COPY

No. S048763

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

SERGIO D. NELSON,

Defendants and Appellants.

APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, County of Los Angeles

HONORABLE CLARENCE STROMWALL, JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. SERGIO D. NELSON, Defendant and Appellant.	No. S048763 Los Angeles Co. Sup. Court No. KA 019560

APPELLANT'S OPENING BRIEF

INTRODUCTION

This is a tragic case. Feeling betrayed and extremely jealous, a teenager lost control and killed the woman he loved, after unexpectedly finding her nestling with his rival in a parked car in the middle of the night. Because the zipper of the rival's pants was not down, the trial court refused to instruct on heat of passion *or* provocation. The court believed that heat of passion and provocation required the most inflammatory of situations, similar to where a husband discovers his wife giving oral sex to another man. The court was obviously wrong. Reversal of the entire judgment is required.

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, §1239.)[1] The appeal is taken from a judgment that finally disposes of all issues between the parties.

STATEMENT OF THE CASE

The Los Angeles County District Attorney filed an information against appellant Sergio D. Nelson on November 18, 1993, alleging that he murdered (§ 187) Robin Shirley (count one) and Lee Thompson (count two) on October 2, 1993. (CT 149.)[2] Each count also alleged the special circumstances of multiple murder (§ 190.2(a)(3)) and lying-in-wait (§ 190.2(a)(15)), as well as personal use of a firearm (§ 12022.5(c)). (*Id.*)

Trial began with jury selection on November 10, 1994. (CT 230.) On December 13, 1994, the jury returned guilty verdicts on both counts, and true findings as to both special circumstances and the gun use enhancement. (CT 365.)

The penalty phase began on December 14, 1994. (CT 367.) The jury failed to reach a verdict, and on December 20, 1994, the court declared a penalty mistrial. (RT 417.)

A second penalty phase began with jury selection on July 5, 1995. (CT 435.) After deliberating 10 days, the jury failed again to reach a verdict. (CT 470.) The court then questioned jurors on the "reasoning process" of their deliberations (RT 5687, 5753), found that two jurors were holding out for a life sentence (RT 5810), and dismissed one of the holdouts

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] "CT" means the three-volume Clerk's Transcript. "RT" means the 36-volume reporter's transcript.

because the court found that she could not be impartial due to her disability, bipolar disorder (RT 5815). Within hours, the second holdout juror relented and the jury returned a verdict of death on August 15, 1995. (CT 526.)

The court denied motions to modify the verdict and for a new trial (CT 547, 549), and imposed a sentence of death (CT 547).

STATEMENT OF FACTS

The Guilt Phase[3]

Sergio Nelson is the child of a violently abusive, alcoholic father and a neglectful mother who deserted her teenage son when Sergio was suffering from deep depression and anorexia. (RT 1942, 1944, 1953, 1961, 2156-2157, 2257.)[4] On many occasions, young Sergio witnessed his father kick Sergio's mother, push her through a broken window, set her hair on fire, and stab her with a knife. (RT 2157.) In the view of Dr. Stephen Wells, Orange County's Chief of Forensic Psychology for 14 years, Sergio's father was a "terrorist" within the family. (RT 2129, 2157.) As a result Sergio experienced night terrors throughout his life, reliving the painful traumas inflicted by his father. (RT 2159, 2210.)

Sergio's father also stole money from him, and when Sergio was old

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[3]This portion of the statement of facts is based on evidence presented by the prosecution and defense during the guilt phase of the first trial, except as otherwise noted.

[4]This brief will refer to Sergio Nelson by his first name to underscore that the life under examination here is that of a young person, from early childhood until age 19. As the United States Supreme Court recently observed in holding unconstitutional the execution of persons under the age of 18: "'[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.'" (*Roper v. Simmons* (2005) __ U.S. __ [125 S.Ct. 1183, 1195] [quoting *Johnson v. Texas* (1993) 509 U.S. 350, 367].)

enough to drive and own a car, absconded with Sergio's Volkswagen, which Sergio had painstakingly restored. Dr. Wells found that Sergio continued to look for the love of his father, even though his father abused and abandoned him. (RT 1969, 2157-2158.)

Sergio's father kicked his wife in the womb when she was four months pregnant with Sergio. Sergio's mother thought of aborting Sergio until she had a frightening dream that caused her to keep the child. After Sergio was born, his mother was not available for nurturance and affection.[5] Dr. Wells believed that Sergio was extremely deprived of any affection from his mother. When he was home, Sergio was a latchkey child without a father and virtually without a mother, who paid little attention to him. From third grade until high school, he stayed mostly with friends. (RT 1877, 1886, 2158.)

Dr. Wells opined that, for most of his adolescent life, Sergio experienced a depressive condition called dysthymia, a type of long-standing depression. As a result of his early childhood development, Sergio manifested a number of different personality disorders that tended to cause him to function in psychologically impaired ways, including acting impulsively. (RT 2155-2156, 2172.) Dr. Wells also found that Sergio doubted himself as a man, doubted himself sexually, and doubted himself for his color and short stature. (RT 2165, 2412.)[6]

By the time he was 15 years old, Sergio contemplated suicide. (RT 2042.) By age 16, he went beyond merely thinking about it. On March 10,

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[5]During the penalty phase retrial, the parties stipulated that Sergio was born on September 9, 1974. (RT 4705.)

[6]Sergio is half African American and half Latino. (RT 153, 890, 912.)

1991, Sergio slit his wrist with a knife and sought treatment at the Pomona Valley Hospital Medical Center. (Exh. F; RT 2608.)

Sergio's social life paralleled his mental decline. In 1991, while attending Ganesha High School, Sergio befriended classmate Valerie Horner. (RT 1974-1976.) Sergio became infatuated and expressed his love for her. (RT 2087.) Valerie's mother, 38-year-old Karen Horner, disapproved of the relationship, and sent Valerie to northern California for the summer. (RT 1206, 2084.) On her return home in September 1991, Valerie learned that her mother was having an affair with Sergio, who was only 16 years old. (RT 1205, 2090.)

Sergio deteriorated physically as well. By November 1991, Sergio was anorexic – he was very thin, he had dark sunken eyes, and, in the words of his aunt, Yvonne Cosey, his voice was "like a whisper, like it was taking all the energy he had just to enunciate a word for you to even hear." He also exhibited huge bumps on his face. At the same time, Sergio seemed depressed and disoriented. (RT 1941-1943, 1961.)

During the 1991 Thanksgiving holiday, Sergio's mother threw him out of their house after an argument in which she sided with her boyfriend, who had been abusive towards Sergio. (RT 1944, 1953, 1961, 1980.) In tears, Sergio telephoned his aunt, Yvonne Cosey, and explained what had happened. Although Ms. Cosey wanted Sergio to move in with her family, Sergio's mother would not allow this. Sergio's mother, however, did not permit him to come home either. (RT 1944-1945, 1980.)

Sergio then dropped out of school and moved to San Bernardino with Karen Horner, who had left her husband and four children. (RT 1206, 1208, 2085, 2111-2112.) Dr. Wells bluntly described the relationship between Sergio and the older woman as "extremely sick" and

"pathological." He concluded that Sergio "was clearly seeking a substitute for his alienated relationship with his mother." (RT 2166-2167, 2417.)

In February 1992, Karen Horner became pregnant and had an abortion against Sergio's wishes. Sergio became upset and reacted impulsively. He had two automobile accidents where he suffered severe injuries and was admitted to the hospital. (RT 2041, 2098, 2169.) He started giving away his property because he did not plan on living too much longer. (RT 1982-1983.) Sergio also appeared to be starving himself to death. (RT 1985, 2093.) He seemed very depressed and talked of suicide. (RT 1980, 2092-2093.)

In March 1992, Sergio was hospitalized after taking an overdose of medicine, prescribed for him as a result of the car accident two weeks before. (RT 2047-2048.) An emergency room physician referred Sergio for a psychiatric evaluation. (RT 2047, 2049.) Dr. Herb Glazeroff evaluated Sergio and concluded that Sergio had acted "impulsively" and made the "suicide gesture" of taking an overdose because he suffered from an "adjustment disorder with depressed mood." (RT 2063-2064, 2067, 2077-2079.) Dr. Wells concurred that Sergio's suicide gesture was an impulsive act. (RT 2169, 2172.)

During April and May 1992, Sergio's severe depression persisted and again he appeared to be starving himself to death. He talked about going away for a long time and not wanting to see anyone. He thought he was "no good" and unwanted. (RT 1868, 1872, 1885.)

In May 1992, at the age of 17, Sergio became legally emancipated. (RT 2282.) Dr. Wells concluded that Sergio's emancipation efforts amounted to mere pretense: "It was all pretending. He thought – he was functioning in his world as if he were an adult, even though he was not in

any sense, [he was] still just a child." (RT 2172-2173.)

On May 4, 1992, Sergio began working at the Target store in La Verne, unloading trucks and stocking the shelves, as a member of the "push crew." (RT 1121, 1230, 1482, 1982, 2981.) According to his supervisor, Alejandro Sandoval, Sergio was an excellent, hard working employee, a great listener, always performing and hustling, and eager to learn his and other jobs and to take on more responsibilities. (RT 1410-1411, 1432.) Kristin Strickland, the store's merchandise receiving manager, confirmed that Sergio was very eager to learn ("He wanted to know everything there was to know about the job"), ambitious, a very good worker, and proud of his work. (RT 1457, 1505, 1518.) Sergio helped other people do their jobs when he was done with his. (RT 1519.) Ms. Strickland stated, "he definitely had what . . . he needed to succeed." (RT 1464.)

