Cal.4th at p. 329; *Ford v. State, supra*, 625 A.2d at p. 1000 [concurrent intent may reasonably be inferred where “the defendant has intentionally created a ‘kill zone’ to ensure the death of the primary victim”] (quotation marks in original).)

California’s first version of the “kill zone” instruction was CALJIC No. 8.66.1, issued in 2003. CALJIC No. 8.66.1 was revised in 2004, leaving it entirely up to the trial court whether to use the term “zone of risk” or “kill zone.” That instruction was superseded in 2006 by CALCRIM No. 600, which restored the mandatory use of “kill zone” in defining concurrent intent. The instruction given in this case was a variant of CALJIC No. 8.66.1 using the “kill zone” language.

C. The Pattern “Kill Zone” Instruction Is Constitutionally Infirm Because It Unduly Favors the Prosecution and Lightens the Prosecution’s Burden of Proof

The California Judicial Council instructions are the official instructions for use in this State. (Cal. Rules of Court, rule 2.1050(a).) Notwithstanding the judicial endorsement, pattern jury instructions are not sacrosanct. (Cf. *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1464 [that CALJIC pattern instructions are not sacrosanct “is apparent from their treatment by the appellate courts”].) “The articulation and interpretation of California law . . . remains within the purview of the Legislature and the courts of review.” (Cal. Rules of Court, rule 2.1050(b).) Even so, “it is dangerous to frame an instruction upon isolated extracts from the opinions of the court.” (*People v. Hayes* (2009) 171 Cal.App.4th 549, 558, citing *People v. Cavitt* (2004) 33 Cal.4th 187, 202; see also *Delos v. Farmers Ins.* (1979) 93 Cal.App.3d 642, 656 [judicial opinions are not written as jury instructions and may be notoriously unreliable as such].)

The 2006 version of the “kill zone” instruction issued by the Judicial Council reads as follows:

[A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or “kill zone.” In order to convict the defendant of the attempted murder of _____ *<insert name of victim charged in attempted murder count[s] on concurrent-intent theory>*, the People must prove that the defendant not only intended to kill _____ *<insert name of primary target alleged>* but also either intended to kill _____ *<insert name of victim charged in attempted murder count[s] on concurrent-intent theory>*, or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill _____ *<insert name of victim charged in attempted murder count[s] on concurrent-intent theory>* by harming everyone in the kill zone, then you

must find the defendant not guilty of the attempted murder of _____ *<insert name of victim charged in attempted murder count[s] on concurrent-intent theory>.*]

(CALCRIM No. 600 (italics in original).)

Since its original appearance in January 2006, the concurrent intent portion of CALCRIM No. 600 has been revised twice in response to defense challenges. First, in December 2008, the last sentence of the concurrent intent instruction was amended to replace “*harming* anyone in the kill zone” with “*killing* anyone in the kill zone.” (See *People v. Stone* (2009) 46 Cal.4th 131, 138, fn. 3, citing *People v. Campos* (2007) 156 Cal.App.4th 1228, 1241 [recognizing that because the intent required is to kill rather than merely harm, better to use the word “kill” consistently rather than the word “harm”].) In August 2009, the instruction was again revised to substitute the word “everyone” wherever the word “anyone” had appeared in the instruction. (See *Ibid.* [recognizing that concurrent intent instruction using “anyone” instead of “everyone” was ambiguous].)

In short, the Judicial Council has been diligent in refining the language of the concurrent intent instruction where legitimate concerns have been raised. That being said, the Judicial Council and the courts have ignored or dismissed the most glaring flaw in the instruction – namely, that it needlessly employs an inherently prejudicial and inflammatory military combat metaphor, i.e., “kill zone.” In *People v. Campos, supra*, the court of appeal rejected the defendant’s argument that the use of this term “invited inferences favorable to either party,” or “integrat[ed] facts of th[e] case as an argument to the jury.” (156 Cal.App.4th at p. 1244.) The court compared “kill zone” to other disparaging terms such as “flight,” “suppression of evidence” and “consciousness of guilt,” which had long

been used and approved in criminal jury instructions. (*Ibid.*) This comparison is misconceived.

Other than being disparaging, the consciousness of guilt concept has little in common with “kill zone,” as used in CALCRIM No. 600 and the earlier CALJIC version of the instruction. First, it should be noted that the term consciousness of guilt does not appear in any of the instructions setting out the elements of an offense or the prosecution’s burden of proof. It is, at most, a makeweight in the determination of culpability. Indeed, while CALJIC has continued to use the term “consciousness of guilt,” CALCRIM has dispensed with this usage entirely in the body of its instructions. (See CALCRIM Nos. 362, 371.)

“Kill zone,” in contrast, is the pivotal concept in the concurrent intent analysis. Under both the instruction and this Court’s jurisprudence, the concurrent intent doctrine has two requirements, both dependent on the kill zone metaphor: (1) the defendant targeted a primary victim by intentionally creating a kill zone; and (2) the attempted murder victims were within that kill zone. (*People v. Smith* (2005) 37 Cal.4th 733, 746.)

Further, both the common, i.e., dictionary meaning, and the legal meaning of the phrase “consciousness of guilt” are the same. The subjects of the instructions – misleading statements, concealment or fabrication of evidence and flight – are concrete actions with no extraneous connotations.

“Kill zone,” no matter how defined in an instruction, has unavoidable inflammatory associations with the catastrophic casualties of war and, by rhetorical extension, the most horrific mass killings. Nothing in CALCRIM No. 600 or CALJIC No. 8.66.1 addresses, much less prevents these inevitable, prejudicial associations. As such, these instructions are inherently argumentative and unduly favor the prosecution. (Cf. *Fierro v.*

International Harvester Company (1982) 127 Cal.App.3d 862, 869

[instructions must not be argumentative or overemphasize or stress selective items of evidence].)

No other state adopting the concurrent intent analysis of *Ford* and *Bland* has imported the “kill zone” language verbatim into its instructions. For instance, the Maryland instruction, although rooted in *Ford*, uses “zone of danger” or “zone of harm” in explaining concurrent intent. (See, e.g., *Dionas v. State* (2011) 199 Md.App. 483, 534 [23 A.3d 277, 307]; see also, *Graure v. United States* (D.C. App. 2011) 18 A.3d 743, 760-761 (same).) Thus, there is no conceivable reason to use “kill zone,” with its inflammatory connotations when the neutral terminology used by other states suffices to convey the relevant concept. (See, e.g., CALJIC No. 8.66.1 (2004) [“. . . Whether the perpetrator actually intended to kill the victim, either as a primary target or as someone within a [“kill zone”] [zone of risk] . . .”].)

Even apart from the battlefield imagery evoked by the expression, which generally detracts from a reasoned examination of the facts, the use of “kill zone” specifically dilutes the individualized intent requirement, hence lowering the prosecution’s burden of proof, by implying that firing into the area must invariably carry with it the intent to kill. These combined prejudicial effects denied appellant his rights to a fair trial and due process of law, and continuing into the penalty phase, the indelible, prejudicial impact of the expression by itself could well have tipped the balance for some jurors in favor of death.

For these reasons, the “kill zone” instruction, whether the CALCRIM version or the CALJIC version given here, is legally and constitutionally infirm and so inherently prejudicial as to require reversal of

all the attempted murder convictions and the judgment of death. Moreover, because the kill zone instruction given was fatally defective in other respects, the cumulative prejudicial impact of all these defects is discussed more fully in Argument VI, *post*.

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V.

BY INSTRUCTING THE JURY ON THE CONCURRENT INTENT THEORY OF ATTEMPTED MURDER IN THE LANGUAGE OF CALJIC NO. 8.66.1, INSTEAD OF THE APPROVED LANGUAGE OF CALCRIM NO. 600, THE TRIAL COURT RELIEVED THE JURY OF ITS DUTY TO FIND INDIVIDUALIZED INTENT TO KILL BEYOND A REASONABLE DOUBT. THIS ERROR REQUIRES REVERSAL OF COUNTS FIVE THROUGH EIGHT AND THE JUDGMENT OF DEATH

A. Introduction

In Argument IV, *ante*, appellant maintained that the “kill zone” instruction, as a consequence of using this expression, was legally and constitutionally infirm in violation of both the federal and state Constitutions. In this argument, appellant contends that the trial court erred, for several reasons, in using a modification of the kill zone instruction in CALJIC No. 8.66.1, because the instruction given relieved the prosecution of its burden to prove beyond a reasonable doubt, with respect to all the attempted murder charges, that appellant had the specific intent to kill each alleged attempted murder victim.²⁴ This error, in compounding the substantial prejudice resulting from the use of the inflammatory expression “kill zone,” denied appellant a fair trial, due process of law and a reliable penalty verdict in violation of both the federal and state Constitutions. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 15 and 17; *In re Winship* (1970) 397 U.S. 358, 364.) Accordingly, reversal is required.

²⁴ In Argument VI, *post*, appellant argues that the kill zone instruction was specifically inapplicable to Counts Five through Eight and then discusses the cumulative impact of all the defects of that instruction.

B. The ‘Kill Zone’ Instruction Given in this Case Lightened the Prosecution’s Burden of Proof as to the Element of Specific Intent to Kill

1. The Error

With only one critical exception, the charge to the jury in this case was based on the original set of CALCRIM instructions promulgated in January 2006.²⁵ (13RT 2704-2761.) That exception was the concurrent intent instruction. Instead of giving CALCRIM No. 600 in its entirety, the court mixed and matched instructions. After reading the beginning of CALCRIM No. 600, the court then, on its own motion, gave a modified kill zone instruction in the language of CALJIC No. 8.66.1. (13RT 2559, 2742-2743; 28CT 8293-8305.)

The instruction read:

A person who primarily intends to kill one person may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the Kill Zone. *The intent is concurrent when the nature and scope of the attack while directed at a primary victim are such that it is reasonable to infer that the perpetrator intended to kill the primary victim by killing everyone in the victim’s vicinity.* Whether a perpetrator actually intended to kill a victim either as a primary target or as someone within the zone of risk is an issue to be decided by you.

(13RT 2742-2743, italics added; see also CALJIC No. 8.66.1(2004).)

²⁵ Apart from the concurrent intent instruction, there were only two inconsequential instances where the court incorporated language from CALJIC into a CALCRIM instruction at counsel’s request. The prosecutor had requested that the court give CALJIC No. 2.06 in place of CALCRIM No. 371. (28CT 8295.) Instead, the court slightly modified CALCRIM No. 371 to include the word “destroy.” (12RT 8295; 13RT 2730.) Similarly, at defense counsel’s request, the court incorporated some language from CALJIC No. 3.01 into CALCRIM No. 401 (12RT 2567; 13RT 2733.)

At the time of appellant's trial, the doctrine of concurrent intent in relation to attempted murder was not long established in this state; *Bland* was decided in 2002. When CALJIC No.8.66.1 first appeared in the 2003 edition, the instruction defined concurrent intent by quoting almost verbatim one sentence from *Ford*, extracted from the lengthy explanation presented in *Bland*. (*Bland, supra*, 28 Cal.4th at pp. 329-330.) As noted above, the instruction was revised in 2004 to afford courts the discretion to use "zone of risk" instead of "kill zone." No version of CALJIC No. 8.66.1 has been expressly approved by a court.

The Guide for Using CALCRIM states that: "The CALJIC and CALCRIM instructions should *never* be used together. While the legal principles are obviously the same, the organization of concepts is approached differently. Trying to mix the two sets of instructions into a unified whole cannot be done and may result in omissions, or confusion that could severely compromise clarity and accuracy." (CALCRIM at pp. xxii-xxiv; Italics in original.) That is exactly what occurred here.

a. The Instruction Made No Reference to the Prosecution's Burden to Prove Concurrent Intent Beyond a Reasonable Doubt

CALJIC No. 8.66.1 is a bare-bones instruction that includes not a single reference to the prosecution's burden of proof. Rather, it reads very much like the series of consciousness of guilt instructions which allow jurors to draw permissive inferences without regard to proof beyond a reasonable doubt. (See *Argument V., ante*, at p. 93; *People v. Campos, supra*, 156 Cal.App.4th at p. 1244 [comparing kill zone instruction to consciousness of guilt instructions].)

CALCRIM No. 600 (2006), in contrast, makes clear:

In order to convict the defendant of [attempted murder on a

concurrent intent theory], *the People must prove* that the defendant not only intended to kill [named primary target] but also either intended to kill [named victim[s] charged in attempted murder count[s] on a concurrent-intent theory], or intended to kill anyone within the kill zone. If you have *a reasonable doubt* whether the defendant intended to kill [named victim[s] charged in attempted murder count[s] on a concurrent-intent theory] by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of [named victim[s] charged in attempted murder count[s] on a concurrent-intent theory].” (Italics added.)

While this expanded language does not cure the inflammatory impact of repeatedly using “kill zone” in the instruction, at the least, it tethers the concurrent intent theory to the elements of attempted murder and the prosecution’s burden of proof.

Inasmuch as every other instruction given by the court was taken almost verbatim from CALCRIM, it is fair to infer that the court used the simplified CALJIC language to avoid identifying the primary and “concurrent intent” victims as CALCRIM No. 600 expressly requires. There were three distinct sets of attempted murder charges in this case. As to Counts Two and Three, the shooting into the vehicle on February 14, appellant does not contend that the court’s failure to identify a primary victim was ultimately consequential. As to Count Ten, the shooting into a vehicle on February 19, there was no verdict. However, as to Counts Five through Eight, the court’s ill-considered shortcut resulted in an instruction that was both legally insufficient and factually unsupported. As to these counts, there was a complete absence of proof that appellant intended to kill a primary target – precluding application of the concurrent intent theory. (See *People v. Stone, supra*, 46 Cal.4th 131, 138.) The court’s reading of

CALJIC No. 8.66.1, instead of CALCRIM No. 600, however, obscured this evidentiary deficiency. Thus, the court's instruction was flawed as a matter of law because it relieved the prosecutor of the burden of identifying, much less proving there was, a primary victim in relation to Counts Five through Eight. The inapplicability of the concurrent intent theory, as a question of fact, not law, is discussed in Argument VI, *post.*)

The language of CALJIC No. 8.66.1 exemplifies the danger of “fram[ing] an instruction upon isolated extracts from the opinions of the court.” (*People v. Hayes, supra*, 171 Cal.App.4th at p. 558.) CALJIC No. 8.66.1 plucked a single sentence from *Ford*'s lengthy explanation of the concurrent intent theory. As a result, the instruction failed to include all the elements of concurrent intent needed to prevent a conviction of attempted murder based on an implied malice or transferred intent theory.

As quoted in *Bland, supra*, the extracted sentence originally read: “The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that *we can conclude* that the perpetrator intended to ensure the death of everyone in the victim's *vicinity.*” (28 Cal.4th at pp. 329-330, italics added; *State v. Ford, supra*, 625 A.2d at pp. 1000-1001.) Recognizing that the phrase “we can conclude” had no place in a jury instruction, CALJIC No. 8.66.1 substituted “it is reasonable to infer” in its stead. The substitution did not cure the real vice of CALJIC No. 8.66.1 – diluting the specific intent requirement for attempted murder. The instruction, moreover, left the indefinite location “vicinity” unchanged.

Neither “we can conclude” nor “it is reasonable to infer” state or convey that the prosecution has the burden of proving the predicates of concurrent intent beyond a reasonable doubt. The instruction given,

therefore, was not the legal equivalent of nor an adequate substitute for CALCRIM No. 600, which expressly links the concurrent intent theory to the elements of attempted murder and the prosecution's burden of proof. Without such connection to the reasonable doubt standard, the instruction given allowed a conviction of attempted murder based on nothing more than a "reasonable inference" as to the element of intent.²⁶

In California, the correctness of jury instructions is to be determined from the entire charge. (*People v. Burgener* (1986) 41 Cal.3d 505, 538.) The question to be asked is whether a reasonable juror would apply the instruction in an erroneous manner. (*People v. Coddington* (2000) 23 Cal.4th 529, 594.) Here, a rational juror could have concluded – with the entire charge in mind – that the concurrent intent instruction meant exactly what it said, namely, that an attempted murder conviction could be based on a mere – albeit reasonable – inference of intent to kill.

Nothing in the remainder of the charge required the prosecutor to prove or the jury to find concurrent intent beyond a reasonable doubt. Indeed, the instruction, as stated, effectively contradicted the sufficiency of circumstantial evidence instructions, CALCRIM Nos. 224 and 225. The essence of the circumstantial evidence instruction on mental state is that "before you [the jury] may rely on circumstantial evidence to conclude that the defendant had the required [intent], you must be convinced that the *only*

²⁶ The concluding sentence of the instruction – that the issue was to be decided by the jury – was surplusage since the jury is, by definition, the decider of guilt. (See *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1397 ["considering the instructions as a whole, no reasonable juror would conclude from them that the decision as to defendant's guilt of the attempted murder charges in this matter lay anywhere but with this jury".])

reasonable conclusion supported by the evidence is that the defendant had the required [intent].” (CALCRIM No. 225, italics added.) Concurrent intent is a mental state based on a circumstantial inference from the “nature and scope of the attack.” As such, to conform to the sufficiency standard for circumstantial proof, the concurrent intent instruction given would have had to read, at a minimum, that “[t]he intent is concurrent when the nature and scope of the attack while directed at a primary victim are such that” *the only reasonable inference* is that the “perpetrator intended to kill the primary victim by killing everyone in the victim’s vicinity.”

It is assumed that jurors adopt the common sense meaning of instructions. (*People v. Modiri* (2006) 39 Cal.4th 481, 499, citing *People v. Coddington, supra*, 23 Cal.4th at p. 594.) Both logic and common sense support the inference that a specific instruction qualifies or controls over a more general instruction. (Cf. Civ. Code, § 3534 [“Particular expressions qualify those which are general”]; *RadLAX Gateway Hotel, LLC v. Amalgamated Bank* (2012) ___ U.S. ___, 132 S.Ct. 2065, 2068 [“[I]t is a commonplace of statutory construction that the specific governs the general.”].) Here, even assuming jurors understood that concurrent intent was an application of the circumstantial evidence rule, common sense and reason would have led them to apply the instruction exactly as stated without reference to the critical reasonable doubt analog set forth in CALCRIM No. 225.

Further, every CALCRIM instruction given that identified the elements of a charged offense or an enhancement was either introduced by the phrase “To prove the defendant is guilty of [charged offense], the People must prove that” or concluded with the phrase “The People have the burden of proving this [element] [allegation] beyond a reasonable doubt. If

the People have not met this burden, you must find the [element] [allegation] has not been proved.” (See, e.g., CALCRIM Nos. 520 (Murder), 521 (Murder: Degrees), 600 (attempted murder), 601 (Attempted Murder: Deliberation and Premeditation); 29CT 8337-8344; 13RT 2734-2736, 2741-2742, 2743-2744.) There would have been no reason for any juror to assume, therefore, that an orphan instruction that did not include this signaling language, or any other reference to the prosecution’s burden or proof beyond a reasonable doubt, was within the class of instructions subject to the reasonable doubt standard. (Compare CALCRIM No. 600 [“If you have a reasonable doubt whether the defendant intended to kill [alleged concurrent intent victim] or intended to kill [alleged primary victim] . . . you must find the defendant not guilty of the attempted murder of [alleged concurrent intent victim].”])

b. The Use of “Vicinity” Instead of Zone of Harm or Risk Further Diluted the Specific Intent Requirement

The use of the word “vicinity” in the instruction is problematic because it expanded the universe of possible victims based on a purely geographical consideration. In *Bland*, this Court rejected the application of transferred intent to attempted murder, in part, because a jury could not rationally decide on that basis which of the many persons the defendant did not intend to kill were within the class of attempted murder victims. (*People v. Bland, supra*, 28 Cal.4th at p. 329.) Because there may be many persons in the general vicinity of the alleged primary victim, a proper concurrent intent instruction must include narrowing criteria by which a jury can decide which of those persons are within the zone of risk intentionally created by the defendant and which are not. (See Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/vicinity)

[vicinity is alternately defined as “the state of being near: proximity” or “a surrounding area or district: neighborhood].)

Thus, CALCRIM No. 600 and other states’ concurrent intent instructions use special terms such as “zone of risk,” “zone of harm” and “kill zone” to ensure that the universe of possible victims will be circumscribed by the defendant’s intent – that is, the intent to kill the primary victim by killing everyone in a “particular zone of harm.” In contrast, CALJIC No. 8.66.1, as given here, by equating “kill zone” with “vicinity” shifted the jury’s focus from the issue of defendant’s intent to one of mere physical proximity. As a result, the instruction allowed the jury to convict appellant of the attempted murder of anyone in the general area of the primary victim, assuming there was one, even if appellant never intended to kill the primary victim by killing such other person – i.e, the person was not in the zone of risk.

In sum, due to the trial court’s misguided decision to use the language of CALJIC No. 8.66.1, the jury was given a single, legally deficient concurrent intent instruction which had the critical flaw of CALCRIM No. 600, the use of the inflammatory expression “kill zone,” but none of the salutary features of that later, better-developed instruction. Even apart from the strict prohibition against mixing CALCRIM and CALJIC instructions, the instruction given here was seriously defective because it failed to identify the alleged primary and concurrent targets in each of the separate incidents. More importantly, both alone and in context, the instruction failed to require that the element of concurrent intent to kill, a proxy for specific intent, be proved beyond a reasonable doubt as to each of the alleged attempted murder victims. In thus offering the jury an alternative basis for conviction that lightened the prosecution’s burden of

proof, the instruction deprived appellant of due process and a fair trial.

2. Prejudice

Where a jury has been given both a legally erroneous and a legally correct instruction regarding an element of the offense, “the absence of a [special] verdict on this element cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise.” (*California v. Roy* (1996) 519 U.S. 2, 7 (conc. opn. of Scalia, J.), citing *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279, 280 [“The Sixth Amendment requires more than appellate speculation about a hypothetical jury’s actions . . . ; it requires an actual jury finding of guilty.” . . . “and absent such a verdict the conviction must be reversed, ‘no matter how inescapable the findings to support the verdict might be.’”].) Rather, the instructional error can only be harmless if the jury verdict on other points effectively embraced the necessary element or if it is *impossible*, upon the evidence, to have found what the verdict *did* find without finding this element as well. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1201, citing with approval, *California v. Roy*, *supra*, 519 U.S. at p. 7 (conc. opn. of Scalia, J.).)

Here, the jury was given two theories on the specific intent element of attempted murder, one of which, the kill zone theory, was inflammatory and constitutionally defective. (See Argument V, *ante*.) The trial court made an imprudent decision to give an unsanctioned instruction which relieved the jury of its duty to make an individualized specific intent finding for each attempted murder victim. As the instruction read, once the jury found that the defendant intended to kill anyone, it could convict him of the attempted murder of everyone in the vicinity of the intended victim based on a bare inference of concurrent intent – that is, without the requisite proof

beyond a reasonable doubt. Because it cannot be conclusively determined from the general verdicts that the jury did not rely on this legally insufficient theory in convicting appellant of attempted murder on Counts Five through Eight, the convictions on these counts must be set aside. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1122 [harmonizing *Griffin v. United States* (1991) 502 U.S. 46 with *People v. Green* (1980) 27 Cal.3d 1].)

People v. Chun, supra, 45 Cal.4th 1172, is instructive, though distinguishable from this case. In *Chun*, this Court held that the trial court's instruction on felony murder, with shooting at an occupied vehicle as the underlying felony, was invalid under the merger doctrine. (*Id.* at pp. 1200-1201.) Nevertheless, this Court affirmed the second degree murder conviction, finding that the instructional error was harmless beyond a reasonable doubt. (*Id.* at p. 1205.)

The Court found no prejudice because the jury had been instructed on express and implied malice under CALJIC No. 8.11 (Malice Aforethought – Defined). (*People v. Chun, supra*, 45 Cal.4th at p. 1202.) Stating that it was applying Justice Scalia's prejudice standard from *California v. Roy, supra*, 519 U.S. 2, 7, the Court then examined the record to determine whether aspects of the jury's other verdicts or the evidence "leave no room for doubt that the jury made the findings necessary for conscious-disregard-for life malice."²⁷ (*People v. Chun, supra*, 45 Cal.4th

²⁷ It may be noted that the formulation "leave no room for doubt" is not equivalent to Justice Scalia's much stricter articulation of the applicable harmlessness standard. When the reviewing court bases its determination of the jury's necessary findings on the state of the evidence, as well as the other verdicts, Justice Scalia would demand that "it is *impossible*, upon the

(continued...)

at p. 1205.) If so, the erroneous instruction was harmless. (*Ibid.*)

The Court explained that any juror who relied on the erroneous felony-murder theory would necessarily have found, under the instruction for the underlying felony, that the defendant willfully shot at an occupied vehicle. (*People v. Chun, supra*, 45 Cal.4th 1172, 1205.) The Court reasoned that, on the evidence – the vehicle shot at was occupied by three persons who were hit multiple times by gunshots fired at close range from three different firearms – no juror could have found the defendant participated in the shooting without also finding that the defendant committed an act dangerous to life and did so knowing of the danger and with conscious disregard for life. (*Ibid.*) Thus satisfied that no juror could have found felony murder without also finding conscious-disregard-for-life malice – a valid theory of second degree murder – this Court concluded that the error in instructing on an improper theory of felony murder was harmless beyond a reasonable doubt. (*Ibid.*)

Here, no combination of verdicts and evidence supports a finding of harmlessness. Granted the jury was properly instructed on the basic elements of attempted murder under CALCRIM No. 600. However, the kill zone instruction given did not include all the requirements of the approved CALCRIM instruction, nor did it integrate the burden of proof into the chain of inferences on which the alternative concurrent intent theory depends.

In *Chun*, the Court was able to determine prejudice based on the reasonable assumption that jurors had relied on the disapproved felony-

²⁷(...continued)

evidence, to have found what the verdict *did* find without finding [the fact or element at issue]. (*California v. Roy, supra*, 519 U.S. at p. 7.)

murder theory. The likelihood that jurors here relied on the kill zone theory in relation to Counts Five through Eight is no less strong. It is clear from its questions during deliberations that the jury gave close consideration to the kill zone theory of attempted murder. Although those questions were specifically directed to Count Ten, neither the kill zone instruction itself nor the prosecutor's argument differentiated among the several attempted murder charges in explaining the concept. (See 13RT 2600-2603 [prosecutor's reading the kill zone instruction to the jury in closing argument and urging the jury to convict appellant of the attempted murder charges in Counts Five through Eight on that theory].)

However, unlike in *Chun*, it cannot be concluded that a juror who relied on the kill zone or concurrent intent theory, as instructed, necessarily found beyond a reasonable doubt that appellant had the separate intent to kill each alleged attempted murder victim. This is especially so because the instruction given did not identify any primary target. In *Chun*, the Court could assume that every juror who relied on the felony-murder rule drew the same inferences and made the same findings beyond a reasonable doubt. Here, in contrast, there was no assurance of juror agreement as to the primary victim, particularly in relation to Counts Five through Eight. Unlike CALCRIM No. 600, the instruction here did not compel such unanimity, and neither did the general verdict forms. Consequently, each juror who based his or her verdict on Counts Five through Eight on the kill zone instruction could have relied on a different chain of inferences – none subject to the reasonable doubt standard – in making the determination.

The jury's finding of deliberation and premeditation as to the attempted murder charges in Counts Five through Eight also does not exclude convictions based on a defective kill zone theory since the element

of willfulness can be satisfied by concurrent intent, however defined. (See CALCRIM No. 601.) Thus, it is not “*impossible, upon the evidence,*” that the jury could have returned the deliberate and premeditated attempted murder verdicts without finding individualized specific intent to kill.

People v. Chun, supra, is again instructive on this point. The shootings in *Chun* involved numerous bullets from three separate guns, fired at close range into a stopped, occupied vehicle, killing one occupant and wounding two others. (*Chun*, 45 Cal.4th at p. 1179.) On those facts, this Court found that the *necessary* inference was that the defendant acted with conscious disregard for life. Since this was the necessary inference in *Chun*, conscious disregard for life was also a *possible* inference under the substantially similar scenario in this case. And, logically, since conscious disregard for life was a possible inference, specific intent to kill was not a necessary inference. In short, because the evidence and the instruction here supported a conviction of attempted murder based on conscious-disregard-for-life malice, the strict impossibility test set forth in the *Guiton/Green/Chun* line of cases cannot be met. (Cf. *People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1177 [reversing four of defendant’s convictions of assault with a firearm where the letter of the pattern jury instruction allowed the jury to convict defendant of assault on four individuals based on firing the shots that resulted in a direct and probable application of force to someone else and it was not possible for the reviewing court to determine which theory the jury actually used in convicting the defendant].)

Finally, the only other relevant verdict – appellant’s first degree murder conviction on Count Four – did not necessarily “embrace” the requisite individualized finding of intent to kill for each attempted murder

charge. Indeed, appellant submits that, in determining prejudice, no reliance may be placed on the related murder verdict since doing so would, in effect, reintroduce the barred concept of transferred intent. As well, because the intent to kill a primary victim, which some, but not all, jurors may mistakenly have assumed was Gabriel, is incorporated in the kill zone instruction, the first degree murder conviction sheds no light on the chain of inferences on which the jury relied in “transferring” the intent to kill from Gabriel to the alleged attempted murder victims.

Therefore, because it cannot be held beyond a reasonable doubt that the jury, in rendering its other verdicts, necessarily found the requisite individualized intent to kill each alleged attempted murder victim or, stated otherwise, that the defective kill zone instruction did not contribute to the convictions on Counts Five through Eight, the verdicts on these counts and the judgment of death must be reversed. (*People v. Chun, supra*, 45 Cal.4th at pp. 1201, 1204, citing *Neder v. United States* (1999) 527 U.S. 1, 15 and *California v. Roy, supra*, 519 U.S. at p. 7.; see Argument VI, *post.*)

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VI.

BECAUSE THE “KILL ZONE” INSTRUCTION WAS INAPPLICABLE TO COUNTS FIVE THROUGH EIGHT IN THAT THERE WAS NO EVIDENCE OF A PRIMARY TARGET OR CONCURRENT INTENT, REVERSAL OF THOSE COUNTS AND THE JUDGMENT IS REQUIRED

Appellant further submits that it was error to give the kill zone instruction as to Counts Five through Eight because there was no evidence that he aimed at a particular target – the threshold requirement of the concurrent intent theory. Because the trial court’s single, generic kill zone instruction failed to differentiate the attempted murder counts and thereby relieved the prosecution of its burden to prove and the jury of its burden to find this essential element, the error was prejudicial and requires reversal of appellant’s convictions on the affected counts.

A. The Applicable Legal Standards²⁸

The use of the kill zone instruction is discretionary. (Bench Note to CALCRIM No. 600, citing *People v. Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6.) The instruction, however, is not to be given where the defendant fired a weapon with no particular target in mind. (*People v. Stone* (2009) 46 Cal.4th 131.)

“It is error to give an instruction which, while it correctly states a principle of law, has no application to the facts of the case. [Citation.]” (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050, citing *People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.) Instructions not supported by substantial evidence should not be given. (*People v. Marshall* (1997) 15

²⁸ The additional legal standards set forth in Argument IV, *ante*, at pp. 89-91, are incorporated by reference herein.

Cal.4th 1, 39–40.) “Such an instruction tends to confuse and mislead the jury by injecting into the case matters which the undisputed evidence shows are not involved.” (*People v. Jackson* (1954) 42 Cal.2d 540, 546-547.)

The kill zone charge given here offended these basic precepts. Most crucially, the court’s truncated version of the instruction excused the jury from finding individualized proof beyond a reasonable doubt of the intent to kill as to each attempted murder victim. This legal deficiency, which is common to all the attempted murder charges, had its greatest prejudicial impact on Counts Five through Eight and, at a minimum, compels reversal of appellant’s convictions of the attempted murder charges alleged in those counts. Moreover, upon reversal of these verdicts, the judgment of death must be set aside as well.

B. The Error

In *People v. Stone, supra*, 46 Cal.4th 131, this Court held that the kill zone instruction is not appropriate where the defendant fired with no particular target in mind. (*Id.* at p. 140.) Nevertheless, the Court reasoned, a person who shoots into a group of people, intending to kill one of the group, but not knowing or caring which one, can be convicted of attempted murder on the theory that the mental state required for attempted murder is intent to kill a human being, not a particular human being. (*Id.* at p. 139-140.) If applied, as thus articulated, this expansive proposition would make the distinction between specific intent to kill (express malice) and knowing endangerment (implied malice) so subtle as to be practically indistinguishable.²⁹

²⁹ In her dissenting opinion in *People v. Smith* (2005) 37 Cal.4th 733, Justice Werdegar distinguished the specific intent to kill required for
(continued...)