Sergio's mentor at Target, Frances Voss, who "established kind of an auntie, son type rapport" with Sergio, described the teenager as one who "took initiative" and "was willing to do whatever needed to be done." (RT 1908-1909, 1925.) "He liked his job." (RT 1910.) All in all, Sergio was probably the fastest, hardest, and best worker on the push team. (RT 1130.)

Sergio and Karen Horner split up in late 1992, at about the same time Ms. Horner and Sergio began working together on the Target push crew. (RT 1230, 2008, 2315.) After the breakup, Sergio moved to his grandmother's house in Pomona, where he shared a room with his cousin, Alex Cosey. (RT 1938, 1958.)

In February 1993, Mr. Sandoval went on vacation, and Sergio took charge of the 15-20 member push crew in his supervisor's absence. (RT 1233, 1415, 1433.) The common belief among the members of the push crew was that Sergio was being groomed to take over Mr. Sandoval's job.

(RT 1232, 1415, 1432, 1838.)

Mr. Sandoval's supervisor position eventually opened up when he received a promotion in the summer of 1993. (RT 1410.) Sergio applied for the promotion, as did Robin Shirley, another member of the push crew. Manager Kristin Strickland considered them the two most qualified candidates for the job. (RT 1459, 1482.)

Robin Shirley had begun working at Target in April 1991, about a year before Sergio. (RT 1482, 1786.) At the time she applied for the promotion, Ms. Shirley was older than the other members of the push crew and was married, although she was separated from her husband for a time in early 1993. (RT 1426, 1836, 1918, 2589-2590.)

According to her close friends and co-workers, Ms. Shirley was extremely flirtatious, particularly towards the younger male employees at Target. (RT 1836, 1841-1842, 1851-1852, 1917.) Ms. Shirley's friend and co-worker, Tracy Robinson, testified that "[Robin] liked a lot of the new guys that came in, and she was very friendly with them." In fact, "every time a new guy came in she would flirt with him until another new guy came in . . . if she thought he was cute." While still living with her husband, Ms. Shirley pursued one young man and dated another, calling the latter at home a few times a week. (RT 1845, 1849, 1852, 1859-1862, 1905-1906, 1917, 2000-2004.) One coworker agreed that pursuing young men was not totally out of character with Robin Shirley's home life. (RT 1918.)

Robin Shirley and Sergio developed a very close relationship. (RT 1230, 1837, 1967, 2008.) In the process Ms. Shirley revealed to Sergio that her husband did not care about her. (RT 1970.) Elizabeth Rylander, Ms. Shirley's good friend and Sergio's co-worker, testified that Sergio was

infatuated with Ms. Shirley. (RT 1897.) Karen Horner believed that Sergio and Robin Shirley were having an affair. (RT 2043.) At work, Sergio and Ms. Shirley often spent their lunch hours and breaks together. She gave Sergio rides to and from Target. They also socialized outside of the store, playing racquetball and basketball, going to each other's homes, telephoning one another many times a week, and even going to the movies together. (RT 1230, 1234-1235, 1312, 1412, 1514, 1837, 1839, 1900-1904, 1970-1971.)

When Mr. Sandoval's position became available, Sergio was convinced that he would get the job, in part because he had Mr. Sandoval's support. Sergio confidently declared to everyone on the push team that the job was his. (RT 1127, 1415-1416, 1911.) Nevertheless, well before Robin Shirley received the promotion, effective July 11, 1993, it became common knowledge around the store that Sergio was not going to get the job. (RT 1416, 1786.)

The day before Ms. Shirley was elevated to supervisor, manager Kristin Strickland announced over the store loudspeakers to all the push crew members that Ms. Shirley would receive the promotion. (RT 1418.) According to Ms. Strickland, Sergio did not receive the promotion because, unlike the older and more mature Robin Shirley, Sergio did not have the interpersonal skills to speak to other team members to inspire them to work. (RT 1457, 1459.)

Before Ms. Strickland announced that Robin Shirley would be promoted, Ms. Strickland told Sergio that he would not get the job. Sergio became upset because he thought the other employees might make fun of him. He also thought he should quit his job, but Ms. Strickland prevailed on Sergio to stay, reassuring him that he would eventually be promoted.

(RT 1464-1466, 1507.) Sergio felt that people would put him down when Robin Shirley got the job. It seemed that one of his fears was how he was going to be perceived by others. (RT 1511.)

When they heard the news, some employees began to taunt and tease Sergio for not getting the promotion. (RT 1415, 1419.) Sergio was so distraught that he broke down crying in front of supervisor Alejandro Sandoval. (RT 1422, 1437.)

Sergio withdrew from his co-workers and sunk back into a deep depression. (RT 1128, 1234, 1420; 1438, 1509, 1521, 1847, 1867-1868, 1870, 1910.) Kristin Strickland acknowledged that anyone could see that Sergio was depressed. (RT 1510.) Other Target employees agreed, including Ray Nieto. (RT 1868, 1870.) Ms. Shirley's close friend, Tracy Robinson, who testified that Sergio was nice to everybody (RT 1838), also said that Sergio "seemed kind of sad to me." (RT 1847.) Frances Voss put it most poignantly, "I never saw anger. It was – a crushness. . . . it would be like he was crushed, he was devastated I could see in his face and his speech was just so hurt, soft. It was like I just want it so bad. I thought I had it. What did I do wrong." (RT 1912.)

After the promotion, Sergio gave up helping his co-workers with their jobs. (RT 1234.) Although he continued to perform his required duties, he did not go out of his way to take on additional responsibilities, in sharp contrast to his efforts before the promotion. (RT 1133, 1136, 1502, 1508-1509, 1523.) In the words of Ms. Voss, "he was no longer enthusiastic anymore. No longer felt it mattered. Why put out 100 percent everyday when, where did it get me. It didn't get me the job." (RT 1911.) After Sergio failed to obtain the promotion, manager Kristin Strickland no longer saw the boy who was always eager and interested to help. (RT

1523.)

According to Dr. Wells, everything was hopeless to Sergio and there was no point in his trying if this was how Target would treat him. He was now a failure at everything. Sergio felt completely unloved and absolutely frustrated. He began to develop symptoms such as insomnia, anxiety, and agitation. (RT 2177.) His loss of appetite was consistent with that. He lost a good deal of weight and seemed to be starving himself. (RT 2178.)

Sergio did not want to work at the La Verne store anymore, and was looking for a different job at another Target store. (RT 1135-1136, 1240, 1913.)

Nevertheless, by early September 1993, Sergio appeared to be rebounding, at least outside of Target. (RT 1972-1973.) He worked on his Volkswagen every day that he was off. Alex Cosey offered that Sergio "was trying to be independent. He had his own car, his own job. He was working on getting his own apartment. He was happy. You never seen him without a smile. When you seen him with a smile it was just a Sergio smile." (RT 1969.)

Some time in early to mid-September 1993, Michelle Horner gave her mother-in-law, Karen Horner, an ultimatum to remove a bicycle from her property or Michelle Horner would throw it in the trash. (RT 1242, 1244, 2014.) Sergio had left the bicycle at Michelle Horner's house months before; Michelle Horner's husband and father painted it a "nasty green" to play a joke on Sergio. Because it was such an eyesore, Sergio did not want to ride the bicycle and take it home. After Michelle Horner issued the ultimatum, Karen Horner purchased some black paint, which Sergio used to paint the bicycle. (RT 1113, 1242-1244, 2012-2015, 2036.)

On September 4, 1993, Robert Comeau began working at the Target

store. (RT 1375, 1786.) His friend, Lee Thompson, had begun working at the store a week earlier on August 23, 1993. (RT 1526.)

Target fired Mr. Comeau because of his involvement in a credit card scam at the store. (RT 1387-1388.) According to Mr. Comeau, on about September 6, 1993, he witnessed Sergio say something about a raise to Robin Shirley, something about her not deserving it, and that he deserved the raise or promotion. Lee Thompson told Sergio to get away, and Sergio left. (RT 1380-1381.)

Also according to Mr. Comeau, a few days later he heard Sergio and Mr. Thompson arguing over a radio, with Sergio saying that he would get Mr. Thompson back one day. (RT 1387.) Mr. Comeau denied that Robin Shirley was present during the argument. Tracy Robinson testified that Ms. Shirley was there, and she did not recall seeing Mr. Comeau with Sergio, Ms. Shirley, and Mr. Thompson at the time of the argument. (RT 1396, 1843-1845.) Moreover, Ms. Robinson did not corroborate that Sergio said he would get Mr. Thompson back one day. (RT 1834-1858.) According to Mr. Comeau, a rivalry developed between Lee Thompson and Sergio Nelson, each disliking the other. (RT 1399-1400.)

Mr. Comeau reported to a Target supervisor that Sergio had made negative comments about Robin Shirley. (RT 1490.) On September 11, 1993, manager Kristin Strickland met with Sergio to reprimand him for his purported comments. (RT 1488, 1490.) She gave Sergio a "Phase Two Warning." (RT 1487; exh. 20.) The warning stated that if Sergio did not meet certain defined company requirements within 15 days, or if he repeated the prohibited conduct within a certain time (6 or 12 months), he would be fired. (RT 1497.)