In *Bland*, the Court illustrated the theory of concurrent intent by the example of a bomber who places a bomb on a commercial airplane intending to kill a primary target by ensuring the death of all the passengers. (*People v. Bland, supra*, 28 Cal.4th at pp. 28-29.) In a variant of this example, used in *Stone* to explain the concept of indiscriminate “specific” intent, this same terrorist wants to kill as many people as possible, and does not know or care who the victims will be. (*People v. Stone, supra*, 46 Cal.4th at p. 140.) However, because, in this hypothetical, intending to kill “as many people as possible” is tantamount to intending to kill each and every passenger on the plane, the example does not support the very different rule advanced by the Court in *Stone* – a rule tailored to the facts of that case.

In *Stone*, following an altercation between rival gang members and dispersal by the police, the defendant and two others drove back to the location where rival gang members were gathered. (*People v. Stone, supra*, 46 Cal.4th at p. 135.) After the driver threw a gang sign, a passenger, the defendant, rolled down his window and fired a gun at the group, including a 16-year old gang member, Joel F. (*Ibid.*) The information specifically alleged that Joel F. was the attempted murder victim and the jury was charged under a kill zone theory that named Joel F. as the primary target. (*Id.* at p. 136.) The defendant argued that the kill zone theory “simply does

²⁹(...continued)

an attempted murder conviction from “knowing endangerment, which establishes at most implied malice.” (*Id.* at p. 749, 751 [“Express malice, or intent to kill, requires more than knowingly placing the victim’s life in danger: it requires at the least that the assailant either “‘desire the result,’” i.e., death, or “‘know, to a substantial certainty, that the result will occur.’””].)

not fit the charge or facts of the case.” (*Id.* at p. 138.) Upon its review of the evidence, this Court agreed with the defendant because there was no proof that the defendant intended specifically to kill Joel F. rather than *someone else* in the group of 10 persons in Joel F.’s vicinity. (*Id.* at pp. 138-139.)

Even so, the Court concluded that the error was not necessarily prejudicial by itself. (*People v. Stone, supra*, 46 Cal.4th at p. 138.) First, the Court rejected an interpretation of *Bland, supra*, 28 Cal.4th 313, that always required an identifiable primary target for attempted murder. (*Id.* at p. 140.) Rather, the Court concluded a person who intends to kill can be guilty of attempted murder even if the person – characterized as an “indiscriminate would-be killer” – has no specific target in mind. (*Ibid.*) As the Court implicitly recognized, however, none of its prior decisions addressed, much less endorsed, this proposition. Rather, the Court relied on the absence of any contrary holding in *Bland* and a revised interpretation of an earlier Court of Appeal case, *People v. Vang* (2001) 87 Cal.App.4th 554, as support for its position.

In *Vang*, the court affirmed convictions of 11 counts of attempted murder for spraying bullets at two occupied houses – one count for each person in the house where the “defendants harbored the specific intent to kill every living being within the residences they shot up.” (*People v. Vang, supra*, 87 Cal.App.4th at p. 564.) *Bland* described *Vang*, with approval, as essentially a “kill zone” case because the defendants had a primary victim in each house. (*People v. Stone, supra*, 46 Cal.4th at p. 140, citing *Bland, supra*, 28 Cal.4th at p. 330.) Nevertheless, the Court observed in *Stone* that nothing in *Bland* or *Vang* “suggests that if the *Vang* defendants had shot at the houses simply to kill *everyone* who happened to be present, without any

primary target, then no conviction whatever for attempted murder would be possible.” (*People v. Stone, supra*, 46 Cal.4th at p. 140.) Appellant reads *Bland* differently.

The “intent to kill everyone” is only one of the requirements *Bland* imposed in distinguishing concurrent from transferred intent. If an undifferentiated intent to kill by itself sufficed for attempted murder, the Court in *Bland* would not have thought it necessary to include the intent to kill a primary victim as well as its other constraints on the concurrent intent theory. The law of attempted murder, not the facts of the case, compelled these additional elements to ensure that a defendant’s guilt of attempted murder, under all theories, would be determined separately as to each alleged victim.

Further, as noted above, even if a bare intent to kill *everyone* within a group could support a conviction of attempted murder, *Stone* stands for a different proposition – namely, that an undifferentiated intent to kill *someone*, without more, satisfies the separate-determination-of-intent requirement. Appellant submits that the expanded theory of specific intent in *Stone*, at most, applies to the facts of that case and cannot be generalized beyond them.

One problem with *Stone*’s formulation of the theory stems from the inherent ambiguity of generic pronouns. As this Court acknowledged in *Stone*, the reference to the intent to kill “anyone” in the earlier versions of the CALCRIM kill zone instruction was possibly ambiguous because, unlike “everyone,” “anyone” does not invariably mean “each person,” as required by the concurrent intent theory. (*People v. Stone, supra*, 46 Cal.4th at p. 138, fn. 3, citing *People v. Campos, supra*, 156 Cal.App.4th 1228, 1241.) *Stone*, nonetheless, disregarded the ambiguities that result

from replacing “everyone” with the far more indefinite pronoun “someone” and the consequent abrogation of the individualized intent requirement.

As a result, the *Stone* theory runs afoul of the “real” concern in *Bland* that “the world contains many people a murderous assailant does not intend to kill. Obviously, intent to kill one person cannot *transfer* to the entire world.” (*People v. Bland, supra*, 28 Cal.4th at p. 329.) By the same token, the intent to kill “someone” cannot be extended to everyone. Yet that is precisely what *Stone* would allow. The revision of CALCRIM No. 600 in April 2011, occasioned by *Stone*, substituting “[t]he defendant intended to kill [that/a] person” for “[t]he defendant intended to kill **that** person” places no meaningful limitation on the universe of potential attempted murder victims under *Stone*’s undifferentiated intent theory.³⁰

Second, the theory blurs the very distinction between murder and attempted murder that *Bland* took pains to preserve. As *Stone* recognized, although the Court in *Bland* cited with approval Justice Mosk’s criticism of

³⁰ The very fact that, unlike the “kill zone” addendum to the instruction, *Stone* necessitated the amendment of the intent element of the attempted murder instruction to incorporate the more expansive language of the general murder instruction is the most obvious indication that *Stone* has created, without legislative approval or precedent, a new crime. Indeed, other states that have wanted to broaden the intent requirement have recognized the crime of attempted second degree murder. (See, e.g., *People v. Fernandez* (1996) 88 N.Y.2d 777 [673 N.E.2d 910, 914] [crime of attempted second-degree murder committed when, with intent to cause the death of another person, one engages in conduct which tends to effect the commission of that crime]; *Pitts v. State* (Fla. App. 1998) 710 So.2d 62, 63 [attempted second degree murder requires only general intent, not the specific intent to kill]; *State v. Johnson* (1985) 103 N.M. 364 [707 P.2d 1174, 1180] [second degree murder can be committed without a specific intent]. California, however, does not recognize any degrees of attempted murder. (*People v. Ramirez* (2013) 219 Cal.App.4th 655, 679.)

the transferred intent theory of murder, it acknowledged that Justice Mosk's analysis had only limited application to attempted murder – hence, the multiple requirements of the concurrent intent theory. (*Stone, supra*, 46 Cal.4th at pp. 139-140, citing *People v. Scott, supra*, 14 Cal.4th at pp. 554-556 (conc. opn. of Mosk, J.) and *People v. Bland, supra*, 28 Cal.4th at pp. 327-328.)

In Justice Mosk's view, the transferred intent rule was an unnecessary legal fiction because express malice does not exist only in relation to an intended victim in the context of murder. (*People v. Scott, supra*, 14 Cal.4th at p. 555 (concurring. opn. of Mosk, J.) Justice Mosk's starting point was the rule that *implied* malice for murder does not exist only in relation to an intended victim: "Recklessness need not be cognizant of the identity of the victim or even his existence." (*Ibid.*) By the same reasoning, Justice Mosk concluded that express malice for murder also does not require an intent to kill an intended victim. (*Id.* at p. 556; see CALCRIM No. 520 ["A person acted with *express malice* if he/she unlawfully intended to kill"] (italics in original).) As to both forms of malice, the universe of unintended murder victims is limited by the proximate cause requirement. (*Ibid.*; CALCRIM No. 520 ["An act causes death if it is the direct, natural and probable consequence of the act . . .".])

Justice Mosk's analysis has not been adopted by the courts even as to murder. Where unintended victims are killed, the courts continue to instruct on transferred intent. (See, e.g., CALCRIM No. 562.) Further, the proximate cause limitation of murder is not apposite to attempted murder. Instead, *Bland* limited the class of unintended attempted murder victims by requiring the jury first to determine the parameters of a "zone of risk." Then, to ensure that the determination of guilt for attempted murder be

made victim-by-victim, *Bland* required a union of two intents: (1) the intent to kill the primary victim and (2) the intent to kill everyone within the kill zone.

Yet, in *Stone*, in contrast to *Bland*, the Court imported into the attempted murder context, without modification or limitation, the expansive definition of express malice discussed by Justice Mosk. In so doing, *Stone* not only compromised the individualized determination of intent which distinguishes inchoate from completed crimes, but as a consequence, undermined the crucial distinction between express malice and implied malice based on knowing disregard for life. There is scant difference between shooting into the crowd and not caring *whom* – if anyone – you kill and shooting into a crowd and not caring *if* you kill. Under *Stone*, the first described mental state constitutes express malice and supports a conviction for attempted murder. The second mindset, however, would not support an attempted murder conviction under any theory because it falls within the classic definition of implied malice based on conscious disregard for life. (*People v. Scott, supra*, 14 Cal.4th at p. 555 (conc. opn., Mosk, J.)) Nothing in the current attempted murder instruction provides the jury with the slightest guidance in distinguishing the unintended victims of an “intentional” indiscriminate shooter from those of a shooter who knowingly endangers the lives of others without caring who is shot. For these reasons, the *Stone* theory of attempted murder and the corollary CALCRIM instruction should be revised to include requirements that preclude attempted murder convictions based on undirected “indiscriminate” intent or knowing endangerment.

The potential overbreadth of the *Stone* theory of attempted murder is mitigated to a degree in *Stone* itself and in *People v. Perez* (2010) 50

Cal.4th 222. Both cases involved a single shot and only a single count of attempted murder. In *Perez*, the Court clarified that where the defendant shoots at a group of people, without targeting any particular individual and without using a means of force calculated to kill everyone in the group, he may be charged with only a single count of attempted murder even though several members of the group are injured. (*Perez, supra*, 50 Cal.4th at p. 225 [indiscriminate firing of a single shot at a group of seven police officers and a civilian, whom the defendant believed to be rival gang members, supported only one count of deliberate attempted murder and seven counts of assault with a semi-automatic firearm]. In the instant case, neither the kill zone nor the indiscriminate intent theory applied.

Here, appellant was charged and convicted of four counts of attempted murder, Counts Five through Eight, under a kill zone instruction that was both inapplicable and legally defective, as discussed above. The kill zone instruction requires the targeting of a primary victim. With respect to these counts, there was no evidence that appellant aimed at or targeted anyone in particular. The prosecutor suggested in passing that appellant's primary targets were Gabriel and Emmanuel but marshaled no probative facts in support of this argument because there were none. (13RT 2601.) The only evidence the prosecutor mentioned was Camille Johnson's testimony that, after pointing the gun at her, appellant pointed it in the direction of Gabriel and Emmanuel. (9RT 1697.) According to Johnson, appellant told her, in response to her question, that he did not intend to shoot her. (9RT 1697.) She did not hear appellant say anything else. She did not see appellant, who was standing next to her, move closer to Gabriel and Emmanuel or ready the gun for shooting. Johnson did not believe appellant was going to shoot anyone at that point. (9RT 1699.) Emmanuel

did not even remember appellant pointing the gun at him. (9RT 1665.) The fact that Gabriel was killed does not prove he was the primary target, no more than Lua's death shows he was the primary target on the night of February 14. There was no evidence appellant or Gonzalez knew that Lua was in Amezcua's car that night or that appellant knew who had angered Gonzalez the next night, or that it mattered to him.

Mere speculation cannot support a conviction. (*People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Reyes* (1974) 12 Cal.3d 486, 500.) By the same token, mere speculation cannot salvage an instruction that is not supported by the evidence. The kill zone instruction as to Counts Five through Eight was not supported by substantial, or even minimal, evidence that appellant aimed at anyone. Nevertheless, because a single generic kill zone instruction was given as to all the attempted murder charges, some of the jurors could have assumed incorrectly that Gabriel was the primary target because he was killed. In light of the strong likelihood the jury was misled by the kill zone instruction and convicted appellant based on this incorrect assumption, it was error to give the instruction as to Counts Five through Eight. This error, moreover cannot be cured by *Stone*, because, as argued above, an indiscriminate intent to kill someone does not satisfy the individualized specific intent requirement of attempted murder, nor, as demonstrated below, was such theory recognized or permitted at the time of appellant's trial. The Court is urged to reconsider its decision in *People v. Stone*, *supra*, 46 Cal.4th 131, in 2009.

C. The Trial Court's Error in Giving the Inapposite Kill Zone Instruction as to Counts Five Through Eight Was Prejudicial

Where the only error is that the court gave an instruction which, while correctly stating the law, had no application to the facts, the error is one of state law subject to the traditional *Watson* test for prejudice. (*People v. Guiton, supra*, 4 Cal.4th 1116, 1129, citing *People v. Watson, supra*, 46 Cal.2d 818, 836.) Under the *Watson* standard of review, reversal is required if it is reasonably probable that the jury found the defendant guilty based on the unsupported theory. (*Guiton, supra*, 4 Cal.4th at p.1129.) This determination is made based on an examination of the entire record. (*Id.* at p. 1130.) Appellant argued above that the kill zone instruction, as given, was legally defective, thus requiring reversal of, at a minimum, Counts Five through Eight under the heightened federal constitutional standard. (See, *ante*, at pp. 106-111.) Moreover, because the kill zone instruction had no application to the facts, reversal of Counts Five through Eight is also required under the *Watson* standard, given the strong likelihood that, as invited by the instruction and the prosecutor's argument, the jury convicted appellant of these counts based on this inapposite theory. (13RT 2600-2603 [prosecutor's urging the jury to read the "kill zone" instruction and arguing appellant had turned the sidewalk at 57th & Western into a "kill zone"]; see also, Argument VII, *post* [insufficient evidence to sustain convictions on Counts Five and Six] .)

The version of the attempted murder instruction given here required the jury to find that appellant took a step toward killing a person and that he intended to kill *that* person. As such, the instruction, by its language, precluded conviction under the *Stone* "indiscriminate" intent theory. For

that reason the instruction had to be revised in 2011 to read “. . . that/a person” to incorporate the expanded theory of attempted murder articulated in *Stone*. Consequently, to sustain the attempted murder convictions on Counts Five through Eight, this Court would have to apply a theory that had not been articulated by any court in this state prior to 2009, and was not permitted by the approved jury instruction until 2011. Because harmless error review is retrospective, not predictive, the Court cannot rely on a theory of conviction that the jury at appellant’s trial was precluded from using. Indeed, to apply the indiscriminate intent theory to appellant’s case would violate a basic precept of due process, akin to the ex post facto prohibition.

It is well-settled that the limitations on ex post facto *judicial* decision-making are inherent in the notion of due process. (*Rogers v. Texas* (2001) 532 U.S. 451, 456; *People v. Sandoval* (2007) 41 Cal.4th 825, 855.) “[D]ue process bars courts from applying a novel construction of a criminal statute that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.”³¹ (See, e.g., *United States v. Lanier* (1997) 520 U.S. 259, 266; *Douglas v. Buder* (1973) 412 U.S. 430, 432 (per curiam) [holding that court’s construction of term “arrest” as including traffic citation, and application of that construction to defendant, was unforeseeable and a violation of due process]; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 362 [holding that court’s retroactive application of its

³¹ As noted above, the Court’s observation in *Stone* that nothing in *People v. Vang*, *supra*, 87 Cal.App.4th 554 or *People v. Bland*, *supra*, 28 Cal.4th at p. 330, foreclosed the indiscriminate intent theory falls far short of stating that *Vang* or *Bland* affirmatively supported the indiscriminate intent theory or that this theory was recognized as applicable to attempted murder prior to *Stone*. (*People v. Stone*, *supra*, 46 Cal.4th at p. 140.)

construction of the state's trespass statute allowing conviction without proof of notice before entry violated due process].) Here, it could be said that prior to *Bland*, there was no such person as an *unintended* attempted murder victim, and prior to *Stone*, there was no such crime as attempted murder based on an undifferentiated intent to kill. Consequently, appellant's convictions of attempted murder as to Counts Five through Eight may not be affirmed on the basis of *Stone*'s post hoc, novel construction of the attempted murder statute.

Further, under the then-controlling instruction for attempted murder, requiring a determination that each victim was a primary or concurrently *intended* victim, the Court may not rely on appellant's conviction of the first degree murder of Gabriel to dispel the prejudice of the erroneous kill zone instruction. Again, the starting point is Justice Mosk's correct statement that the express malice instruction for murder has always spoken in terms of an unlawful intent to kill a person, not solely the intended victim. (*People v. Scott, supra*, 14 Cal.4th at p. 555-556 (conc. opn. of Mosk, J.); CALCRIM No. 520 ["The defendant acted with *express malice* if (he/she) unlawfully intended to kill" (italics in original)]; CALJIC No. 8.11 ["Malice is express when there is manifested an intention unlawfully to kill a human being"].) That is why the doctrine of transferred intent, or Justice Mosk's alternative rationale, applies to murder, but not, as this Court recognized in *Bland*, to attempted murder. (*Bland, supra*, 28 Cal.4th at pp. 321, 327.) Therefore, under the applicable law and binding instructions at the time of appellant's trial, the jury's return of a first degree murder conviction could not then, and cannot now, be held to support appellant's convictions of the related attempted murder charges because the murder verdict could have been based on an intent to kill "a" – that is, any or some – person.

Appellant acknowledges that the act of firing a lethal weapon is usually probative of intent to kill. (*People v. Smith* (2005) 37 Cal.4th 733, 742, citing *People v. Chinchilla* (1977) 52 Cal.App.4th 683, 690.) However, such an act by itself is not sufficient to distinguish, as required for attempted murder, among (1) the intent to kill a primary target; (2) the intent to kill a primary target and person(s) in immediate proximity to or in the way of that target (see, e.g., *Chinchilla, supra*, 52 Cal.App.4th at pp. 685, 690); (3) the intent to kill a primary target by killing everyone within a zone of risk (see e.g., *People v. Bland, supra*, 28 Cal.4th at pp. 329-330); and (4) the intent to kill someone, everyone or anyone (*Stone, supra*, 46 Cal.4th at p. 134). The first three theories are factually inapposite here because there was no primary target. The last theory, even if applicable, was not properly before the jury at the time of appellant's trial.

Counts Five (Hart) and Six (Jimenez) exemplify the prejudice resulting from the factually-inapposite kill zone instruction. Without a primary target, there is no legal basis, except *Stone's* indiscriminate intent theory, for an attempted murder conviction as to unseen or unknown persons. The trial court's ruling on appellant's Penal Code section 1118.1 motion is informative on this point. At the close of the prosecution's case, defense counsel moved orally for a judgment of acquittal as to Count Six, the shooting of Rene Jimenez. (10RT 2141.) Defense counsel first argued that there was no evidence of intent to kill Jimenez, who stepped out of the club into the spray of bullets, because he was not in the "Gabriel" group.³²

³² It was hardly the "Gabriel" group since he was essentially a tag-along. Defense counsel's labeling the group in that manner demonstrates the natural, but erroneous tendency to elevate the deceased victim to

(continued...)

(10RT 2141-2142.) Without offering any other rationale, the court immediately inquired whether the requisite intent could be found under the kill zone theory. (10RT 2142.) Defense counsel responded that the record did not support the kill zone theory of intent because the evidence was insufficient to place Jimenez within the zone. (10RT 4142.) The court disagreed because the bullets were *not aimed*, but rather were sprayed in the general direction of the entrance of the club. (10RT 1043, italics added.)

Under the court's own description of the shooting, there was no primary target.³³ As such, without relying on the then-nonexistent *Stone* theory, there was no allowable basis for the Hart and Jimenez attempted murder convictions. Because Hart was in a phone booth and not with Johnson and the others when appellant approached the group, he would not have known that she would be on the sidewalk when he fired. In that sense, her presence was unknown to appellant when he formed the intent to shoot. That analysis applies with even greater force to Jimenez who stepped out of the club just as the gun was being fired. Jimenez was neither known to nor seen by appellant at the time he decided to shoot the gun. As to these two victims, misleading the jury into believing appellant could be convicted on the kill zone theory was manifestly prejudicial. (See Argument VIII, *post.*)

In sum, because the kill zone theory was inapplicable to Counts Five through Eight and because, as instructed and as a matter of law, the jury could not have relied on the *Stone* indiscriminate intent theory, it is

³²(...continued)
primary victim status.

³³ The court failed to recognize the inconsistency between its own description of the shooting and the kill zone instruction's threshold requirement of a primary target.

reasonably probable the result would have been more favorable to the defendant on Counts Five through Eight if the erroneous kill zone instruction had not been given; these counts must be reversed, therefore.

D. The Cumulative Prejudice of All Instructional Error on Attempted Murder on the Guilty Verdicts and Judgment of Death

Appellant has alleged three separate, substantial errors infecting the jury's attempted murder verdicts on Counts Five through Eight. Two of these errors – the use of the term “kill zone” and the additional deficiencies of the instruction actually given – apply to all the attempted murder verdicts. The third error, the inapplicability of kill zone theory, has been argued only as to Counts Five through Eight. The cumulative prejudicial impact of these errors on the jury's guilty verdicts on Counts Five through Eight and on its ultimate verdict of death is thus the greatest and requires that the entire judgment be set aside.

Even if for penalty purposes the jury could consider the facts underlying Counts Five through Eight, the label attached to these facts matters in the normative weighing process because the label by itself conveys a measure of culpability. Irrespective of the facts, four counts of attempted murder are more weighty aggravators than four counts of assault with a deadly weapon, for example. (See *People v. Czahara, supra*, 203 Cal.App.3d 1468, 1471.) Society's assessment of the relative severity of these crimes is reflected in the sentencing schedule. (Compare Pen. Code, § 664, subd. (a) [if the crime attempted is willful, deliberate attempted murder, the punishment is life imprisonment with the possibility of parole] with Pen. Code, section 245, subd. (a)(3) [punishment for assault with an assault weapon is 4, 8 or 12 years].) There is every reason to believe a jury

would make this same relative assessment in weighing moral, as well as legal, culpability. As a consequence of the inflammatory and inappropriate kill zone instruction, the jury returned four unwarranted attempted murder verdicts which could well have skewed the balance of aggravating and mitigating factors in favor of death. For this reason, in addition to reversals of appellant's convictions on Counts Five through Eight, the death verdict must be vacated under federal due process and the Eighth Amendment's guarantee of a reliability penalty determination.

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VII.

THE EVIDENCE OF SPECIFIC INTENT TO KILL WAS INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTIONS OF THE ATTEMPTED MURDER OF RENE JIMENEZ AND GIRNET HART

In the preceding argument, which appellant incorporates by this reference herein, appellant challenged the application of the kill zone instruction to Counts Five through Eight. He argued that this instruction did not apply because there was no evidence that appellant had the predicate specific intent to kill a primary victim. He further maintained that the theory of indiscriminate intent first articulated in *People v. Stone, supra*, 46 Cal.4th 141, could not apply because, among other reasons, due process prevents the retroactive application of *Stone's* novel construction of the attempted murder statute. Finally, while arguing that the instructional error was prejudicial and required reversal of all four attempted murder convictions, he focused on Counts Five and Six, which alleged the attempted murder of Girnet Hart and Rene Jimenez, the two victims who were unknown to appellant when he fired the gun. The corollary of these arguments is that there was insufficient evidence to sustain appellant's convictions of Counts Five and Six because, absent recourse to the theories of concurrent or indiscriminate intent, the prosecution was required to prove individualized specific intent to kill as to Jimenez and Hart, and there was no such evidence. Accordingly, appellant's convictions of the attempted murder charges in Count Five and Six must be reversed.

With respect to the Jimenez count, appellant filed a motion for acquittal pursuant to Penal Code section 1118.1 at the close of the prosecution's case. (10RT 2141.) Appellant argued that there was no indication of a specific intent to kill Jimenez, as the evidence showed that

Jimenez unexpectedly came out of the social club at the same time appellant was firing the gun, and that he was not part of the group with whom appellant had engaged. (8RT 1613; 10RT 2141-2142.) The court did not express any disagreement with appellant's analysis, but suggested that, even absent a specific intent to kill Jimenez, the attempted murder conviction as to him could be sustained under the kill zone theory because he was caught in the spray of bullets outside the club. (10RT 2142-2143.) But because the kill zone theory was inapplicable to Counts Four through Eight, the court's ruling cannot stand.

The deficiency in the evidence as to Jimenez also applied to Hart, because, as with Jimenez, appellant was unaware of her presence at the scene when he fired the gun. Hart had no interaction with appellant prior to the shooting, and she testified that, prior to appellant's coming over, she had already crossed the street to a payphone and was pretending to make a call. (8RT 1582, 1587.) Thus, appellant's conviction of attempted murder of Hart must also be reversed.

That appellant did not include the Hart count in his motion for a judgment of acquittal does not preclude appellant from raising that issue here, as this Court has held that claims of insufficiency of the evidence are not subject to forfeiture. (*People v. Butler* (2003) 31 Cal.4th 1119, 1128.) Moreover, the same standard applies to an appellate court's review of a trial court's ruling on a motion for judgment of acquittal as to its review of the sufficiency of the evidence to support a conviction, that is whether when "reviewed in the light most favorable to the judgment, the record [contains] reasonable and credible evidence of solid value, "such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Maciel* (2013) 57 Cal.4th 482, 522 [whether there is any

substantial evidence of each element of the existence of each element of the offense]; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) A conviction based on insufficient proof beyond a reasonable doubt of each element of the offense offends the due process guarantee of the Fourteenth Amendment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315-318.) Thus, appellant's due process rights were violated because his convictions of Counts Five and Six were not supported by "reasonable and credible evidence of solid value" of the mens rea element of attempted murder – an individualized specific intent to kill Jimenez and Hart. (See CALCRIM No. 600 (2006).) Accordingly, appellant's convictions of Counts Five and Six must be reversed.

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VIII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING A MISLEADING DVD WHICH DID NOT ACCURATELY REFLECT THE CIRCUMSTANCES OF THE CRIME AND, AS A RESULT, INVITED THE JURY, IN REACHING THE DEATH VERDICT, TO SUBSTITUTE ITS SUBJECTIVE EXPERIENCE FOR THE EXPERIENCE OF THE VICTIMS

A. Introduction

At the penalty phase of appellant's trial, the prosecution sought to introduce a videotape (video or DVD) of its firearms expert, John Thompson, shooting a Sten Mark submachine gun in both fully and semi-automatic modes. (13 RT 2809-2821; 14 RT 2822-2828; People's Exhibit No. 142.) The Sten Mark in the video was not the alleged murder weapon, which was never recovered. The video was made in the desert in clear daylight with a close-up of Thompson readying, aiming and shooting the gun. (14 RT 2840.) At the guilt phase, Thompson had identified the firearm depicted in People's Exhibit 118 as a Sten Mark III, and testified that it was the type of weapon used in all three shooting incidents. (10RT 2098.) With a non-working Sten Mark III in hand, he had demonstrated the gun's components and minutely explained its operation and capabilities. (10RT 2101-2104.) In addition, each of the surviving shooting victims had fully described their perceptions of and reactions to the firing of the gun. The most detailed descriptions were given by the victims of the February 14-15 shootings. Girnet Hart, Marvin Emmanuel and Camille Johnson all testified that they heard rapid firecracker noises. (8RT 1592; 9RT 1668, 1699.) Emmanuel further testified that he heard 25-30 shots, and both he and Johnson stated that they saw bullets and sparks flying near the ground. (9RT 1669, 1699.)

Appellant objected to the admission of the DVD on hearsay grounds, as well as that it was not relevant, was cumulative with other evidence and that its probative value was substantially outweighed by its prejudicial effect. (13RT 2816; 14RT 2823-2824.) The trial court overruled the objections and admitted the DVD under factor (a) as circumstances of the crime – that is, the impact on the victims – and possibly also as anticipatory rebuttal to any evidence appellant might – but in fact did not – present of motor impairment at the time he operated the gun. (14RT 2827-2828.)

Appellant submits that the trial court abused its discretion, to appellant's substantial prejudice, in erroneously admitting the video. The video had little or no relevance, but considerable potential to confuse and inflame the jury. Because it did not accurately duplicate conditions at the crime scene, it was not admissible under factor (a) as a circumstance of the crime. Nor was it admissible in rebuttal because there was no good faith reason to believe that appellant intended to introduce mitigating evidence based on physical incapacity to fire the weapon due to intoxication. Rather, it was always clear that appellant meant to use evidence of his prolonged drug use to argue mitigation under factor (h), which deals solely with mental impairment.³⁴ Because the video was thus minimally, if at all, relevant, but had significant potential to mislead the jury and excite an irrational, visceral reaction, its erroneous admission violated appellant's rights to a fair and reliable penalty determination as guaranteed by state law

³⁴ Penal Code section 190.3, factor (h), focuses on “[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect, or the affects of intoxication.”

and the Eighth and Fourteenth Amendments to the federal Constitution.

B. Proceedings Below

Appellant challenged the admission of the videotaped demonstration of the Sten Mark firing test on the grounds that the evidence (1) was irrelevant because the firing of a different weapon in daylight in the desert was insufficiently similar to the shooting on February 15 to offer a probative comparison; (2) was cumulative with all the testimony and photographs already before the jury; and (3) was unduly prejudicial. (13RT 2813-2816.) The prosecutor played the DVD for the court. (13RT 2819; People's Exhibit No. 142.) The court's immediate reaction was that Thompson was so fast on the trigger that it was hard to tell the semi-automatic mode from the fully automatic mode. (13RT 2819.)

The trial court then held an Evidence Code section 402 hearing to more fully address appellant's objections. (14RT 2822-2828.) Initially, the court noted that, under the case law, its discretion to exclude evidence at the penalty phase is more circumscribed than at the guilt phase. (14RT 2822.) Further, having watched the video, the court believed that, if anything, it favored the defense because the real life sound of firing the weapon would be much more terrifying than what the jury would hear on the video. (14RT 2823 ["I'll just make that observation because I have been present at such shootings."].)

The court's personal experience aside, appellant maintained that the video was inadmissible because the prosecutor was attempting to convey to the jury the sensation of hearing and seeing the weapon although the test firing was not under the same conditions as the actual shootings. (14RT 2823-2824 ["But there are so many variables here that could be different that the recreation [*sic*] may not, in fact, be accurate enough to provide any

type of help to [the jury] in deciding the issue that is before them.”].) Further, appellant noted that the video was cumulative because the jury had already heard testimony about the shooting and had seen vivid photographs. (14RT 2824.)

With respect to the hearsay objection, the prosecutor proffered that the witness would repeat, for purposes of laying the foundation, the introductory statements on the video with which appellant had taken issue. (14RT 2826.) Further, the prosecutor countered that the DVD was probative of the circumstances of the crime and that the jury was smart enough to know it was not a crime scene re-enactment (14RT 2827.) The prosecutor added the DVD was also relevant to rebut expert testimony that appellant was under the influence of various drugs on the night of February 15 by showing “what it takes to operate and coordinate the actions to make this gun fire.” (14RT 2828.)

In response to the hearsay objection, the court proposed a limiting instruction that the jury was not to consider anything on the video for the truth of what was asserted but as an aid to enable them to tell when the gun was being fired in the semi- and fully automatic modes. (14RT 2827, 2828.) On the merits, the court agreed that the prosecution was allowed to flesh out the circumstances of the crime, including the impact on the victims as they fled down the street. The court then admitted the DVD. (14RT 2828.)

At the penalty phase, Thompson introduced the video of the shooting demonstration he had conducted in Las Vegas. (14RT 2839-2842.) Thompson explained that he fired the gun twice, the first time in semi-automatic mode and the second time in fully automatic mode. (14RT 2841.) There were 21 full-metal jacket 9 millimeter bullets in the clip each

time. (14RT 2841.) The video also included a segment showing Thompson using the gun for target practice. During Thompson's testimony, the video was projected onto the courtroom screen. (14RT 2841-2842.) When the video was played, the court gave the jury a limiting instruction that the comments on the tape were not to be considered for the truth but simply "like labels" for understanding. (14RT 2841.) On cross-examination, Thompson stated that the demonstration took four seconds in semi-automatic mode and two seconds in automatic mode. (14RT 2842.)