During the meeting, Ms. Strickland generally informed Sergio of the

comments that Mr. Comeau reported hearing. (RT 1490-1491.) Sergio denied saying anything negative about Ms. Shirley. (RT 1492.) Ms. Strickland felt that Sergio reacted to her reprimand "like he didn't care anymore." (RT 1520.) Based on Sergio's response to Mr. Comeau's claim, Ms. Strickland concluded that Sergio either did not know what she was talking about or he did not make the comments about Ms. Shirley. (RT 1493.)

Sergio resigned the day of the Phase Two Warning. (RT 1498.) He later told the police that he quit his job because of "self-esteem, mentally he couldn't handle it [and] people [were] treated badly around the store." (RT 1750.)

After Sergio resigned from Target, his aunt, Yvonne Cosey, lost her job, and asked Sergio and her two sons, Alex Cosey and Phillip Davis, to help pay the household bills. She was unaware at that time that Sergio had quit his job at Target. Sergio became very withdrawn and quiet. He stopped eating and lost weight. Ms. Cosey saw a change in Sergio's personality, as if there were two different Sergios. (RT 1937-1940, 1951.)

Although Lee Thompson had only worked for Target a short time, he and Robin Shirley were very close at the time of their deaths on October 2, 1993. (RT 1246, 1255, 1406, 1842, 1857.) Ms. Shirley had her eye on Mr. Thompson even before he came to work for Target. She told her friend, Tracy Robinson, that a new guy (Lee Thompson) was going to start at Target, he was very cute, and she already liked him a lot. After Mr. Thompson started working at Target, he and Ms. Shirley spent a great deal of time together. (RT 1842, 1857.) Robert Comeau agreed that it was not uncommon for Ms. Shirley and Mr. Thompson to be together. (RT 1406.) Frances Voss saw them together often, and it was apparent to her that Ms.

Shirley and Mr. Thompson had a strong relationship even though he had worked at Target only a few weeks. (RT 1916, 1931.) According to Karen Horner, they were together all the time; she suspected they were having an affair. (RT 1255.)

Karen Horner constantly fed Sergio information that upset him about Robin Shirley's involvement with others. (RT 2167.) But Ms. Horner never heard Sergio say anything negative about Ms. Shirley. On the contrary, "He always stuck up for her," even when Ms. Horner spoke ill of her. (RT 1214, 1239.) Sergio confided in Alex Cosey that he was having problems at the job, but Sergio was not mad or upset with Robin Shirley for getting the promotion. (RT 1312.)

Earlier, in May 1993, members of Happy Town, a local criminal street gang, threatened Sergio's housemate and cousin, Phillip Davis, with a gun. The gang member directed the threat towards the entire family living at the Leebe Street home, which included Sergio's aunt, Yvonne Cosey, and his grandmother. As a result of the threats, Sergio and his cousins, Phillip and Alex, kept guns in the house for protection. Sergio kept his gun, which he obtained in June, under his pillow. Sergio was also afraid of being attacked by gang members outside his home so he carried a gun in the neighborhood, which was controlled by Happy Town. (RT 1309, 1317-1318, 1358-1360, 1693, 1695-1697, 1763, 1937.)

On Thursday night, September 30, 1993, Sergio went to the Los Angeles County Fair in Pomona with the Horners – Karen, her son Alan, and daughter-in-law Michelle. (RT 2304.) An individual, who appeared to Alan Horner to be a gang member, hit Mr. Horner. Sergio stuck up for him and fought the assailant. At one point the attacker pointed a gun at Sergio. The fight broke up without a shot being fired. (RT 2029, 2304-2307; 2311,

2319-2322.)

The next night when he went out, Sergio carried the gun that he had obtained to protect himself and his family from the Happy Town street gang. (RT 1309, 1317-1318, 1358-1360, 1693, 1695-1697, 1763, 1937.) Sergio told Dr. Wells that in the early morning hours of October 2, 1993, he had trouble sleeping and rode out to Target on his bicycle, without any clear idea of what he was going to do, although he thought of killing himself with his gun. (RT 2213, 2381-2382.) As almost always, Sergio wore dark clothing, and a black baseball cap. (RT 1040, 1314-1315, 1355.)

Sergio related to Dr. Wells that when he arrived at the store, Robin Shirley's truck was parked in its usual spot in front. (RT 1377.) Sergio also saw a second vehicle, a brown Plymouth, which he had no reason to associate with Lee Thompson. Since he started working at Target on August 23, 1993, Lee Thompson usually rode to work on his motorcycle or was driven by his mother; on very rare occasions he drove his mother's car, a brown Plymouth. (RT 1377, 1526, 2449.) Thus, when she later went into work that morning, Karen Horner did not recognize the brown car. (RT 1141.)

As Sergio approached the car, he thought he saw Mr. Thompson in the driver's seat, bending down as if he was picking something up from the floor. Thinking that Mr. Thompson was reaching for a gun and sensing immediate danger, Sergio fired at Mr. Thompson. (RT 1083-1084, 2213, 2376.) Sergio could not remember what immediately followed, although he remembered riding away on his bicycle. (RT 2214, 2376, 2378.) Dr. Wells explained that sometimes individuals lose temporary awareness ("dissociation") during, as here, a traumatic event. (RT 2377.)

Dr. Wells testified that Sergio perceived Mr. Thompson as a threat

because he had threatened Sergio on two occasions. (RT 2212.) Monica Vergara, Mr. Thompson's fiancee, told the jury that Mr. Thompson often got into fights with men at work. (RT 2447, 2451.)

La Verne police officer Larry Ross found the bodies of Lee Thompson and Robin Shirley in the front seat of Mr. Thompson's mother's brown Plymouth. (RT 1083-1084, 1377.) Mr. Thompson had been shot five times, while Ms. Shirley had been shot three times. (RT 1549, 1558.) Los Angeles County Sheriff's Department serologist Elizabeth Devine, whose primary expertise was in blood and blood stain patterns, opined that Ms. Shirley had been shot before Mr. Thompson. She based her opinion on the assumption that both Mr. Thompson and Ms. Shirley were sitting back in their seats when they were shot. Ms. Devine had attended a one-week crime scene reconstruction class. Ms. Devine never saw the victims in this case, and did not view the crime scene. (RT 1612, 1626 1632-1634.)

When Officer Ross first approached the brown Plymouth, it appeared to him that there was only one person in the car. Mr. Thompson's body was slumped over with his head on the right floorboard. Ms. Shirley's body was on the right side of the car, slightly slumped over towards the center with her head tilted toward the left. (RT 1080, 1084, 1086.) Dr. James Ribe, the coroner who performed the autopsy on Mr. Thompson, testified that the wounds to the back were in an upward position, consistent with the conclusion that Mr. Thompson must have been tilted forward when he was shot. (RT 1558, 1570-1571.)

Both Ms. Shirley and Mr. Thompson had their shoes off. (RT 1096.) A pair of socks and a plaid jacket were on the back seat. (RT 1585-1586.) The front windows were closed, the back windows were rolled down about half way, the radio was on, and the engine was off. (RT 1084, 1096.)

Richard Hart testified that he was with an acquaintance across the street from Target at a 7-Eleven store when the shooting occurred about 3:30 or 3:40 a.m. He heard around five to eight gunshots. He saw a person fire a gun into one of two cars parked in front of the Target store. After the initial firing, the person started walking away from the car; Mr. Hart heard a gurgling or rumbling sound coming from the direction of the car. The person walked back and fired two or three more rounds into the car, and then walked away. (RT 1027-1032, 1035.) Mr. Hart's acquaintance yelled at the person, who looked in their direction, started walking down the sidewalk, and then ran off. (RT 1036-1037.) Mr. Hart called 911 and said that "the guy fired four shots, took 10 steps, went back and fired one more, and then ran." (Exh. 6.)[7] Although the distance between Mr. Hart and Mr. Thompson's car was over 130 yards, Mr. Hart was able to identify Sergio as the person he saw because the lights in the parking lot were so bright. (RT 1037, 1042-1043, 1052-1053, 1055, 1058, 1064, 1068, 1078, 1141, 1812, 1814.)

Sergio was arrested at home on the evening of October 2, 1993. (RT 1704-1705.)

Dr. Wells determined that on the morning of October 2, 1993, Sergio was in the early stages of paranoid schizophrenia. (RT 2155-2156.) As Orange County's Chief of Forensic Psychology, Dr. Wells's "basic work [was] seeing late adolescents to early young adults developing symptoms of schizophrenia and becoming more and more dysfunctional." (RT 2129, 2208-2209.) Although Dr. Wells had extensive experience in diagnosing

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[7]At the penalty phase retrial, Mr. Hart agreed that his statements on the tape of the 911 call were probably more accurate than his present recollection. (RT 4058.)

schizophrenia in teenagers, he did not initially detect that Sergio suffered from the mental disorder while interviewing him. As Dr. Wells testified, "One does not pick this up simply by talking with this individual." (RT 2231.) Not until Dr. Wells subjected Sergio to a battery of psychological testing did he conclude that Sergio had the illness. (*Id.*) Nevertheless, Dr Wells conceded that the tests were not completely reliable in that there was approximately a 10-15 percent chance that the tests were unreliable. (RT 2191.)

Although psychiatrist Ronald Markman did not examine Sergio, he testified for the prosecution that he would not conclude that Sergio was a paranoid schizophrenic because he had concerns over the validity of the testing done by Dr. Wells. (RT 2460-2462, 2483.) Dr. Markman did not disagree with Dr. Wells's diagnosis that Sergio was afflicted with a second mental disorder, dysthymia, which Dr. Markman defined as a pervasive depression of over two years duration. (RT 2156, 2508.) Nor did he refute Dr. Wells's view that on the morning of October 2, Sergio was in a state of enormous turmoil, suffered from insomnia, exhibited fragmented thought and disassociation, and could not remember what happened in the car. (RT 2212-2213, 2426.)

Moreover, Dr. Markman did not dispute Dr. Wells's opinion that loss of impulse control is a symptom of schizophrenia (RT 2332), or his diagnosis that Sergio manifested a number of different personality disorders, which tended to cause him to function in psychologically impaired ways, including acting impulsively. (RT 2155-2156, 2172.) Similarly, Dr. Markman did not disagree with the earlier psychiatric evaluation by Dr. Herb Glazeroff that Sergio had acted "impulsively" in taking an overdose because he was suffering from an "adjustment disorder

with depressed mood" (RT 2063-2064, 2067, 2077-2079), or the concurrence of Dr. Wells that Sergio's suicide gesture was an impulsive act (RT 2169, 2172).

The Penalty Phase Retrial

The Prosecution Case

At the penalty phase retrial, the prosecution presented essentially the same evidence presented during the first trial's guilt phase. (RT 4028-4838.) In addition the prosecution offered victim impact testimony by four witnesses.

Robert Shirley, Robin Shirley's husband, testified that he and his wife were married for 11 years and had two children. (RT 4672.) Ms. Shirley's children were everything to her, and were her reason for living. She loved them very, very much. (RT 4687-4688.) Mr. Shirley also testified that his wife was his best fiend, he loved her dearly, and they did everything together. (RT 4689.)

Ellis Verdugo, Robin Shirley's mother, told the jury that Robin had three living siblings at the time of her death. (RT 4815.) Ms. Verdugo saw Robin every day, and they were very close. (RT 4816-4817.) She missed her daughter, as did Robin's children, who Ms. Verdugo believed were doing okay since their mother died, though it was not the same. (RT 4821.)

Monica Vergara, Lee Thompson's fiancee, testified that Lee was like Superman, always trying to help somebody and doing the best that he could. (RT 4696.) They did everything together including spending time with Lee's family, which was mostly what he liked to do. (RT 4697-4698.) He was the only person she could really depend on. (RT 4701.)

Clara Thompson, Lee Thompson's mother, told the jury that Lee had two brothers and a sister. (RT 4823.) Lee was a really good son who was

never in trouble with the police. (RT 4824.) He loved his family and they loved him. (RT 4825.) Lee was very helpful to his family, especially to his mother and his brother, Ernie, who cried when he learned of Lee's death. (RT 4826.) Lee meant the world to his mother and she missed him badly. (RT 4827.) Her life had stopped since his passing. His brothers and sisters missed him as well. (RT 4828.) Lee had a lot of dreams including marrying Monica, getting a good job, going to college, and having children. (RT 4830, 4832.) Ms. Thompson felt sick, empty, and as if her heart had been ripped out when informed of Lee's death. (RT 4833.) Not one day went by that she had not thought about Lee. (RT 4834.)

The Defense Case

Sergio's grandmother, Catalina Miller, testified through a Spanish interpreter. Growing up, Sergio spent a lot of time in her home. He was a very sweet and kind boy. Sergio and his grandmother shared a very special relationship. It was obvious that Sergio loved his grandmother. One of his teachers once told his grandmother that of all the children Ms. Miller took to school, Sergio was the one who loved Ms. Miller the most. Sergio always talked to his grandmother and showed her much respect. (RT 5274-5278.)

Whatever she told him to do, he would do it. He was concerned about her, and if she had any problems, he would help her. Sergio also did chores, like cleaning the house and clearing the yard. If she had medical appointments or needed groceries, he would help by giving her a ride and making the appointments with the doctor. Since he was a child, Sergio was always supportive of his grandmother. (RT 5278.)

For Mother's Day 1993, Sergio gave his grandmother some dishes and a microwave oven. Sergio treated her as if she were his actual mother.

(RT 5279-5280.)

Ms. Miller owed a lot of money to people and was desperate. Everyone around her realized that. She asked Sergio for help. She wanted to pay off all her debts and have one loan on the house. She told Sergio to look for a loan company, which he found, to see if they could pay off her debts. The people from the loan company suggested that Sergio add his name to the title of her house because he was also going to help with the loan payments. (RT 5280-5283.)

After obtaining the loan, Sergio's grandmother realized that Sergio had lost his job. He was very sad and looked very serious all the time. He would hardly talk. Sergio was a soft-spoken person, but after he lost his job, he became even less talkative. (RT 5285.)

Sergio was a caring person and a very good boy. Sergio's grandmother loved him dearly with all her heart. (RT 5285-5286.)

Sergio's aunt, Yvonne Cosey, testified that Sergio's mother was not supportive of Sergio. (RT 5188.) In 1992, Sergio called his aunt on Thanksgiving. He sounded really happy. But then he called back later and was crying. Sergio wanted his aunt to pick him up. He was upset that his mother and her boyfriend had verbally abused him. (RT 5090-5191.) Sergio was very hurt because his mother's boyfriend was cursing him out, and Sergio's mother joined in the attack, instead of helping him. (RT 5239-5240.) Sergio's mother told the family that as soon as Sergio turned 18, she wanted him out of the house. (RT 5188.)

During the summer of 1993, Ms. Cosey lived with her mother, Catalina Miller, and her sons, Phillip Davis and Alex Cosey. Sergio moved into the house in the beginning of June 1993, when he was 18. (RT 4705; 5172-5173.) Because Sergio's mother did not support him emotionally or

financially, his grandmother and aunt did what they could to provide support and love for Sergio. (RT 5180-5181.) Sergio gave gifts to his grandmother and aunt. (RT 5188.)

Sergio had a great relationship with his grandmother. Sergio loved and respected her. A close bond developed between Sergio and his grandmother when he was an infant. (RT 5180.) If there was anything his grandmother needed in the yard, or electrical work done, Sergio would buy parts and fix it. He did other tasks without being asked. Sergio was fluent in Spanish. If his grandmother received a letter, she would ask Sergio to interpret it. (RT 5250-5252.)

Ms. Cosey was laid off from her job, and her unemployment payments ran out in August 1993. She needed help paying the bills. (RT 5178.) Sergio's grandmother was also worried about the financial situation. She was heavily in debt in September, with bills continuing to pile up. (RT 5189.) The financial crisis created tension with Sergio. (RT 5179.) Sergio's grandmother tried to borrow money, but she could not find anything. (RT 5181.) Sergio found a lender to refinance his grandmother's house. (RT 5180.)

Elisabeth Temme, a real estate loan officer, testified that on September 10, 1993, she met with Sergio and Catalina Miller. Ms. Temme understood from Sergio that he was worried about his grandmother's ability to keep her home and make the payments on the home. He therefore wanted to assume responsibility for the payments. Ms. Temme believed that Sergio was genuine in his desire to help his grandmother. (RT 5081-5087.)

Ms. Cosey further testified that Sergio was communicative as of September 10, 1993. (RT 5252.) But within a few days after the loan

people came to the house, Ms. Cosey had a conversation with Sergio and her sons about paying some bills. At that time, Sergio was reluctant to come out of the room and appeared to be very depressed. He did not say very much; he just nodded his head. (RT 5222.) When Ms. Cosey told Sergio that he needed to help pay some bills, Sergio failed to tell her that he had just lost his job on September 11, 1993. (RT 5229.) Sergio was withdrawn, depressed and upset. Ms. Cosey noticed it even more so after the discussion about paying the bills. Ms. Cosey never again saw the old Sergio that she had seen in the past, the person who was carefree and happy. (RT 5231.)

Sergio stopped eating and started losing a lot of weight. (RT 5185.) Sergio would go to his room and not say anything to anyone. (RT 5186.) There was a drastic change in Sergio's personality from months earlier. (RT 5186.) He was isolating himself. (RT 5187.) Sergio was in deep depression. (RT 5255.)

It was completely out of character for Sergio to have killed those two people. When Sergio would harm someone, he would apologize. He would try to fix it or say he was sorry. When he was growing up, he was not vengeful and angry. He was very helpful. He always wanted to volunteer, asking his aunt what he could help with. He always did the laundry and dishes. He enjoyed going to church and playing Little League. Sergio had plans. He wanted to go to college and get his degree. Ms. Cosey loved him as if he were her son. (RT 5195-5196.)

Consuelo Zavala Garcia, Sergio's other aunt, testified that Sergio was very affectionate toward his grandmother, and he helped her whenever she needed it. When Sergio was in grade school, his grandmother took care of the children, and Sergio helped her often with all the children. As Sergio

matured, he was very good and very affectionate. In terms of his personality, he was very mild-mannered. He was not boisterous. Sergio's aunt loved him very much and would give her life for him. (RT 5261-5268.) Sergio was a very good boy. (RT 5270.)

Sergio's mother, Maria Nelson, testified that Sergio's father, who had drug problems, was not part of helping Sergio grow up. Sergio's mother held two jobs at a time that kept her out of the house including weekends. (RT 5329-5330.)

Sergio was a good student and enjoyed church. (RT 5332.) Sergio's mother loved Sergio. She raised a great son. (RT 5335.)

Raymond Nieto testified that his sons, Ray and Eric, were friends with Sergio, and he had known Sergio since the third grade. Sergio was always a good kid and always welcome in Mr. Nieto's house. (RT 5120-5123.) Sergio participated in school sports and had good grades. (RT 5126.) He showed Mr. Nieto respect and was always polite to him. Sergio was often with Mr. Nieto's family. Sergio would help out all the time, cleaning up the yard and pool. (RT 5140-5142.)