In closing argument, the prosecutor again played the video and urged the jurors to imagine themselves at the end of the barrel of the gun. (15RT 3181.)

C. The Trial Court Abused Its Discretion in Admitting the Video Demonstration Because the Potential Prejudice of the Evidence Substantially Outweighed Its Marginal Probative Value

The trial court's discretion to exclude circumstances-of-the-crime evidence as unduly prejudicial is more circumscribed at the penalty phase than at the guilt phase. (*People v. Box* (2000) 23 Cal.4th 1153, 1201.) The court may not exclude *all* factor (a) evidence on the ground that it is inflammatory or lacking in probative value. (*Ibid.*, citing *People v. Karis*, *supra*,) 46 Cal.3d 612, 641-642, fn. 21 (italics in original).) That being said, the court retains its traditional discretion to exclude "particular items of evidence" by which the prosecution seeks to demonstrate the circumstances of the crime in a "manner" that is misleading, cumulative, or unduly inflammatory. (*People v. Karis*, *supra*, 46 Cal.3d at pp. 641-642, fn. 21.)

To determine whether there was error in admitting such evidence, this Court examines two factors: (1) whether the evidence was relevant;

and (2) whether the trial court abused its discretion in finding that the probative value of the evidence outweighed its prejudicial effect. (*People v. Solomon* (2010) 49 Cal.4th 792, 841, quoting *People v. Whisenhunt* (2008) 44 Cal.4th 174, 211-212.)

Appellant submits that the trial court abused its discretion in admitting the videotape as factor (a) evidence because the taped demonstration was not relevant in that it did not accurately reflect the circumstances of the offense or the impact of hearing the gunshots on the fleeing victims. As such, the video served no legitimate probative purpose. The jury had already heard considerable testimony regarding the immediate reactions of the victims to the shootings, as well as the characteristics and firepower of the weapon. At best, the video was cumulative of this evidence. At worst, it misrepresented the experience of the victims and aroused reflexive emotions in the jury which potentially undermined a rational, reliable determination of the appropriate penalty. For this reason, the judgment cannot stand.

1. The Video Was Not Admissible as a Circumstance of the Crime Under Factor (a)

As noted in the preceding argument, it is well settled that the general rules of evidence have equal application to noncapital and capital trials and to both the guilt and penalty phases of the latter. (See, e.g., *People v. Richardson*, 43 Cal.4th 959, 1033.) As such, “evidence that is incompetent or irrelevant is not admissible at the penalty phase” of a capital trial. (*People v. Gay* (2008) 42 Cal.4th 1195, 1220-1221 [citing *People v. Terry* (1964) 61 Cal.2d 137, 144-145; *People v. Blair* (2005) 36 Cal.4th 686, 750].) In order to be admissible at penalty, evidence must be relevant to prove one of the enumerated section 190.3 factors. (*People v. Boyd* (1985)

38 Cal.3d 762, 773-774 [“Relevant evidence ‘means evidence ... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.’ [Citations.] Since the jury must decide the question of penalty on the basis of the specific factors listed in the statute, the quoted language must refer to evidence relevant to those factors”].)

Further, in ruling on the admissibility of a video, at either phase of the trial “a trial court must determine whether: (1) the videotape is a reasonable representation of that which it is alleged to portray; and (2) the use of the videotape would assist the jurors in their determination of the facts of the case or serve to mislead them. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1114.) In other words, “[t]o be admissible in evidence an audio or video recording must be authenticated. [Citations.] A video recording is authenticated by testimony or other evidence that it accurately depicts what it purports to show. [Citation.]. (*People v. Mayfield* (1997) 14 Cal.4th 668, 747.) Although “the physical conditions which existed at the time of the event in question occurred need not be duplicated with precision,” they must be substantially similar. (*Ibid.*; compare *People v. Turner* (1994) 8 Cal.4th 137, 197-198 [no error in admitting experiment where conditions of experiment were as close as experimenters could make them to the conditions at the time of the crime] with *People v. Rivera* (2011) 201 Cal.App.4th 353, 364 [error to admit demonstration where minimal probative value of the evidence was diminished further by the absence of similarity of both the setting and circumstances to the circumstances of the crime].) Here, there was no effort to make the conditions of the firing demonstration similar to the conditions at the time of the February 15 shooting and the video was consequently misleading,

rather than helpful to the jury.

This Court has long recognized the dangers of admitting filmed crime re-creations into evidence. (*People v. Dabb* (1948) 32 Cal.2d 491, 498.) As the Court explained, “[a] motion picture of the artificial re-creation of an event may unduly accentuate certain phases of the happening, and because of the forceful impression made upon the minds of the jurors by this kind of evidence, it should be received with caution.” (*Ibid.*) Other jurisdictions have also stressed that “because a filmed reenactment of a particular event is the type of evidence which has the potential to cause great prejudice, a court should exercise caution when ruling upon the admissibility of a filmed reenactment in a criminal case . . . [citations].” (*Lam Luong v. State* (Ala. 2013) __ So.3d __, 2013 WL 598119, *30, quoting *State v. Trahan* (La. 1990) 576 So.2d 1, 8 [explaining that “[t]he strong impact of seeing an inaccurate reenactment creates such a substantial possibility of prejudice that it is unlikely cross-examination could effectively point out the discrepancies [citation omitted]”].)

This Court has, nonetheless, approved the admission of illustrative evidence such as crime scene photographs, autopsy photographs and other visual depictions of the victims or crime scene as factor (a) evidence in the penalty phase. (See, e.g., *People v. Solomon, supra*, 49 Cal.4th at pp. 841-842 [upholding admission of photographs and videotapes of the victims’ bodies as they were found]; *People v. Box, supra*, 23 Cal.4th 1199-1201 [photographs of victims’ bodies and the surrounding crime scene]; cf. *People v. Brady* (2010) 50 Cal.4th 547, 578 [directing trial courts to be cautious about admitting “victim impact” evidence by way of videotape or other visual or auditory aids].)

In all such cases, involving photographs or videotapes of the actual

crime scene, the threshold requirement of accuracy was necessarily met. Not so here. The only foundation offered in this case was that Thompson went to Las Vegas with another investigator to fire a Sten Mark submachine gun, and that he fired the gun first as a semi-automatic and then as a fully automatic. (14RT 2840-2841.) While it is true the prosecutor did not offer the videotape as an accurate reconstruction of the shooting on February 15, it was admitted to demonstrate the impact of the shooting on the victims which still depended on the accuracy of the depiction. Here, the dissimilarity in critical respects between the firing test and the actual conditions the night of the shooting rendered the test irrelevant for any purpose germane to the penalty decision. (Cf. *People v. Gonzalez* (2006) 38 Cal.4th 932, 952-953 [holding that trial court did not err in excluding a videotape of crime scene which did not accurately portray that for which it was offered, the lighting conditions at the time of the crime].)

The video at issue included three demonstrative segments none of which remotely duplicated the circumstances as experienced by any of the victims. In the first two segments, Thompson is seen going through all of the actions required to load the weapon and make it operational in semi-automatic and automatic modes, including switching modes and replacing the magazine. In the third segment, Thompson is seen shooting at a target that he had placed at an unspecified distance. In all three segments, Thompson is seen shouldering the gun, looking down the sight and aiming at a specific target. (People's Exhibit No. 142.) Altogether, Thompson fired far more than 42 projectiles.

The demonstration was conducted in the desert in bright daylight. No one was present except Thompson and the officer filming the scene. The only sound heard was that of the gun firing. Thompson was shown in

close-up at the center of the visual field. All of this was displayed to the jury on the large courtroom screen.

By contrast, the February 15 shooting occurred at night on a major urban street. Appellant was almost 150 feet from the closest victim when the gun was fired. (See People's exhibit No. 59.) None of the victims either saw or heard appellant load the clip, release the safety or switch the mode of the gun before the shooting.³⁵ None saw appellant aim or even shoot the gun. (See, e.g., 8RT 1616-1617.)

Thus, the only similarity between Thompson's firing demonstration and the actual conditions at the time of the February 15 shooting was the use of the same type of weapon. Even assuming this similarity was probative of the victims' experience of the gunfire, its value as such was minimal. First, the jury had heard ample testimony at the guilt phase regarding the victims' actual experience of the shooting, as well as the firepower and characteristics of the weapon. The appearance of the weapon was not contested at the guilt phase. And although the mode of firing the weapon was disputed, from the standpoint of the victims' subjective experience – and, as a corollary, appellant's moral culpability – it was essentially irrelevant. In either mode, the shooting lasted between approximately two or four seconds, a difference that would have been indiscernible and wholly inconsequential to the victims under the circumstances of the crime. Moreover, none of the victims saw the gun

³⁵ Thompson testified at the guilt phase that the magazine of the Sten Mark III holds 32 rounds. (10RT 2103.) Nine rounds had been fired during the Manchester shooting, leaving at least 21 rounds in the clip. In other words, there was no reason appellant would have needed to load, change or insert the magazine at the scene on 57th and Western.

firing and, in this critical respect, had an entirely different experience than the jury.³⁶ Rene Jimenez, the only victim of the February 15 shooting who saw the gun right before it was fired, testified that he saw two guns but paid no attention to what the persons with the guns were doing; he did not see either person aim his gun. (8RT 1617-1618.) Jimenez had turned around and started running when he was shot. (8RT 1617-1619.)

In enhancing the jury's perception of the event relative to what was actually seen and heard by the victims, the video gave the jury a misleading impression of what the victims experienced and aroused emotional responses in the jurors that the victims never felt. Therefore, in light of the marginal probative value of the videotape versus its potential for substantial prejudice, it was error to admit the videotape to supposedly replicate the sensory and emotional impact on the victims of hearing the gun firing.

2. The Videotape Was Not Admissible as Anticipatory Rebuttal

As in other cases, the scope of rebuttal at the penalty phase of a capital trial must be specific, and the evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1191 [finding that trial court erred in permitting the prosecution to present evidence in rebuttal that did not relate specifically to the mitigating evidence presented by the defense]). Here, in addition to factor (a), the prosecutor proffered an alternative theory of admissibility for the DVD, that

³⁶ Similarly, with regard to the Lua shooting, both of the surviving victims, Francisco Amezcua and Carlos Zepeda, testified that they ducked when they heard the shots and did not see anyone shooting the gun. (7RT 1291-1294; 11RT 2287-2289.)

it would rebut the defense expert's testimony that appellant was high on drugs at the time of the offense. (14RT 2827-2828.) The prosecutor did not explain how being able to operate the weapon was responsive to any drug-related mitigation evidence she reasonably expected appellant to present. The prosecutor knew generally that the defense expert, Dr. Frank Gawin, would testify to appellant's psychological impairment from methamphetamine use, resulting in erratic, hallucinatory behavior and bad judgment, not physical incapacitation.³⁷ (See 14RT 2940-2943.) Further, the prosecutor knew from Thompson's earlier testimony that the Sten Mark family of weapons is very easy to operate. (10RT 2115.) The prosecutor therefore knew that the multi-step demonstration on the video was misleading in suggesting, and allowing her to argue, that firing the weapon required a degree of coordination that was inconsistent with appellant's evidence of drug or alcohol use. (See 15RT 3172.) As such, the video was not proper, good-faith rebuttal to appellant's mitigation evidence, but rather, served only to divert the jury's attention from the effects of his drug use on appellant's reality testing, impulsivity and judgment to a completely irrelevant consideration – i.e., appellant's ability to operate the Sten Mark, which was never at issue.

Notably, when the prosecutor undertook to actually rebut the

³⁷ The prosecutor knew prior to the penalty phase that Dr. Gawin had based his expert opinion regarding appellant's long-term drug use on interviews with appellant, and she had raised hearsay concerns with both defense counsel and the court. (14RT 2942-2944 [trial court did not see the issue as hearsay but rather as an Evidence section 352 issue].) As a result of these objections, defense counsel confined his examination of Dr. Gawin to general symptoms of various drugs and hypotheticals, and elicited no opinion from Dr. Gawin regarding appellant's personal drug use. (15RT 3048, 3104.)

mitigating evidence of drug use, her questions demonstrated that she knew appellant was not going to claim motor impairment at the time of the shooting, which would have been inconsistent with the testimony of the victims, as well as appellant's own statement. For example, in her voir dire of Officer Pereida, one of the arresting officers on January 15, to establish his knowledge of drug symptoms, the prosecutor focused on such objective symptoms of methamphetamine and PCP use as sweaty palms, dilated pupils, increased heart rate, nystagmus and increased body heat in the case of PCP. (14RT 2947.) When then examining Pereida regarding the stop and arrest, the prosecutor elicited only that Pereida had observed nothing about appellant on that date that would have led him to believe that appellant was under the influence of any controlled substances. (14RT 2951.) Later, in rebuttal, the prosecutor called Detective Carranza who had been in contact with appellant on multiple occasions beginning with the arrest of Johnny Argueta and ending with appellant's interrogation in this case. With respect to each of these contacts, as with Officer Pereida, the prosecutor obtained Carranza's general opinion that nothing in appellant's behavior showed he was under the influence of drugs. (15RT 3140-3146.) The prosecutor's only question regarding a specific drug was whether Carranza had observed any weight loss by appellant, which is one of the main symptoms of methamphetamine use. (15RT 3140, 3145, 3156.)

These rebuttal questions were generally responsive to appellant's drug mitigation evidence, including the hypotheticals posed to Dr. Gawin which related the testimony of appellant's family regarding his aberrant behavior to the use of psychomotor stimulants such as methamphetamine. (15RT 3050-3051, 3104.) None of this testimony remotely suggested, nor was it intended to suggest, that appellant was physically incapable of

operating the Sten Mark. Consequently, there was never a good faith basis for proffering the videotaped test firing as preemptive rebuttal of the defense drug expert or other drug mitigation evidence. Nor is it clear that the court admitted the video for this purpose. But if it did so, the court erred because, even accepting the prosecutor's proffer, the video included a more complicated and deliberate series of actions than those actually needed to fire the gun – basically, cock the bolt and pull the trigger. Indeed, the court, as well as the prosecutor, had heard Thompson's testimony at the guilt trial, when asked to compare the Sten Mark to the general class of weapons, that "[i]t's very simple. Simple design. *Simple to use.*"³⁸ (10RT 2115, italics added.) Because the video suggested otherwise, it was inexcusably, if not intentionally, misleading. In sum, because the recorded demonstration did not accurately depict the victims' experiences on the night of February 15 and because it was not responsive to appellant's mitigation evidence, its minimal probative value was substantially outweighed by its prejudicial impact on the jury's penalty determination, discussed more fully below. Accordingly, the court abused its discretion in admitting the tape under either of the prosecutor's untenable theories of relevancy.

D. The Erroneous Admission of the Videotape Was Prejudicial

A death judgment must be reversed if there is a reasonable possibility the trial court's error affected the judgment. (*People v. Brown*

³⁸ Thompson also explained that the Sten Mark did not have a scope to increase accuracy, and that the shooter had the option of using the sight or doing what is called "instinctive shooting," i.e., "point and shoot." (10RT 2115.)

(1988) 46 Cal.3d 432, 446-448.) One of the most, if not the most, significant considerations in the penalty determination is the nature of the underlying crime, including the victim's viewpoint. (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Irrelevant or inaccurate information regarding this factor that diverts the jury's attention from proper penalty considerations or invites an irrational or purely subjective response is, therefore, inevitably prejudicial. (See *Ibid.*) This is precisely the type of prejudice arising from the videotaped demonstration erroneously admitted in this case.

While, in seeking the video's admission, the prosecutor never represented that it accurately depicted the shooting on February 15, that was not her tactic in closing argument. (14RT 2827.) Once the video was admitted, the prosecutor fully exploited its misleading and inflammatory potential.

You saw the video clip – and I'm going to show it to you again because I think that – you can hear the evidence. . . . Even with all that I think it's very difficult to comprehend the awesome firepower that this submachine gun had. *Imagine being a human being at the end of the barrel.* That's what he used to kill Jorge Lua and Gregory Gabriel, a gun that can fire five-hundred bullets a minute.

(15RT 3181, italics added.)