Mr. Nieto became close to Sergio in part because Sergio's mother really did not care much about Sergio. There were times when Sergio would be over at Mr. Nieto's house until midnight, but Sergio's mother would not even bother to call the house to see where her son was. Sergio's mother started seeing a boyfriend and just completely neglected Sergio. (RT 5125.)

Sometimes Sergio had to sneak into his mother's house because she would not answer the door or she was not there. She was not a good mom. (RT 5140-5142.) Mr. Nieto felt sorry for Sergio. (RT 5141.)

Mr. Nieto met Sergio's father, who just happened to be passing in

front of Mr. Nieto's house, when Sergio said, "that's my dad." Sergio said he did not have a picture of his dad, so Mr. Nieto's wife came out and took a picture of the two together. That was the first picture Sergio had ever taken with his dad. (RT 5127.)

In August 1993, Sergio had a Volkswagen and was very fond of it. He worked on it constantly, day and night. One day Sergio's dad borrowed the car, and although he was supposed to bring it right back, he took off with it for a week. It was the first time that Sergio had seen his dad in quite awhile, and Sergio was depressed over it. Sergio talked about leaving and killing himself. (RT 5130-5134.)

During that time, there was a change in Sergio's personality and speech. He was depressed all the time. Before he had always been "real hyper." Mr. Nieto and Sergio used to kid around a lot. Sergio used to tell Mr. Nieto and his wife that they were his mom and dad. When Sergio had problems, he would talk to Mr. Nieto, who was very concerned for Sergio's well-being. Sergio told Mr. Nieto that he had been put down at work. He was upset about not getting the promotion. Sergio took a lot of pride in his work. (RT 5134-5138.)

Having known Sergio all his life, Mr. Nieto was surprised to hear about the shooting. It was totally out of character, just like day and night. But Mr. Nieto knew that Sergio was going through depression. Mr. Nieto's son, who does not cry easily, worried and cried about Sergio because Sergio was contemplating suicide. Sergio was serious about killing himself. (RT 5158.) Before, Sergio had always been a happy-go-lucky boy and always straightforward. He never raised his voice. He was a real good kid and not an aggressive type kid. Sergio was the most mellow person you could meet. Mr. Nieto loved Sergio. (RT 5142-5144, 5158.) Everybody liked Sergio.

(RT 5146.)

Mr. Nieto and his family left for vacation in September. He believed that if he had been in town in September, he might have prevented this tragedy from happening. (RT 5164-5165.)

Sergio's friend, Johnny Lopez, testified that he was shocked when he heard that Sergio was involved in the shooting because Sergio was not that type of person, far from it. It was totally out of character. Sergio was really caring. Mr. Lopez believed that Sergio had a tough childhood and that basically he brought himself up. Sergio worked at Target so that he could get out of the neighborhood that Mr. Lopez and Sergio came from. Sergio was able to avoid drugs in the neighborhood, and he did not drink any alcohol. He did not have any gang affiliations. Sergio was a really nice person and all the words to describe him were positive. (RT 4152-4153, 4188.)

Mr. Lopez knew that Sergio worked at Target and was proud of him. Sergio loved his job; it made him happy. Sergio told Mr. Lopez many times that he was proud to be a Target employee, and that he was making something of himself. Target was a big part of Sergio's life. (RT 4155-4157.)

Sergio did not have a father at home. Occasionally Mr. Lopez saw Sergio's father, a heroin addict, on the street. He was not a father figure. (RT 4159, 4184.) Sergio's mother was always at work. (RT 4160.)

Sergio was a sensitive person. Once when Mr. Lopez and Sergio were in a ball game at the church, Sergio accidentally knocked Mr. Lopez down, and Sergio was so sorry that he was almost close to tears. When he hurt someone, Sergio felt guilty about it. (RT 4171.)

When Mr. Lopez saw Sergio on the morning after the shooting,

Sergio was emotionless, far from the boy that he had seen the day before. Sergio was not normal. His face was different. He was not the Sergio that Mr. Lopez grew up with. (RT 4191-4192.)

Sergio's supervisor, Alejandro Sandoval, testified that he urged Target to promote Sergio. Sergio did his job so well that when there was a problem at another Target store, Sergio was hand-picked to go over there and straighten out the backlog. Because of Mr. Sandoval's encouragement to management, Sergio was grateful, and he thanked Mr. Sandoval profusely, over and over again, for his input. Mr. Sandoval and Sergio's coworkers were proud of Sergio because he overcame his background to hold that job. Sergio led a clean life. (RT 4221-4226.)

Sergio was a great friend to Mr. Sandoval. Sergio cared for people. (RT 4235.)

Alexander Cosey, Sergio's cousin and roommate, testified that Target was Sergio's life. Everybody in the neighborhood knew Sergio was Mr. Target. He proudly wore the red shirt and black pants of a Target employee. (RT 4508.) And Mr. Cosey was always proud of Sergio. He knew that Sergio had dropped out of school, but Sergio had overcome that by getting a job. (RT 4509.) Sergio was not attracted to gangs. He was not the kind of person who would be attracted to drugs. Mr. Cosey never saw Sergio drink alcohol. (RT 4510.)

Kristin Kiggins (formerly Strickland) testified that Sergio took pride in his work and that Sergio received Care Clubs from Target, which recognized an employee who provided good service. (RT 4378-4380.)

Rick Travis, the merchandise flow team leader at the La Habra Target store, testified that he was confronted with organizational problems at the store and needed help. Target sent some workers from other stores,

including Sergio who performed very impressively. He was an informal leader from day one, and did exactly what needed to be done. (RT 4764-4768.) Sergio got along with all of his coworkers in the store. (RT 4774.) Out of the 20 people that came from other stores, Sergio was the one that stood out. (RT 4775.)

Frances Voss, Sergio's mentor at Target, testified that Sergio was the kind of person who cared for others. He worked well with other workers. Sergio did not appear to be the kind of person who could be involved in the shooting. Ms. Voss and Sergio were friends; he was a caring individual who was sensitive to others. (RT 4880-4881.)

Robert Griffith testified that he was assigned to the same push crew team as Sergio. Mr. Griffith was retired and worked part time at Target. His impression of Sergio was that he was a nice boy. Sergio helped Mr. Griffith with his duties, especially with picking up bulky merchandise. (RT 4902-4905.) Sergio was a hard-working boy. (RT 4908.)

Tracy Robinson, Robin Shirley's close friend and coworker, testified that Sergio helped people. He was very enthusiastic about his job. He worked very hard. (RT 4910, 4914.)

Charles McGruder, a professor at Cal Poly, testified that when his son Justin was in the hospital, Sergio visited Justin several times. Sergio's visits helped Justin recuperate. Professor McGruder was very impressed with Sergio. He found him to be a hardworking young man, motivated, and career oriented. Sergio was outgoing, gregarious, and friendly. (RT 5114-5118.)

Joseph A. Kinney, the executive director of the National Safe Workplace Institute and an expert in workplace violence, testified based on numerous studies that he had conducted. He opined that the primary cause

of workplace violence is that the employees involved have such a tremendous emotional attachment to their workplace that, when things go wrong, such as the threat of a job loss, they react and engage in aggression toward the work environment. They cannot live without their job. (RT 4977-4979, 4982, 4983, 4986, 4990-4991.)

These workers do not have the interpersonal skills or social skills to effectively engage, so they become taunted, teased, and shunned, or they might have experienced some failure. There is a sociology and criminal term called the shun principle that is well established. When people become more isolated, they begin to feel much more stress and sometimes that stress has physical manifestations. Some people may be superficially fine, but inside they are extremely tortured. (RT 4992.)

These people are often unable to control themselves. They are unable to see the implications of what they are doing. Basically they act rashly or irrationally, and they do not think about the consequences of their actions. They may engage in activities that may be totally uncharacteristic with their past. As they become isolated, they begin in many cases to lose impulse control, and they become irrational and unstable. One would expect to see some history of mental health problems in them. (RT 4993.) Young perpetrators especially lack the necessary coping skills. (RT 4994.)

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ARGUMENT

1.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON HEAT OF PASSION WITH RESPECT TO MALICE MURDER AND VOLUNTARY MANSLAUGHTER.

A. Introduction

Despite strong evidence that Sergio killed in a heat of passion, the trial court refused to instruct the jury on the doctrine because the court believed that heat of passion was applicable only in the most inflammatory situations, such as where a husband walks in on his wife performing oral sex on another man. By failing to instruct on heat of passion, the court precluded the jury from determining that the presence of heat of passion negated malice and that Sergio was not guilty of first or second degree murder. Furthermore, by refusing to instruct the jury on heat of passion, the court prevented the jury from reaching the most plausible verdicts in this case, that Sergio committed voluntary manslaughter in the heat of passion in killing Robin Shirley and Lee Thompson. As a consequence, the trial court violated Sergio's rights under the federal and state constitutions, mandating reversal of the judgment in its entirety.