Of course, the jurors had already heard Camille Johnson's testimony regarding her reaction to having the gun pointed at her, but that was when she was assured that appellant did not intend to shoot her.³⁹ (9RT 1695-1697.) They had heard her testify about her fear both then and later when

³⁹ At the guilt trial, the jury was shown a replica gun to illustrate Camille Johnson's testimony that appellant had pointed a similar looking gun at her at close range. (9RT 1695-1696.)

the shooting began and needed no videotape to empathize with her and the other victims or to appreciate how frightened they must have been. Aside from Johnson, no other victim testified to being at the end of the barrel of the gun at any time or seeing the gun as it was being fired. The jury, moreover, had already heard detailed testimony from Thompson regarding the speed and firepower of the gun and again needed no demonstration to appreciate the gun's terrifying effect. As such, the demonstration served only to encourage the jury to "imagine," as the prosecutor put it, victim experiences that never occurred. The vice of such imagining was that it diverted the jury from its proper role by substituting the individual jurors' own, manufactured experiences for the real experiences of the victims.

The trial court's comments are telling on this point. In rejecting appellant's argument that the videotape was unduly prejudicial, the court observed that it had been present at "such shootings" and the sound in real life was more terrifying than on videotape. (14RT 2823.) The court did not elaborate on its experience or explain how this experience was remotely similar to the conditions on February 15. The actual shooting occurred on a Saturday night on a major metropolitan thoroughfare (see, e.g, People's Exhibit No. 60) in the vicinity of a presumably noisy party, not in a desert with no ambient noise whatsoever, or under any of the controlled test firing conditions that the court was likely to have encountered. But the court ignored these objective differences and instead relied on its subjective experience to minimize the terrifying impact of the videotape. (13RT 2816.) In the same vein, the jurors were urged by the prosecutor to view the video and then use their subjective impressions to imagine what the victims had experienced even though the jurors could see and hear things that, under the conditions at the time of the crime, the victims could not possibly

have seen or heard.

This Court has most often addressed the tension between heightened emotion and normative reasoning in the context of “victim impact” evidence, that is, “evidence showing the direct impact of the defendant’s acts on the victim’s friends and family.” (*People v. Dykes* (2009) 46 Cal.4th 731, 781.) This Court has held that such evidence is admissible “provided [it] is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case.” (*Ibid.*) Applying this same test, the Court has also allowed a prosecutor to urge jurors to put themselves in the victim’s shoes and imagine how she felt during the attack, finding that the comments were not so inflammatory as to invite an irrational or purely subjective response from the jury. (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) In short, insofar as sympathy for the defendant may be considered at the penalty phase, so may, within prescribed limits, sympathy or empathy for the victim.

No case, however, has sanctioned subjecting jurors to the traumatic emotions experienced by the victim – literally placing them in the victim’s shoes – much less inviting them, as here, to substitute their responses to an artificial demonstration for the victims’s actual reactions. Even if the videotape were a completely accurate depiction of the shooting, it would have evoked diverse, reflexive responses in the jurors that “were untethered to the facts of the case.” (See *People v. Dykes, supra*, 46 Cal.4th at p. 864.) But, of course, the video was not accurate because the duration of the shooting was necessarily longer, the volume of the noise possibly louder and the actions of the shooter clearly visible and far more deliberate than what was observed by the victims during any of the incidents. Even if the jurors realized, as they probably did, that the demonstration was not a re-

creation of any of the shootings, they could not have resisted substituting the graphic misleading images on the video for the true, but incomplete descriptions offered by the victims. Nor could they have prevented the involuntary physiological and emotional effects of viewing and hearing this evidence.⁴⁰ Indeed, because these responses are reflexive, it would have been especially difficult for jurors to segregate their own reactions from the experiences of the victims in deciding whether death or life without parole was the proportionate punishment.

Both by presenting the misleading video, in the first place, and then exploiting the jury's subjective reaction to the demonstration, the prosecutor virtually ensured that the erroneous admission of the tape contributed to the death verdict. As such, this Court cannot discount the reasonable possibility that a visceral or emotional response to the misleading videotape led at least one juror to impose the death penalty. (See *People v. Hamilton, supra*, 60 Cal.2d at p. 137 [any error which may have reasonably led one juror to impose the death penalty is substantial and prejudicial].) In sum, because the erroneous admission of the videotape compromised the reliability of the penalty determination – by injecting misleading aggravating information into the weighing process – it denied appellant a fair penalty trial in violation of due process and the Eighth Amendment's heightened reliability requirement, and because it is reasonably possible that this error contributed

⁴⁰ Loud noise produces a variety of well-studied involuntary physiological and psychological responses. (See, e.g., Davis, *The Mammalian Startle Response in Neural Mechanisms of Startle Behavior*, (Eaton edit.) (1984) pp. 287-351; Landis C. & Hunt, W. A. (1939) *The Startle Pattern*; see also Westman & Walters (1981) *Noise and Stress: A Comprehensive Approach* in 41 *Environmental Health Perspectives*, pp. 291-309.)

to the death verdict, the judgment of death must be set aside. (*Chapman v. California, supra*, 386 U.S. 18, 24; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [federal constitutional errors will be found prejudicial unless the state can show beyond a reasonable doubt that the error did not contribute to the verdict].)

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IX.

THE TRIAL COURT'S DETERMINATION OF THE ULTIMATE FACTUAL QUESTION WHETHER APPELLANT'S POSSESSION OF A HANDGUN INVOLVED FORCE OR VIOLENCE OR THE EXPRESS OR IMPLIED THREAT OF FORCE OR VIOLENCE IMPERMISSIBLY INVADED THE EXCLUSIVE FACTFINDING PROVINCE OF THE JURY AND REQUIRES REVERSAL UNDER BOTH THE FEDERAL CONSTITUTION AND STATE LAW

A. Introduction

Over appellant's objection, the trial court admitted, as factor (b) evidence of other crimes involving violence, testimony regarding appellant's arrest for possession of a handgun in January, 2004. (14RT 2828-2833.) The court found that the possession of illegal weapons by appellant and his companion, as well as the use of an illegal weapon in the subsequent shootings, sufficiently supported an inference of implied threat of force to go to the jury. (14RT 2930.) However, and again over appellant's objection, the only issue submitted to the jury was whether appellant unlawfully carried or possessed a loaded firearm, not whether that act involved an implied threat of force or violence. (15RT 3065-3066, 3223.) Appellant argues in this section that the trial court erred in appropriating to itself the issue of force or violence when, under applicable constitutional and statutory law, it was a factual question to be determined by the jury.

Penal Code section 190.3 states that, in determining the penalty, the "trier of fact" shall take into account specified aggravating, as well as all mitigating, circumstances. Section 190.3, subdivisions (a)-(c), lists the three statutory aggravating factors: factor (a), the circumstances of the crime; factor (b), criminal activity by the defendant which involved the use

or attempted use of force or violence or the express or implied threat to use force or violence (hereinafter “force, violence or threat”); and factor (c), any prior felony conviction. (See *People v. Hillhouse* (2002) 47 Cal.4th 469, 509 [on request, jury must be instructed to consider only statutory aggravating factors].) Although the ultimate penalty determination is, as this Court has long stressed, moral and normative, not factual, the aggravating circumstances are necessarily grounded in factfinding by the jury. Nevertheless, for no logically discernible reason – the practice has arisen that only some of the facts determinative of factor (b) are decided by the jury. The most critical factual determination – whether the crime *involved* the use or threatened use of force or violence – is made by the court. Not only is this disparate treatment of factor (b) anomalous within the structure of the state’s capital sentencing scheme, but it offends the basic precepts of the Sixth and Eighth Amendments and due process held applicable to the penalty decision.

That being said, in many, if not most, factor (b) cases, the asserted erroneous allocation of factfinding to the judge is not consequential because the alleged uncharged crime has force, violence or threat thereof as an element which the jury is instructed to find beyond a reasonable doubt. However, in this case, the only crime on which the jury was instructed was carrying a loaded weapon, i.e., simple possession, the court having predetermined that the facts surrounding the act of possession involved the implied threat of force. Appellant submits that whether appellant committed a crime *involving force, violence or threat* is a factual question which should ultimately have been decided by the jury, and the jury should have been instructed accordingly.

Here, by taking the element of force, violence or threat – the

gravamen of aggravation – away from the jury, the court exceeded its proper, limited gatekeeper role and denied appellant his statutory and constitutional rights to a jury determination of all aggravating facts. Further, because the crime and appellant’s conduct were not inherently violent – that is, the jury could have reached a different conclusion than the court regarding his simple possession of the handgun – the court’s error was prejudicial and requires that the death judgment be set aside.

B. Proceedings Below

On July 27, 2006, the prosecutor filed a Notice of Factors in Aggravation which included, under factor (b), evidence of appellant’s arrest on January 15, 2004, for possession of a stolen, loaded firearm. (14CT 888-891.) Appellant objected to this evidence on the ground that there were insufficient facts to prove that the crime, a misdemeanor, involved violence. (14RT 2828-2833, 3065.) The court ultimately ruled that appellant’s gun possession was admissible as factor (b) evidence. (14RT 2929.) In finding that the conduct involved an implied threat of force or violence, the court relied on *People v. Michaels* (2002) 28 Cal.4th 486, where the use of similar weapons in the proffered factor (b) incidents and both charged and uncharged crimes was held sufficient to support such an inference of an implied threat of violence.⁴¹ (14RT 2929.) The court pointed to the use of an illegal weapon in the Gabriel count (Count Four) and appellant’s involvement as an aider and abettor in the other counts, as well as the pictures and writings seized from appellant’s residence which, according to

⁴¹ Because the issue in the instant argument is whether the court usurped the jury’s ultimate factfinding prerogative, the secondary issue whether the court abused its discretion in admitting the factor (b) evidence is not addressed. That issue is dealt with in Argument X, *post*.

the court, evidenced a propensity or readiness to use violence, as sufficient to support the inference of implied threat of force. (14RT 2929-2930.)

Three police officers testified regarding the circumstances of appellant's arrest and the characteristics of the seized weapons. Newton Patrol Officer Juan Pereida testified that, while on bicycle patrol on January 15, 2004, he and his partner came into contact with appellant and two other individuals. (14RT 2932-2933.) When Pereida's partner approached the individuals and asked "what's up," one of them, "Perez," reached for his waistband where officers observed a large bulge. (14RT 2936.) The three individuals were then ordered to put their hands up and submit to patdowns; they all complied. (14RT 2936.) Officers recovered a sawed-off shotgun from Perez and a small handgun from Argueta's front waistband. (14RT 2936-2937, 2956.) The handgun was missing a clip and had only one bullet in the chamber. (14RT 2956, 2962.) Five rounds of 00 buckshot were found in the shotgun. (14RT 2966.) No weapon or ammunition were recovered from the third individual, Rosales. (14RT 2955.)

During the instructional conference, appellant objected to the proposed factor (b) instruction because he believed that the issue for the jury was whether the crime was one involving violence based on the surrounding circumstances, not merely whether there was a violation of the weapons law. (15RT 3065-3066.) The court disagreed, stating that it was required to give a reasonable doubt instruction solely as to the elements of the crime. (15RT 3066.) The court instructed the jury accordingly. First, the court instructed the jury that the prosecution had to prove beyond a reasonable doubt that appellant committed the crime of unlawfully carrying a loaded firearm, alleged as an aggravating factor. (15RT 3220-3222.) The court next instructed on the elements of the alleged crime:

It is alleged that defendant Carlos Argueta committed the crime of unlawfully carrying a loaded firearm on his person.

To prove the Defendant is guilty of this crime the People must prove that, one, the Defendant carried a loaded firearm, two, the Defendant knew he was carrying a loaded firearm and, three, at that time the Defendant was in a public place or on a public street in an incorporated city. . . .

(15RT 3223-3224; CALCRIM No. 2530.) The court then proceeded directly to reading CALCRIM No. 766 regarding the weighing process.

C. Whether a Crime Involves Force, Violence or Threat is a Factual Question for the Jury, Not a Legal Question for the Court

The Sixth Amendment guarantees that all factfinding necessary to support a death verdict must be conducted by a jury. (*Ring v. Arizona* (2002) 536 U.S. 584, 609 [recognizing that “[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years, but not the factfinding necessary to put him to death.”].) In addition to its traditional role as factfinder, the Eighth Amendment uniquely imposes on a capital jury the responsibility to “express the conscience of the community on the ultimate question of life and death.” (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519; see also *Ring, supra*, 536 U.S. at pp. 615-616, 619 (conc. opn. of Breyer, J.) [concluding that the Eighth Amendment’s procedural safeguards require that only a jury may determine whether society’s ultimate punishment is justified in a particular case].)

In keeping with these constitutional mandates, the state’s capital sentencing scheme reserves for the jury all the factfinding and moral weighing necessary to impose the death penalty. (Pen. Code, §§ 190.2, 190.3.) Thus, absent a valid jury waiver, the trial court has no factfinding

or normative authority at the penalty hearing beyond that granted by the Legislature.

With respect to the weighing process, the court's role is specified in Penal Code section 190.4 and comes into play only after the jury has rendered a death verdict. (Pen. Code, § 190.4, subdiv. (e) [providing that in every case in which the jury returns a death verdict, the trial judge shall review the evidence and make a determination whether the jury's findings and verdict are contrary to law or the evidence presented].)

As for factfinding at the penalty phase, the court's authority is no greater than that at the guilt phase. This Court has often stated that the generally applicable rules of evidence have equal application to noncapital and capital trials and to both the guilt and penalty phases of the latter. (See, e.g., *People v. Richardson* (2008) 43 Cal.4th 959, 1033.) Evidence Code sections 310 and 312 delineate the respective provinces of judge and jury at trial. Evidence Code section 310 specifies that all questions of law, but only issues of fact that are foundational or preliminary to the admission of evidence, are to be decided by the court. Evidence Code section 160, states that "law," hence a question of law, refers to constitutional, statutory, decisional law and the like. Evidence Code section 312, states that where there is trial by jury, *all questions of fact* are to be decided by the jury.

The definition of preliminary fact and the scope of the court's factfinding authority under section 310 are specified in Evidence Code sections 401 to 405. In particular, section 405 provides that if a preliminary fact is also a fact in issue in the action the jury shall *not* be informed of the court's determination as to the existence or nonexistence of the preliminary fact and its determination of the fact may differ from the court's determination.

The section 190.3, factor (b) question – that is, whether the defendant committed a crime involving force or violence or the express or implied threat of force or violence – is factual, not legal. (*People v. Nakahara* (2003) 30 Cal.4th 705, 720.) Indeed, whether a defendant’s actions involved force, violence or threat is an essential *factual* element of numerous crimes routinely decided by the jury.⁴²

Notwithstanding that, in all other contexts, the presence of force, violence or threat is a jury question, this Court has allowed that issue to be taken from the penalty phase jury based on a distinction that has no legal or logical significance. As explained in *People v. Nakahara, supra*, 30 Cal.4th at p. 720, “the question whether the acts occurred is certainly a factual matter for the jury, but the *characterization* of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal question for the court.” (Italics in original.) This analysis is demonstrably wrong.

First, even apart from the invariant treatment of these particular elements as jury questions, juries are constantly called upon to *characterize* facts and draw precisely the types of historical and circumstantial inferences this Court has mistakenly allocated to the trial court. Indeed, under the

⁴² See, e.g., CALJIC No. 16.141 [“Force and Violence” - Defined]; CALCRIM No. 1000 (Rape by Force, Fear or Threats), CALCRIM No. 1015 (Oral Copulation by Force, Fear or Threats); CALCRIM No. 1030 (Sodomy by Force, Fear or Threats); CALCRIM No. 1240 (Felony False Imprisonment by Violence or Menace); CALCRIM No. 1350 (Interference with Civil Rights by Force); CALCRIM No. 1351 (Interference with Civil Rights by Threat); 518 & 519/CALCRIM No. 1830 (Extortion by Threat or Force); CALCRIM No. 2620 (Using Force or Threatening a Witness); CALCRIM No. 2671 (Escape by Force or Violence); and parallel Penal Code provisions.

Court's rationale, it would be fair to say that, absent a direct statement of a defendant's intent or mental state, all such findings are *characterizations* of the defendant's acts and thus would be legal questions for the court.

Obviously, whether a defendant expressly used force or violence or expressly threatened force or violence are observable acts which require no characterization and, thus, even under *Nakahara*, would necessarily go to the jury. Whether force and violence were impliedly involved or threatened is similarly a common jury question which, like intent or other mental elements, is determined by reasonable inferences from circumstantial evidence. Indeed, in the cases where this Court has found an implied threat of force or violence, it has considered precisely the same circumstantial facts that a jury would look at in making this determination. (*People v. Elliott* (2012) 53 Cal.4th 535, 587 ["[t]he *factual circumstances* surrounding the possession *may* indicate an implied threat of violence"]; see, e.g., *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187 [possession of knife in custodial setting sufficient for implied threat of violence]; *People v. Bacon* (2010) 50 Cal.4th 1082, 1126-1127 [possession of weapons while subject to parole searches sufficient for implied threat of violence]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1235-1236 [status as escaped prisoner sufficient for implied threat of violence]; *People v. Quartermain* (1997) 16 Cal.4th 600, 631 [possession of sawed off shotguns and silencers in connection with murder conspiracy sufficient for implied threat of violence]; *People v. Michaels, supra*, 28 Cal.4th at pp. 535-536 [use of firearm in robbery sufficient to find implied threat of violence].)

It follows that the question whether the alleged crime involved force, violence or threat is not within the scope of either preliminary facts or of legal issues within the meaning of Evidence Code section 310. By contrast,

whether a crime is a “crime of violence” or a “violent felony” is clearly a legal question since it is, in most instances, a matter of statutory interpretation, but in no instance a case-specific determination of fact. In California, a “violent felony” is limited to the crimes specified in Penal Code section 667.5, subdivision (c). (Cf. *Stinson v. United States* (1993) 508 U.S. 36, 47 [holding that unlawful possession of a firearm by a felon is not a “crime of violence” because the commentary to the Sentencing Guidelines is binding on the federal courts].) Consequently, no matter how violent the circumstances surrounding the commission of the crime, it is not a “violent felony” unless it is enumerated in section 667.5, subdivision (c). The crime at issue here, “carrying a loaded firearm,” is not one of the enumerated violent crimes.

Nor is the factfinding approved by the Court within the scope of the trial court’s proper gatekeeping function. Indeed, this judicial appropriation offends the most basic safeguard applicable to factor (b) evidence – namely, that this factor should be proved beyond a reasonable doubt to the jury. (*People v. Stanworth* (1969) 71 Cal.2d 820, 840-841 [holding that trial court has sua sponte duty to instruct the jury that it may consider only those crimes found beyond a reasonable doubt]; *People v. Terry, supra*, 61 Cal.2d at p. 149, fn. 8 [“in the penalty trial, the same safeguards should be accorded the defendant as those which protect him in the trial in which guilt is established”].) It should be noted that in the guilt trial, the court engages in no dispositive factfinding with respect to other crimes evidence. Rather, the only preliminary screening function performed by the court is to weigh the probative value of the proffered evidence against its prejudicial effect under Evidence Code section 352. (*People v. Rogers* (2013) 57 Cal.4th 296, 331.) If the evidence is allowed, the issue is duly submitted to the jury.

(See, e.g., CALCRIM No. 375.)

In the penalty phase, the trial court may exercise an additional gatekeeping role. In *People v. Phillips* (1985) 41 Cal.3d 29, this Court recommended that, where factor (b) evidence is proffered, it may be advisable for the trial court to conduct a preliminary inquiry to determine whether there is sufficient substantive evidence to prove the elements of the other criminal activity, not whether the crime involves force or threat of force or violence. (*Id.* at p. 73, fn. 25.) The screening hearing recommended in *Phillips* bears no resemblance and lends no support to the ultimate factfinding approved in *Nakahara*. Whether the proffered factor (b) conduct amounts to a crime is an appropriate preliminary question for the court under either Evidence Code section 402 or section 352. If the evidence is excluded, that is the end of it. But, if the evidence is admitted, the issue goes to the jury to be decided under the beyond a reasonable doubt standard.

Similarly, whether the proffered conduct is a crime involving force, violence or threat is an issue for the jury irrespective of any preliminary factfinding by the court. (See Evid. Code, § 405, subdiv. (b)(1).) Appellant recognizes that this Court has upheld the practice of taking this question away from the jury in the face of a Sixth Amendment challenge under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). (See, e.g., *People v. Ochoa* (2001) 26 Cal.4th 398.) That is not appellant's argument.

In *People v. Ochoa, supra*, the defendant appealed the trial court's denial of his request for a special jury instruction which required a juror determination whether the crime involved force, violence or threat. The requested instruction, a modification of CALJIC No. 8.87, read: "You may not consider as aggravation any evidence of unadjudicated acts allegedly

committed by the Defendant unless you first determine beyond a reasonable doubt that (1) the Defendant committed the acts; [and] (2) the acts involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.” (*Ochoa*, 26 Cal.4th at pp. 452-453.) The defendant argued that *Apprendi*’s holding that the Sixth Amendment jury guarantee applies to sentencing factors mandated that the jury determine for itself whether the acts involved the use, attempted use or threatened use of force or violence. (*Id.* at p. 453.) This Court rejected the argument on the ground that *Apprendi* and the Sixth Amendment do not require a jury to find beyond a reasonable doubt the sentencing factors specified in section 190.3. because the defendant’s eligibility for the death sentence has already been determined by the jury in compliance with Sixth Amendment standards.⁴³ (*Id.* at p. 454.)

To be clear, for purposes of this argument, appellant has no quarrel with *Ochoa* because his claim does not invoke the jury mandate of *Apprendi*. (But see Argument XI, *post.*) Rather, he bases his argument on

⁴³ The decision in *Ochoa* was based in large part on *Walton v. Arizona* (1990) 497 U.S. 639, 647-649, which restricted the right to a jury in determining that death was the appropriate penalty. In *Ring v. Arizona*, *supra*, 536 U.S. at p. 609, the High Court overruled *Walton*. This development has not altered this Court’s conviction that the Sixth Amendment does not apply to a penalty phase jury’s determination of aggravating factors. (*People v. Whalen* (2013) 56 Cal.4th 1, 90.)

The *Ochoa* Court also stated that CALJIC No. 8.87 had been upheld in *People v. Milwee* (1998) 18 Cal.4th 96, 162, fn. 33. Not so. The only penalty phase instruction challenged in *Milwee* was CALJIC No. 8.88. (*Id.* at pp. 162-165.) Footnote 33, referenced in *Ochoa*, merely recited, without discussion or approval, the case-specific factor (b) instruction that the court actually read, a modification of CALJIC No. 8.87. (*Id.* at p. 162.)

the historical and statutory division of authority between judge and jury which is fundamental to our justice system. Consequently, appellant's argument does not conflict with *Ochoa*, but cannot be reconciled with the distinction between facts and *characterization* of facts that this Court posited in *People v. Nakahara, supra*, 30 Cal.4th 705.

In *People v. Nakahara, supra*, this Court again rejected the argument that CALJIC No. 8.87 was invalid for failing to submit to the jury the issue whether the defendant's acts involved force, violence or the threat thereof. (30 Cal.4th at p. 720.) However, in that case, in contrast to *Ochoa*, the stated rationale for removing the issue from the jury was that the presence or absence of force, violence or threat was a question of law, not a question of fact. As noted above, this is an untenable distinction. Whether an act involves force, violence or threat is not a definitional or categorical question; rather, it is always a question of fact. Further, while the question whether the proffered facts amount to a crime may be subject to preliminary judicial screening, both that and the presence or absence of violence are ultimately and indisputably issues for the jury, not the court. (Cf. *People v. Phillips, supra*, 41 Cal.3d at p. 73 [after the trial court has determined at a hearing under Evidence Code section 402 what evidence is admissible as other criminal activity, the issue is submitted to the jury].) Accordingly, this Court is respectfully urged to reconsider its reasoning in *Nakahara*, endorsing the allocation of ultimate factfinding to the trial court when the jury is the exclusive trier of *all facts* at the penalty phase.⁴⁴

⁴⁴ The element of force, violence or threat is an ultimate fact because the remaining questions for the jury, i.e., whether and to what degree appellant's conduct was an aggravating circumstance, are moral and
(continued...)

D. The Error in Failing to Submit the Factual Question Whether Appellant's Possession of a Handgun Involved Force, Violence or Threat Was Prejudicial and Requires Reversal of the Death Verdict

It has long been recognized that evidence of other crimes “may have a particularly damaging impact on the jury’s determination whether the defendant shall be executed” – hence the requirement that the jury must be instructed that it is not to consider such evidence as aggravating circumstances unless it has first found that these crimes have been proven beyond a reasonable doubt. (See, e.g., *People v. Robertson* (1982) 33 Cal.3d 21, 53; *People v. McClellan* (1969) 71 Cal.2d 793, 805.) That the defendant committed another crime, even one which may have been relatively minor, invokes the heightened standard of proof required by this Court because it raises the inference of propensity or readiness to commit violent acts, the basis for the admission of the proffered factor (b) evidence here, that is so damaging – i.e., aggravating – that it necessitates the utmost scrutiny by the jury. (*People v. Robertson, supra*, 33 Cal.3d at p. 54.)

Because, under California law, only a jury, absent a constitutionally-valid waiver, has the authority to find aggravating facts, and with respect to factor (b) those findings must be made beyond a reasonable doubt, the final determination of the issue by a court under a far less stringent standard, and its resulting removal from the jury, violates due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [recognizing that when state law creates for a defendant a liberty interest in having the jury make particular findings, judicial findings will not suffice to protect that entitlement for due

⁴⁴(...continued)
normative, not factual. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.)

process purposes].) Moreover, in delegating all factfinding to the jury at the penalty phase, the Legislature and this Court have implicitly invoked, most particularly with regard to unadjudicated crimes evidence, the reliability and normative principles that are at the core of the Sixth and Eighth Amendments. (See, e.g., *People v. Albertson* (1944) 23 Cal.2d 550, 579 [requiring a heightened standard of proof for other crimes evidence at penalty trial – beyond a reasonable doubt standard instead of the preponderance standard applicable in the guilt trial].) Accordingly, the trial court’s error in depriving appellant of essential factfinding by the jury is constitutional error subject to the *Chapman* prejudice standard. (*Chapman v. California, supra*, 386 U.S. at p. 24 [“before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt”] .) Moreover, even if the error is deemed to be state-law error, the “reasonable possibility” standard applies. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1092, citing *People v. Brown, supra*, 46 Cal.3d at p. 448 [applying the reasonable possibility standard of prejudice first articulated in [*Brown*] which is the “same in substance and effect” as the beyond-the-reasonable doubt for prejudice articulated in [*Chapman*].)

The relevant question in the present case may also be stated as whether, absent the error, there is a reasonable likelihood that “at least one juror would have struck a different balance” been life and death. (*Wiggins v. Smith, supra*, 539 U.S. 510, 537.) That standard is readily met here where it is certainly conceivable that at least one juror would have found that appellant’s simple possession of a gun did not involve force, violence or threat thereof, and as a result, would have concluded that the appropriate punishment was life without parole, not death. There was nothing violent

or threatening in appellant's personal interaction with the police.⁴⁵

Appellant made no threatening gestures and was fully compliant with police instructions throughout the encounter. Appellant's weapon was a small handgun, which was missing a clip and had only one bullet in the chamber. Under these circumstances, one or more jurors could well have found that appellant's unlawful possession of the gun, itself a nonviolent crime, did not qualify as aggravation under factor (b).

Moreover, the prosecutor made very damaging use of the evidence in her penalty phase closing argument. (15RT 3181; see Argument X, *post*.) And defense counsel acknowledged that the evidence was the "second most aggravating factor." (15RT 3197.) As such, it is reasonably possible that taking the issue of violence away from the jury, leaving it with only the comparatively trivial question whether appellant had possessed the gun, contributed to the death verdict. Therefore, the death judgment must be reversed.

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⁴⁵ The circumstances surrounding appellant's possession of the gun and the additional circumstances which the court referenced in finding that appellant's act of possession involved an implied threat of force or violence are discussed in greater detail in appellant's related argument, Argument X, *post*, that the court abused its discretion in submitting the evidence to the jury.

X.

**APPELLANT'S NONVIOLENT POSSESSION OF A
HANDGUN WAS ERRONEOUSLY ADMITTED AS FACTOR
(B) OTHER VIOLENT CRIMES EVIDENCE**

A. Introduction and Proceedings Below

The prosecutor was permitted to present evidence that on January 15, 2004, appellant was arrested for possession of a handgun. This evidence was admitted under Penal Code section 190.3, factor (b), as criminal activity which allegedly involved the use or attempted use of force or violence or the express or implied threat to use force or violence (hereinafter "force, violence or threats").

Appellant challenged this evidence on the ground that there were insufficient facts to prove the crime, a misdemeanor, involved violence. (14RT 2828-2833, 3065.) The court disagreed. Relying on *People v. Michaels* (2002) 28 Cal.4th 486, the court pointed to the use of an illegal weapon in the Gabriel count (Count Four) and appellant's involvement as an aider and abettor in the other counts, as well as the seized writings as evidencing a propensity or readiness to use violence sufficient to support the inference of implied threat of force. (14RT 2929-2930.)

Following the court's ruling, police officers testified that on January 15, 2004, at about 2:45 in the afternoon, bicycle patrol officers made contact with appellant and two other individuals. (14RT 2932-2933.) When the officers approached, one of the individuals, "Perez," reached for his waistband where officers observed a large bulge. (14RT 3936.) The three individuals were then ordered to put their hands up and submit to patdowns; they all complied. (14RT 2936.) Officers recovered a sawed-off shotgun from Perez and a small handgun from Argueta's front waistband. (14RT 2936-2937, 2956.) They also found a single glove in appellant's

pocket. (14RT 2938.) The handgun was missing a clip and had only one bullet in the chamber. (14RT 2956, 2962.) Five rounds of 00 buckshot were found in the shotgun. (14RT 2966.) No weapon or ammunition were recovered from the third individual, Rosales. (14RT 2955.) Appellant's jury was subsequently instructed under CALCRIM No. 2530 on the crime of carrying a loaded firearm, at the time a violation of Penal Code section 12031, subdivision (a).⁴⁶ (15RT 3220-3222.)

Appellant submits that the trial court erred in admitting the testimony regarding his arrest for simple possession of or carrying a handgun where his conduct was at all times nonviolent and nonthreatening. The erroneous admission of this evidence violated appellant's state and federal constitutional rights to due process and a fair and reliable penalty determination (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17), and reversal of his death sentence is required (*Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Brown, supra*, 46 Cal.3d at p. 447).

B. Under All the Circumstances, Appellant's Simple Possession of a Handgun Without More Did Not Involve An Implied Threat of Force or Violence

"Possession of a firearm is not, in every circumstance, an act committed with actual or implied force or violence." (*People v. Elliott* (2012) 53 Cal.4th 535, 587 [quoting *People v. Bacon* (2010) 50 Cal.4th 1082, 1127]; *People v. Belmontes* (1988) 45 Cal.3d 744, 809 [defendant's possession of a handgun in his waistband, while stating he had all the protection he needed, did not amount to criminal conduct in violation of

⁴⁶ Penal Code section 12031 was repealed by Stats. 2010, c. 711 (S.B. 1080) § 4, effective January 1, 2012.

penal statute]; *People v. Dyer* (1988) 45 Cal.3d 26, 76 [ex-felon in possession of a gun is a non-violent crime]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1235 [ex-felon in possession of a handgun is not in every circumstance an act committed with actual or implied violence].)

This Court has held that additional circumstances beyond simple possession of a weapon may establish an implied threat of violence, making simple possession of a weapon potentially admissible as aggravating evidence under factor (b). For example, the fact that the defendant is in custody may support the inference that his or her possession of a weapon involves an implied threat of violence. (See, e.g., *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589 [“a defendant’s knowing possession of a potentially dangerous weapon in custody is admissible under factor (b)”]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187 [defendant while in the California Youth Authority possessed a sharpened eight-and-one-half-inch table knife]; *People v. Harris* (1981) 28 Cal.3d 935, 962-963.)