B. Proceedings Below

Citing *People v. Berry* (1976) 18 Cal.3d 509, 515 (passion need not mean rage or anger but may be any violent, intense, high-wrought or enthusiastic emotion, and the defendant may be aroused to a heat of passion by a series of events over a considerable period of time), the defense argued strenuously that the trial court should instruct the jury on voluntary manslaughter based on heat of passion. (RT 2535-2548; CT 309.) In response the court offered its understanding of heat of passion: "Heat of

passion is [w]here the husband comes in and finds his wife giving a head job to a guy on a piano stool and he went bonkers and killed him. Why that's the blue flame heat of passion; that's the classic case. [¶] I don't think there's anything that even comes close to that." (RT 2537.) The court further stated: "Heat of passion is kind of an instantaneous thing, is it not? It's not something that grows and matures and nurtures." (RT 2538.) The defense replied that the court was in error, and explained that under the law, provocation sufficient to arouse heat of passion may occur over a period of time, and heat of passion may be any severe overwrought emotion. (RT 2538-2539.) The defense insisted that when Sergio "walks up to the car and there's the person he desired and the adversary in the car and he gets inflamed jealousy, we have . . . passion[]." (RT 2539.)

The court admitted that it was "completely befuddled" (RT 2545), noted that the *Berry* case preceded the 1986 amendment to Penal Code section 192 (the voluntary manslaughter statute), and asked defense counsel if he had "something after 1986." Defense counsel responded that *Berry* was still the law. (RT 2546.) The court, nonetheless, denied the requested instruction (CT 341), while stating, "the other guy comes up to the car and the other guy is there and he's got his zipper down; that's one thing" (RT 2548), but "I still don't see [how] manslaughter in any stretch of the imagination would apply" (RT 2549).

Later, in discussing appropriate murder instructions, defense counsel argued that the court should also instruct the jury that heat of passion negates the element of malice for purposes of first and second degree murder, and that to show murder, the prosecution had to prove beyond a reasonable doubt that the killings were not done in a heat of passion. (RT 2626, 2627A, 2628A, 2652-2657; CT 309.) Again the court found that heat

of passion did not apply based on the evidence presented. (RT 2628A, 2657, 2669-2672; CT 343-348.) The court therefore rejected the instructions proposed by the defense. (RT 2657; see also RT 2669-2672 [court refuses to instruct jury with CALJIC No. 8.42 (explaining heat of passion), and 8.44 (no specific emotion alone constitutes heat of passion)]; CT 343-348.) Instead the court read a modified version of CALJIC No. 8.50, which told the jury that malice was absent if Sergio killed in imperfect self-defense; the court omitted the standard jury instruction's reference to heat of passion negating malice and the requirement that the prosecution prove beyond a reasonable doubt that the killings were not done in a heat of passion. (RT 2723; CT 309.)

Eventually the trial court instructed the jury on two theories of first degree murder: deliberate and premeditated murder and murder preceded by lying in wait. (RT 2716-2718.) The court also provided instructions on lesser included offenses: two theories of second degree murder – unpremeditated murder and a killing resulting from an unlawful act dangerous to life (RT 2719); voluntary manslaughter, as to Lee Thompson only, committed with the honest but unreasonable belief in the need to defend oneself (RT 2722; 2892-A); and involuntary manslaughter (RT 2725).

C. The Court Committed State Constitutional Error in Failing to Instruct the Jury That (1) Malice Is Absent If Heat of Passion Is Present, (2) the Prosecution Had the Burden of Proving Beyond a Reasonable Doubt That Sergio Did Not Act in a Heat of Passion, and (3) Voluntary Manslaughter Based on a Heat of Passion Theory Was a Lesser Included Offense.

In California, a criminal defendant has a state constitutional due process right to have the jury instructed on lesser included offenses when

the evidence raises a question as to whether all of the elements of the charged offense were present. (*People v. Breverman* (1998) 19 Cal.4th 142, 163.) Thus, on request, the trial judge must instruct on every included offense that the evidence tends to prove. (*People v. Noah* (1971) 5 Cal.3d 469, 478.) A court's duty to give requested defense instructions is greater than its obligation to instruct *sua sponte* on the general principles of law relevant to the case. (*People v. Stevenson* (1978) 79 Cal.App.3d 976, 985.)

"In a murder case, this means that both heat of passion and unreasonable self-defense, as forms of voluntary manslaughter, must be presented to the jury if both have substantial evidentiary support." (*People v. Breverman, supra*, 19 Cal.4th at p. 160; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1703-1704 ["Of course, when the evidence suggests that the defendant acted in the heat of passion upon adequate provocation, the trial court must instruct on voluntary manslaughter"].) Substantial evidence is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*Id.* at p. 162.) "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." (*Ibid.*) In deciding whether the evidence supports a requested instruction, trial courts should resolve all "[d]oubts as to the sufficiency of the evidence . . . in favor of the accused." (*People v. Tufunga* (1999) 21 Cal.4th 935, 944 [internal quotes and citations omitted].)

The duty to instruct on lesser included offenses arises "regardless of the trial theories or tactics the defendant has actually pursued. Hence, substantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself." (*People v. Breverman, supra*, 19 Cal.4th at pp. 162-163.) "This

means that substantial evidence of heat of passion . . ., and the duty to instruct . . . may therefore arise, even when the defendant claims that the killing was accidental, or that the states of mind on which these theories depend were absent." (*Id.* at p. 63, fn. 10.)

Heat of passion has a subjective and objective component. First, it requires substantial evidence that the defendant actually acted under the heat of passion. (*People v. Steele* (2003) 27 Cal.4th 1230, 1252.) "'[T]his heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.'" (*Id.* at pp. 1252-1253 [quoting *People v. Logan* (1917) 175 Cal. 45, 49].)

The defendant's heat of passion must also be due to sufficient provocation by the victim. (*Id.* at p. 1253.) No specific type of provocation is required, however, and the passion aroused need not be anger or rage, but can be any violent, intense, high-wrought or enthusiastic emotion. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.) The sufficiently provoked passion can even be jealousy. (*People v. Wickersham* (1982) 32 Cal.3d 307, 327; *People v. Berry*, *supra*, 18 Cal.3d at p. 551; *People v. Fenenbock*, *supra*, 46 Cal.App.4th at p. 1704; *People v. Hyde* (1985) 166 Cal.App.3d 463, 473; 1 Witkin & Epstein, Cal.Criminal Law (2d ed. 1988) Crimes Against the Person, § 512, p. 579.) Moreover, "provocation sufficient to reduce murder to manslaughter need not occur instantaneously, but may occur over a period of time." (*People v. Wharton* (1991) 53 Cal.3d 522, 569.)

In *People v. Bridgehouse* (1956) 47 Cal.2d 406, the defendant unexpectedly saw his wife's lover in the home of his mother-in-law, and then shot and killed the man. This Court held that the sudden sight of his wife's lover "was adequate provocation to provoke in the reasonable man such a heat of passion as would render an ordinary man of average disposition likely to act rashly or without due deliberation and reflection." (*Id.* at p. 414.)

In *Breverman*, a group of young men challenged the defendant to a fight, trespassed on his driveway, and hit his car with a bat and similar instruments. The defendant responded by firing 13 shots from his front door and driveway as the group fled, killing one victim 182 feet away. This Court held that "a reasonable jury could infer that defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition." (*People v. Breverman, supra*, 19 Cal.4th at pp. 163-164.)

In *People v. Barton* (1995) 12 Cal.4th 186, the Court concluded that when a killing occurred during a heated argument between the victim and defendant, which shortly followed an "upsetting" traffic incident between the victim and the defendant's 20-year-old daughter, there was substantial evidence of heat of passion. (*Id.* at p. 202.)

In *People v. Edgmon* (1968) 267 Cal.App.2d 759, the defendant quarreled with his father over work done on his car by an auto mechanic recommended by his father. The father hit the defendant over the head with a fishing pole, and the son retaliated by hitting his father over the head with a chair. The son went to his own house next door, returned 15 to 30 minutes later with his rifle, found his bleeding and incapacitated father lying prone on the kitchen floor, and shot him five times. The *Edgmon*

court stated that these facts did not preclude a reasonable jury verdict of voluntary manslaughter. (*Id.* at p. 766.)

Like *Bridgehouse*, *Breverman*, *Barton*, and *Edgmon*, the following cases illustrate that the crime of voluntary manslaughter and the concept of heat of passion cover a broad range: from a wife shooting her husband because he angrily told her to leave their home (*People v. Welborn* (1966) 242 Cal.App.2d 668, 673), to a husband strangling his wife because she *disclosed* her infidelity (*People v. Berry*, *supra*, 18 Cal.3d at p. 513); from shooting one's friend because he failed to close the front door to discourage any possible burglars (*People v. Strickland* (1974) 11 Cal.3d 946, 952-953, 958), to the defendant shooting his girlfriend because she admitted her infidelity and taunted him to shoot her (*People v. Borchers* (1958) 50 Cal.2d 321, 329); from the defendant shooting a victim who made an obscene gesture, to the same defendant shooting a second victim whom the defendant hated (*People v. McCowan* (1986) 182 Cal.App.3d 1, 15).[8]

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[8]Cf. *People v. Pride* (1992) 3 Cal.4th 195, 250 (defendant was not entitled to instruction on lesser included offense of voluntary manslaughter in capital murder prosecution, as evidence that defendant received criticism about his janitorial work *three days* before the crimes was "insufficient as a matter of law to arouse feelings of homicidal rage or passion in an ordinarily reasonable person"); *People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1235, 1246 (long history of criticism, reproach, and ridicule at the hands of defendant's grandparents not sufficient provocation given that two weeks intervened between defendant's last contact with his grandparents and their deaths). Here, Sergio was provoked when he unexpectedly came upon Robin Shirley and Lee Thompson sitting close together in the front seat of Mr. Thompson's car. Provocation has been found inadequate as a matter of law in the following cases: *People v. Rich* (1988) 45 Cal.3d 1036, 1112 (a victim's resistance against a rape attempt); *People v. Lucas* (1997) 55 Cal.App.4th 721,739 (name calling, smirking, or staring and looking

(continued...)

Thus, the trial court's understanding of heat of passion was clearly wrong. (RT 2545.) According to the court, which admitted that it was "completely befuddled" (RT 2545), heat of passion is where a husband comes in and finds his wife providing oral sex to another man. (RT 2537.) The court apparently believed that heat of passion requires a relationship akin to a husband and wife, or at least that the provocative couple be engaged in a sex act, and not merely necking, before the jealous suitor could invoke the heat of passion doctrine. (See RT 2548 [the court stated, "the other guy comes up to the car and the other guy is there and he's got his zipper down; that's one thing"].) The law, as shown, is to the contrary. (See, e.g., *People v. Breverman*, *supra*, 19 Cal.4th at pp. 163-164 [victim and defendant were strangers]; *People v. Bridgehouse* (1956) 47 Cal.2d at p. 414 [defendant unexpectedly saw his wife's lover in the home of his mother-in-law, and then shot and killed the man].)

In addition, the trial court apparently believed that *People v. Berry* was no longer good law because it predated the 1986 amendment to the voluntary manslaughter statute, Penal Code section 192.[9] Therefore, said the court, it wanted "something after 1986." (RT 2546.) Nevertheless, as

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[8](...continued)
stone-faced); *People v. Fenenbock*, *supra*, 46 Cal.App.4th at p. 1704 (revenge); *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1555 (refusing to have sex in exchange for drugs); and *People v. Dixon* (1961) 192 Cal.App.2d 88, 91 (insulting words or gestures). This Court has also suggested that mere vandalism to an automobile is insufficient for provocation. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 164, fn. 11; *In re Christian S.* (1994) 7 Cal.4th 768, 779, fn. 3.)

[9]The 1986 amendment made changes irrelevant to this case concerning vehicular manslaughter. (See Historical and Statutory Notes, West's Ann. Pen. Code foll. § 192.)

defense counsel correctly responded, *Berry* is still the law. (See *People v. Breverman*, *supra*, 19 Cal.4th at p. 163 [quoting *Berry* with approval].)

Here, there was substantial evidence that Sergio killed both victims in the heat of passion. Hence, the jury should have been instructed that the presence of heat of passion negates the element of malice in both first and second degree murder, and supports convictions for voluntary manslaughter.

Elizabeth Rylander, Robin Shirley's good friend and Sergio's co-worker, testified that Sergio was infatuated with Ms. Shirley. (RT 1897.) And according to Ms. Shirley's close friends and co-workers, Ms. Shirley, although married, was extremely flirtatious, particularly towards the younger male employees at Target. (RT 1836, 1841-1842, 1851-1852, 1917.) Tracy Robinson, testified that "[Robin] liked a lot of the new guys that came in, and she was very friendly with them." In fact, "every time a new guy came in she would flirt with him until another new guy came in . . . if she thought he was cute." While still living with her husband, Ms. Shirley pursued one young man and dated another, calling the latter at home a few times a week. (RT 1845, 1849, 1852, 1859-1862, 1905-1906, 1917, 2000-2004.) One co-worker agreed that pursuing young men was not totally out of character with Robin Shirley's home life. (RT 1918.)

Robin Shirley and Sergio developed a very close relationship, with Sergio having romantic feelings for her. (RT 1230, 1837, 1897, 1967, 2008.) In the process Ms. Shirley revealed to Sergio that her husband did not care about her. (RT 1970.) Karen Horner believed that Sergio and Robin Shirley were having an affair. (RT 2043.) At work Sergio and Ms. Shirley often spent their lunch hours and breaks together. She gave Sergio rides to and from Target. They also socialized outside of the store, playing

racquetball and basketball, going to each other's homes, telephoning one another many times a week, and even going to the movies together. (RT 1230, 1234-1235, 1312, 1412, 1514, 1837, 1839, 1900-1904, 1970-1971.)

On August 23, 1993, Lee Thompson began working at Target. (RT 1526, 4705.) On about September 6, 1993, Sergio had words with Ms. Shirley; Mr. Thompson intervened and told Sergio to leave. (RT 1380-1381.) A few days later, Sergio and Mr. Thompson argued over which radio station to play at work, and appeared on the verge of a physical fight when they were separated. (RT 1384-1386.) According to Robert Comeau, Mr. Thompson's friend, a rivalry developed between Lee Thompson and Sergio Nelson, each disliking the other. (RT 1399-1400.) On September 11, 1993, the day after Sergio and Mr. Thompson almost came to blows, Sergio resigned from Target. (RT 1487-1488, 1490, 1498.)

Although Lee Thompson had only worked for Target a short time, he and Robin Shirley were very close at the time of their deaths on October 2, 1993. (RT 1246, 1255, 1406, 1842, 1857.) Ms. Shirley had her eye on Mr. Thompson even before he came to work for Target. She told her friend, Tracy Robinson, that a new guy (Lee Thompson) was going to start at Target, he was very cute, and she already liked him a lot. After Mr. Thompson started working at Target, he and Ms. Shirley spent much time together. (RT 1842, 1857.) Robert Comeau agreed that it was not uncommon for Ms. Shirley and Mr. Thompson to be together. (RT 1406.) Frances Voss saw them together often, and it was apparent to her that Ms. Shirley and Mr. Thompson had a strong relationship even though he had worked at Target only a few weeks. (RT 1916, 1931.) According to Karen Horner, they were together all the time; she suspected they were having an affair. (RT 1255.) Ms. Horner constantly fed Sergio information that upset

him about Robin Shirley's involvement with others. (RT 2167.)

Sergio told Dr. Wells that in the early morning hours of October 2, 1993, he had trouble sleeping and rode out to Target on his bicycle, without any clear idea of what he was going to do. (RT 2213, 2381-2382.) Sergio carried a gun, which he had obtained to protect himself and his family from Happy Town, a local criminal street gang whose members had threatened the family. (RT 1309, 1317-1318, 1358-1360, 1693, 1695-1697, 1763, 1937.)[10] In fact a gang member had pointed a gun at Sergio just two nights before. (RT 2029, 2304-2307; 2319-2322.)[11]

Sergio further related to Dr. Wells that when he arrived at the store, Robin Shirley's truck was parked in its usual spot in front. (RT 1377.) Sergio also saw a second vehicle, a brown Plymouth, which he had no reason to recognize as Mr. Thompson's car. Since he started working at Target on August 23, 1993, Lee Thompson usually rode to work on his motorcycle; on very rare occasions he used his mother's car, a brown Plymouth. (RT 1377, 1526.) Thus, when she later went into work that morning, Karen Horner did not recognize the brown car. (RT 1141.)

As Sergio approached the car, he thought he saw Mr. Thompson in the driver's seat, bending down as if he was picking something up from the floor. Thinking that Mr. Thompson was reaching for a gun and sensing immediate danger, Sergio fired at Mr. Thompson. (RT 1083-1084, 2213,

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[10]See *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1337 (discussing the Happy Town criminal street gang in Pomona).

[11]On Thursday night, September 30, 1993, Sergio went to the Los Angeles County Fair in Pomona, where a gang member assaulted Sergio's companion, whom Sergio sought to defend. During the encounter the gang member pointed a gun at Sergio. (RT 2029, 2304-2307; 2319-2322.)

2376.) Sergio could not remember what immediately followed, although he remembered riding away on his bicycle. (RT 2214, 2376, 2378.) La Verne police officer Larry Ross found the deceased bodies of Lee Thompson and Robin Shirley in the front seat of Mr. Thompson's mother's brown Plymouth. (RT 1083-1084, 1377.) Mr. Thompson had been shot five times, while Ms. Shirley had been shot three times. (RT 1549, 1558.) Los Angeles County Sheriff's Department serologist Elizabeth Devine opined that Ms. Shirley had been shot before Mr. Thompson. (RT 1612, 1626 1632-1634.)

When Officer Ross first approached the brown Plymouth, it appeared to him that there was only one person in the car. Mr. Thompson's body was slumped over with his head on the right floorboard. Ms. Shirley's body was sitting in the right seat, slightly slumped over towards the center with her head tilted toward the left. (RT 1080, 1084, 1086.) Dr. James Ribe, the coroner who performed the autopsy on Mr. Thompson, testified that the shots Mr. Thompson received to his back were all in an upward position, and were consistent with the conclusion that Mr. Thompson must have been tilted forward when he was shot. (RT 1558, 1570-1571.)

Both Ms. Shirley and Mr. Thompson had their shoes off. (RT 1096.) A pair of socks and a plaid jacket were on the back seat. (RT 1585-1586.) The front windows were closed, the back windows were rolled down about half way, the radio was on, and the engine was off. (RT 1084, 1096.)

The foregoing demonstrates substantial evidence of heat of passion. From the testimony of Officer Ross and Dr. Ribe, a fair inference is that Mr. Thompson was bent over into Ms. Shirley's lap when they were shot. Both Ms. Shirley and Mr. Thompson had their shoes off. Clothing was on the back seat. There was evidence that the two had been having an affair.

When Sergio walked up to the car, he had no reason to believe that Ms. Shirley and Mr. Thompson were in the car. Mr. Thompson had worked at Target for less than three weeks when Sergio quit, and during that time he had rarely driven his mother's car to work. Karen Horner did not even recognize the car after Mr. Thompson had worked at Target for almost six weeks.