This Court has on occasion also found an implied threat of violence in a noncustodial setting. For example, in *People v. Clair* (1992) 2 Cal.4th 629, the defendant carried a knife in the course of committing a burglary. Though the defendant did not actually use the knife, this Court held that by carrying the knife, the defendant “made an implied threat to use the knife against anyone who might interfere” in the burglary. (*Id.* at pp. 676-677.) In *People v. Garceau* (1993) 6 Cal.4th 140, defendant was an ex-felon in possession of a machine gun, silencer and concealable handguns. This Court found “such an arsenal” clearly to be factor (b) evidence. (*Id.* at p. 203.) In *People v. Michaels, supra*, 28 Cal.4th 486, the defendant illegally possessed a double-edged dagger with a seven-inch blade, a butcher knife and a concealed handgun in his car. This Court found that the criminal

character of the possession of these weapons, including the fact that they were classic instruments of violence that are normally used only for criminal purposes, was sufficient to permit the jury to find an implied threat of violence, where, in addition, one of the victims had been killed with a similar knife and the concealed firearm was the same gun the defendant had used to rob another victim the previous day. (*Id.* at pp. 531-536.) None of these cases is apposite here.

In the present case, the trial court did not rely on *Clair* and it effectively distinguished *Garceau* and *Michaels*. The court distinguished *People v. Garceau, supra*, 6 Cal.4th 140, because, whereas the instant case involved a single handgun, *Garceau* was found in possession of a small arsenal, which included a machine gun and silencer in addition to handguns. (14RT 2832.) The Court also recognized that *People v. Michaels, supra*, was not directly on point because the handgun in that case was seized from the defendant the day after he used it or a similar gun in a violent crime, whereas here, approximately one month had elapsed between appellant's possession of the handgun and the charged shootings involving an entirely different type of firearm. (14RT 2833.) Nevertheless, the court ultimately concluded that appellant's and Perez's possession of illegal weapons at the same time, the subsequent shootings and various other evidence that showed a propensity or readiness for violence were sufficient to support an inference of an implied threat or force *as a matter of law*. (14RT 2929-2930.) The court erred.

Unlike in *People v. Michaels, supra*, 28 Cal.4th 486, appellant was not found in repeated possession of dangerous weapons during the commission and possibly while in flight from the commission of prior violent crimes. (*Id.* at p. 505.) Here, in marked contrast, there is only a

single instance of gun possession having no connection whatsoever with the commission of a prior or subsequent violent offense. At bottom, the only real similarity between *Michaels* and this case was, as the court remarked, the fact that all of the weapons in *Michaels* and the handgun here were possessed unlawfully. While certainly a relevant consideration, it is hardly sufficient to support the conclusion that illegality of the weapon's possession in itself posed a threat of violence.

This case is also distinguishable from *People v. Dykes, supra*, 46 Cal.4th 731. In *Dykes*, the proffered factor (b) evidence involved the defendant's stop and arrest at 9:30 at night while holding a semi-automatic weapon – cocked with one round in the chamber and three rounds in the clip. (*Id.* at p. 776.) After the arresting officer noticed the defendant “fidgeting,” he found the gun concealed in the defendant's glove. (*Ibid.*) In that case, where the issue of violence was submitted to the jury, this Court concluded that the jury could have legitimately inferred an implied threat from the circumstances surrounding the defendant's illegal possession of a concealed, loaded and *cocked* weapon and the use of a similar firearm in committing the charged offense. (*Id.* at p. 777.) Here, by contrast, the stop occurred in broad daylight and appellant did nothing personally to arouse suspicion that he was engaged in or planned to engage in violent conduct.

In short, unlike the other factor (b) cases, here, there were no prior or contemporaneous circumstances to support the inference of threatened violence by appellant. Appellant had no prior arrests for weapons possession or violent crimes; he was not in custody or under criminal justice supervision at the time of the encounter; and he engaged in no suspicious, much less threatening, behavior during the stop, frisk and his eventual arrest. That he was in the company of Perez, who had a shotgun, or that

Perez initially reached toward his waistband does not render appellant's own conduct expressly or impliedly threatening, especially when Perez and their other companion were also fully compliant with police commands.

In the absence of impliedly threatening behavior at the time of the arrest, the court relied on propensity evidence based on the subsequent shootings and seized writings. But by that reasoning, every simple possession of a gun would be admissible as factor (b) evidence since propensity or readiness to commit violence is almost a given by the time of the penalty phase of a capital trial. Thus, because the court's reasoning – which would support an inference of implied violence in every capital case based on character evidence rather than incident-specific indicia of violence – was contrary to this Court's admonition that not every possession of a weapon involves actual or implied force or violence, the court abused its discretion in admitting evidence of appellant's gun possession under factor (b). (See *Nichols v. City of Taft*, *supra*, 155 Cal.App.4th 1233, 1239.)

The court then compounded this error by failing to properly assess the balance of relevancy and potential prejudice under Evidence Code section 352. The question whether evidence is unduly inflammatory "is closer under factor (b) than factor (a)" to the extent the penalty jury must decide whether the factor (b) crime actually occurred beyond a reasonable doubt as well as gauge its moral weight for purposes of sentencing. (*People v. Robertson*, *supra*, 33 Cal.3d at pp. 53-55.) Even if the factor (b) evidence fairly presents the facts of the offense, it may unfairly depict the defendant's moral blameworthiness, and may thus be excludable under Evidence Code section 352. (Cf. *People v. Box*, *supra*, 23 Cal.4th at p. 1201.) Here, the proffered factor (b) evidence should have been excluded under section 352 because its slight probative value as a measure of

appellant's history of violence independent of Gonzalez was substantially outweighed by its potential to exaggerate that history and thus unfairly amplify appellant's overall moral culpability. (See section C of this argument, below.)

C. The Erroneous Admission of the Factor (b) Evidence Was Prejudicial

State-law error at the penalty phase and federal constitutional error are reviewed under the same reasonable possibility standard. (*People v. Nunez* (2013) 57 Cal.4th 1, 60; *People v. Fuiava* (2012) 53 Cal.4th 622, 719 [affirming that state law test for error at the penalty phase is whether there is a "reasonable possibility that the error affected the jury's penalty verdict].) In rejecting the *Watson* (*People v. Watson, supra*, 46 Cal.2d 818, 836) standard of review, applicable to state-law error at the guilt phase, and reaffirming the more exacting "reasonable possibility" standard, this Court concluded that where the jury's role is not merely to find facts "but also – and most important – to render an individualized, *normative* determination" of the appropriate penalty, "the *Watson* standard is simply insufficient to ensure "reliability in the determination that death is the appropriate punishment in a specific case." (*People v. Brown, supra*, 46 Cal.4th at p. 446, italics in original.) As this Court had explained in first adopting the "reasonable possibility" test:

If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another. The facts that the evidence of guilt is overwhelming, as here, or that the crime involved was, as here, particularly revolting, are not controlling. This being so it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may

have swayed a juror, must be deemed to have been prejudicial.

(*People v. Hamilton, supra*, 60 Cal.2d at pp. 136-137.)

In this case, there is a “realistic” possibility that the jury would not have unanimously agreed that death was the appropriate penalty had the erroneous admission of the other crimes evidence not occurred. Without ignoring the aggravating circumstances of the crime – specifically, the nature of the weapon, Gabriel’s youth and the impact of Gabriel’s killing on his family – appellant’s own youth, family history of alcohol abuse and domestic violence, as well as appellant’s likely impairment from drug use were mitigating considerations. (See, e.g., 14RT 2989-2990, 3031-3032 [appellant’s father alcoholic who became violent when under the influence of alcohol]; 14RT 2995-2996, 3014-3015, 3034-3036 [appellant under influence of drugs].) Moreover, although “duress” may have overstated Gonzalez’s influence over appellant, one or more jurors could have concluded that the older Gonzalez’s pivotal role in each of the charged crimes, and particularly his instigation of the Gabriel shooting, reduced appellant’s degree of moral culpability. (Cf. Pen. Code, § 190.3, factor (g) [whether or not the defendant acted under the extreme domination of another person].)

Absent the factor (b) evidence regarding appellant’s arrest for gun possession in the company of Perez, the jury could have determined – accurately, in appellant’s view – that he had no history of “violent” gun possession until he fell under Gonzalez’s sway. Indeed, there was significant mitigating testimony at the penalty trial regarding Gonzalez’s

bad influence on appellant.⁴⁷ (See, e.g., 14RT 2997, 3013, 3018, 3037, 3074.) The prosecutor used the factor (b) evidence to attack this mitigation. (15RT 3169-3170.) She stressed that Gonzalez was not there when appellant had a loaded semi-automatic with a live round in the chamber while in the company of another T.C.A. member who had a loaded sawed-off shotgun.⁴⁸ (15RT 3170.) The prosecutor, thus, made certain that the factor (b) evidence would contribute to the verdict.

Therefore, it is reasonably possible – indeed a near certainty – that, the erroneous admission of the factor (b) evidence led at least one juror to impose the death penalty. (See *People v. Hamilton, supra*, 60 Cal.2d at p. 137 [any error which may have reasonably led one juror to impose the death penalty is substantial and prejudicial].) Accordingly, the judgment of death must be vacated.

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⁴⁷ In addition to the percipient evidence of Gonzalez's negative influence on appellant, Dr. Gawin, the drug expert, observed that the use of all euphoriants, including psychomotor stimulants, produced increased levels of suggestibility and heightened vulnerability to suggestions from others. (15RT 3119.)

⁴⁸ No evidence was presented that Perez or Rosales were T.C.A. members.

XI.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained twenty-one special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

**B. The Broad Application Of Section 190.3,
Subdivision (a) Violated Appellant's Constitutional
Rights**

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALCRIM No. 763; 3 CT 662-663; 15RT 4098-4099.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. In this case, for instance, the prosecutor was allowed to introduce a videotape of the test-firing of a gun

under circumstances that were substantially and prejudicially different than the circumstances of the crime and the experiences of the victims. (See Argument VIII, *ante.*)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 [“circumstances of crime” not required to have spatial or temporal connection to crime].) As a result, the concept of “aggravating factors” has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as “aggravating.” As such, California’s capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the “circumstances of the crime” within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALCRIM Nos. 764, 765; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not “susceptible to a burden-of-proof quantification”].) In conformity with this standard, appellant’s jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (29CT 8386-8406; 15RT 3225-3228.) More specifically, as set forth in Argument VIII, *ante*, appellant’s jury was not told that it had to find beyond a reasonable doubt that the crime proffered as factor (b) evidence involved the use or attempted use of force or violence or the express or implied threat to use force or violence. (29CT 8392-8395; 15RT 3220-3225.)

Blakely v. Washington (2004) 542 U.S. 296, 303-305, *Ring v. Arizona*, *supra*, 536 U.S. at p. 604, and *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 478 require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant’s jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors

outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALCRIM No. 766; 3CT 692-693; 15RT 4117-4119.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring*, and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law “necessary for the jury’s understanding of the case.” (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Blakely*, *Ring* and *Apprendi* impose a reasonable doubt standard on California’s capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California’s death penalty scheme will comport with the principles set forth in *Blakely*, *Ring* and *Apprendi*.

Setting aside the applicability of the Sixth Amendment to California’s penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant’s claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a

reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALCRIM Nos. 763 and 766, the instructions given here (29CT 8388-8392, 8395-8396; 15RT 3215-3219, 3225-3228) fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996)

13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court “has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard.” (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. “Jury unanimity ... is an accepted, vital mechanism to ensure that real and full

deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Penal Code § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated criminal activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALCRIM No. 764; 29CT 8393; 15 RT 3222-3223.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant (see Argument X., *ante*) and the jury was instructed that each juror could decide for him or herself whether appellant had committed the alleged crime. (CALCRIM No. 764, 15RT 3222.)

The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim.

(*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were “persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison with the mitigating circumstances that a sentence of death is appropriate and justified.” (29CT 8396; 15RT 3227) The phrase “so substantial” is an impermissibly broad phrase that does not channel or limit the sentencer’s discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant’s circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990)

494 U.S. 370, 377.) Yet, CALCRIM No. 766 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP (life without the possibility of parole) verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

6. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007)

550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

7. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the laws (U.S. Const. 14th Amend.).

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing To Require That The Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALCRIM No. 763; § 190.3, factors (d) and (g); (29CT 8390; 15RT 3217-3218) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra*, 486 U.S. at p. 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

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2. The Failure to Delete Inapplicable Sentencing Factors

Some of the sentencing factors set forth in CALCRIM No. 763 were inapplicable to appellant's case. (See, e.g., CALCRIM No. 763, factors (e) [whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act] and (f) [whether the defendant reasonably believed the circumstances morally justified or extenuated his conduct]; 29CT 8390; 15RT 3218.) The trial court failed to omit those factors from the jury instructions, likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 36 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALCRIM No. 763 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALCRIM No. 763 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton*, *supra*, 48 Cal.3d at p. 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289).

Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could

establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.)

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates The Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and

mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423. In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the court to reconsider.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short of International Norms

This Court has repeatedly rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook, supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the court to reconsider its previous decisions.

XII.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming, arguendo, that the errors asserted in Arguments I-X, taken separately, do not require reversal, the effect of these errors should be evaluated cumulatively because together they undermine confidence in the fairness of the trial and the reliability of the resulting death judgment. (Cal. Const., art. I, § 15; U.S. Const., 8th & 14th Amends.; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect the trial with unfairness that the resulting verdict is a denial of due process]; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi, supra*, 410 U.S. 284, 298 [“The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair”]; *People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error].) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

In appellant’s case, each of the guilt phase errors, standing alone, was sufficient to undermine the prosecution’s case and the reliability of the jury’s ultimate verdict, and none can properly be found harmless beyond a

reasonable doubt. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 278-282; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) When viewed cumulatively, the trial court's erroneous admission of the inflammatory rap lyrics and the redacted videotape, as well as its overreaching in advising appellant incorrectly on a tactical matter, effectively foreclosed any defense to Counts Four through Eight. Further, as previously noted, with respect to Counts Five through Eight, the combined defects in the court's instruction on the kill zone theory of attempted murder relieved the jury of its obligation to find the element of specific intent to kill. As a result, these errors, viewed separately or in combination, deprived appellant of his state and federal constitutional rights to a fair trial, due process and a reliable determination of guilt. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Brown* (1988) 46 Cal.3d 432, 448.) Appellant's convictions and the special circumstance findings must therefore be reversed. (*People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital-murder conviction for cumulative error].)

In addition, the death judgment must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing penalty phase].) In this context, this Court has expressly recognized that evidence that may not affect the guilt determination can have a prejudicial impact on the penalty trial. (*People v. Brown*, *supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a

different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase]; accord, *Arizona v. Fulminante*, 499 U.S. 279, 301-302 [erroneous introduction of evidence at guilt phase had prejudicial effect on sentencing phase of capital murder trial]; *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1101-1102 [erroneously admitted confession harmless in guilt phase but prejudicial in penalty phase].)

In the present case, there is at least a reasonable possibility that the guilt and penalty phase errors, singly and in combination, had a prejudicial effect upon the jury's consideration of the evidence presented at the penalty phase, as well as the jury's ultimate decision to return a death sentence. Penalty phase errors – the erroneous admission of the misleading videotaped demonstration and non-violent factor (b) evidence – compounded the already substantial prejudicial effect of guilt phase error on the penalty determination.

Reversal of the death judgment is therefore mandated here because it cannot be shown by the People that the penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Brown*, *supra*, 46 Cal.3d at p. 466.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions, special circumstance findings, and death sentence.

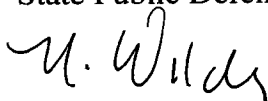
CONCLUSION

For all the reasons stated above, appellant's convictions and the judgment of death must be reversed.

Dated: December 20, 2013

Respectfully submitted,

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State Public Defender



Nina Wilder
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**CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.360)**

I am the Supervising Deputy State Public Defender assigned to represent appellant, CARLOS MARVIN ARGUETA, in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates, is 54,684 words in length.

DATED: December 20, 2013



NINA WILDER
Supervising Deputy State Public Defender
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Carlos Argueta*

Supreme Court No. S150524
Superior Court No. BA261252

I, Tamara Reus, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California 94607; that I served a copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Tasha G. Timbadia
Deputy Attorney General
California Department of Justice
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Los Angeles, CA 90013

Carlos Argueta, #F63367
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San Quentin, CA 94974
(Appellant)

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Clara Shortridge Folz Criminal
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Los Angeles County Superior
Court, Dept. 103
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101 2nd St., #600
San Francisco, CA 94105

Each said envelope was then, on December 20, 2013, sealed and deposited in the United States mail at Oakland, Alameda County, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on December 20, 2013, at Oakland, California.



DECLARANT