A jury could reasonably conclude that Sergio fell in love with Robin Shirley, he developed a rivalry with and disapproval of Lee Thompson, and when he discovered Ms. Shirley in an intimate moment with the rival who quickly replaced him, Sergio felt betrayed by Ms. Shirley and extremely jealous of Mr. Thompson. Provoked by the unexpected shock of seeing Robin Shirley in a romantic situation with his rival, Sergio lost control and killed them both.

Under these circumstances "a reasonable jury could infer that defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition." (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 163-164.) Accordingly, the trial court erred under the California constitution in failing to instruct the jury on heat of passion. (*Id.* at p. 160.)

D. The Court Violated Sergio's Federal Due Process Rights in Failing to Instruct on Heat of Passion with Respect to Malice Murder and Voluntary Manslaughter.

The Due Process Clause of the United States Constitution requires the prosecution to prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) When murder is charged and there is evidence of heat of passion, the prosecution has the burden of proving the essential element of malice beyond a reasonable doubt by showing the absence of

heat of passion. (*People v. Rios* (2000) 23 Cal.4th 450, 462, citing *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 ["the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case"]; *People v. Bloyd* (1987) 43 Cal.3d 333, 349].)

In addition, "a criminal defendant is entitled to adequate instructions on the defense theory of the case." (*Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739; *United States v. Mason* (9th Cir. 1990) 902 F.2d 1434, 1438 ["A defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence"]; *People v. Elam* (2001) 91 Cal.App.4th 298, 308 ["The court must instruct the jury with respect to every defense theory of the case that is supported by substantial evidence"].) Thus, a defendant has a due process right to a lesser included offense instruction if necessary to safeguard "the defendant's right to adequate jury instructions on his or her theory of the case." (*Solis v. Garcia* (2000 9th Cir.) 219 F.3d 922, 929; see also *People v. Breverman, supra*, 19 Cal.4th at p. 187 (dis. opn. of Kennard, J.) ["when a defendant is charged with murder and there is sufficient evidence to support a conviction for voluntary manslaughter on a 'heat of passion' theory, failure to instruct on that theory violates the defendant's federal constitutional rights to a jury trial and to due process of law"].)

Finally, "denying an accused the right to make final arguments on his theory of the defense denies him the right to assistance of counsel." (*Conde v. Henry, supra*, 198 F.3d at p. 739.)

As shown, evidence was presented that Sergio, having fallen in love with Robin Shirley, unexpectedly came on her in an intimate moment with

his rival, Lee Thompson, and killed them both in a heat of passion. The trial court, however, refused to instruct the jury on heat of passion because it believed that heat of passion was only available in the most extreme situations, such as where a husband walks in on his wife having oral sex with another man.

By omitting the requirement from CALJIC No. 8.50 that the prosecution prove beyond a reasonable doubt the absence of heat of passion in this murder case (RT 2723; CT 309), the court failed to define accurately the malice element of murder. (*People v. Rios*, *supra*, 23 Cal.4th at p. 462 [CALJIC No. 8.50 has long provided that if there is evidence of heat of passion, the prosecution must prove beyond a reasonable doubt that heat of passion was lacking to establish the murder element of malice].) Therefore, the instructions in this case were defective under federal and state constitutional law. (*Neder v. United States* (1999) 527 U.S. 1, 10, 12 [an error in the instruction that defined the crime is an error of omission that violates the Sixth Amendment]; *People v. Flood* (1998) 18 Cal.4th 470, 479-480 ["instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions"]); *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1320-1321 [where unambiguous instruction omits element, constitutional error has occurred].)

Malice murder instructions that required the prosecution to disprove heat of passion, and voluntary manslaughter jury instructions based on heat of passion – instructions requested by the defense (RT 2626, 2627A, 2628A, 2652-2657, 2669-2672; CT 309, 343-348) – were also needed to safeguard Sergio's theory of the case. Because the trial court refused to

provide them, Sergio was denied his federal constitutional rights to a jury trial and due process. (*Conde v. Henry*, *supra*, 198 F.3d at p. 739.)

Trial counsel requested heat of passion instructions so that he could argue the defense theory of the case to the jury. (RT 2653 ["You leave the language, the heat of passion in there and then allow me to argue to the jury"].) In rejecting Sergio's proposed heat of passion instructions, the trial court precluded defense counsel from arguing his theory of the case, and thereby denied Sergio his Sixth Amendment right to assistance of counsel. (*Conde v. Henry*, *supra*, 198 F.3d at p. 739.)

E. Because There Was Strong Evidence That Sergio Acted in the Heat of Passion, the Failure to Instruct the Jury on That Theory Enhanced the Risk of Unwarranted First Degree Murder Convictions and Violated the Heightened Reliability Requirement of the Eighth Amendment.

Under the Eighth Amendment, a state rule that diminishes the reliability of the guilt determination is invalid. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) Here, the court's refusal to instruct the jury on heat of passion with respect to both malice murder and voluntary manslaughter diminished the reliability of the first degree murder convictions. Hence, the guilt and penalty judgments must be reversed. (*Id.* at p. 646.)

As the United States Supreme Court has repeatedly stated:

> [D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

(*Gardner v. Florida* (1977) 430 U.S. 349, 357-358 (plur. opn. of Stevens, J.).) Relying on this passage from *Gardner* and citing *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plur. opn. of Burger, C. J.), the *Beck* Court noted: "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638.) *Beck* next quoted *Lockett's* rationale for requiring more reliable procedures in capital sentencing determinations.

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to *circumstances of the offense proffered in mitigation* creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

(*Id.* at p. 638, fn. 13 [quoting *Lockett*, 438 U.S. at p. 605, italics added].) *Beck* then concluded: "The same reasoning must apply to rules that diminish the reliability of the guilt determination." (*Id.* at p. 638.)

Accordingly, under *Gardner*, *Lockett*, and *Beck*, two conclusions may be drawn: in a capital case, if a court rule diminishes the reliability of the guilt determination or precludes the jury from considering as a mitigating factor "'any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death'" (*People v. Griffin* (2004) 33 Cal.4th 536, 598 [quoting *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604]), then the court violates the Eighth Amendment. Here, court rules, specifically jury instructions, prevented the jury from considering that

heat of passion negated the malice element of first and second degree murder, and reduced the crimes to voluntary manslaughter. Moreover, the instructions prevented the jury from considering as a mitigating factor that Sergio acted in a heat of passion. Thus, the guilt determinations *and* the death verdict were not reliable, and the court deprived Sergio of his rights under the Eighth Amendment.

Beck not only relied on *Lockett* and *Gardner*, it cited *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (because "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two . . ., there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"), in holding that "if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the state] is constitutionally prohibited from withdrawing that option from the jury in a capital case." (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.) Thus, central to *Beck's* holding was the requirement under the Eighth Amendment and Due Process Clause that capital cases be subjected to heightened reliability in both the guilt and penalty determinations. (See also *Sumner v. Shuman* (1987) 483 U.S. 66, 72 [acknowledging "the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case"].)

Nevertheless, this Court has taken an extremely narrow view of *Beck* and its progeny. In *People v. Breverman*, *supra*, 19 Cal.4th 142, the Court concluded that "*Beck* is satisfied if a capital jury receives only a single noncapital third option between the capital charge and acquittal, since this relieves the all-or-nothing pressure to return an inaccurate capital verdict in

order to avoid acquitting the defendant entirely." (*Id.* at p. 167 [citing *Schad v. Arizona* (1991) 501 U.S. 624, 647].) *Breverman* held this view of *Beck*, while nonetheless observing that "[a] single third option may actually be of little value to either side if arbitrarily chosen and no closer to the jury's rational view of the evidence." (19 Cal.4th at p. 161, fn. 8.)

Contrary to *Breverman*, the high court would not deem *Beck* satisfied with an arbitrary and irrational lesser included instruction, given *Beck's* holding that "if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the state] is constitutionally prohibited from withdrawing that option from the jury in a capital case" (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638), and that the root of *Beck's* holding is the necessity for heightened reliability in capital cases. (*Ibid.*; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 ["we have held that the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case" (citing *Beck*)]; *Schad v. Arizona*, *supra*, 501 U.S. at p. 647 ["*Beck* was based on this Court's concern about 'rules that diminish the reliability of the guilt determination' in capital cases"]; *Spaziano v. Florida* (1984) 468 U.S. 447, 455 ["The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations"]; *Hopper v. Evans* (1982) 456 U.S. 605, 611 ["Our holding in *Beck*, like our other Eighth Amendment decisions in the past decade, was concerned with insuring that sentencing discretion in capital cases is channeled so that arbitrary and capricious results are avoided"].)

Breverman cited *Schad* in support of its conclusion that any single noncapital third option would satisfy *Beck*. (*People v. Breverman*, *supra*,

19 Cal.4th p. at 167.) But *Breverman* badly misread *Schad*.

As stated by the high court, the issue in *Schad* was "whether the principle recognized in *Beck* . . . entitles a defendant to instructions on *all offenses* that are lesser than, and included within, a capital offense as charged." (*Schad v. Arizona*, *supra*, 501 U.S. at p. 627 [italics added].) The defendant argued that under *Beck* he was entitled to a jury instruction on robbery, a lesser included offense of robbery murder, even though the jury was given the option of finding the defendant guilty of a lesser included noncapital offense, second degree murder. (*Schad v. Arizona*, *supra*, 501 U.S. at p. 645.) The high court did not simply conclude, as *Breverman* would have us believe, that *Beck* was satisfied because the jury received a single noncapital third option between the capital charge and acquittal. (*People v. Breverman*, *supra*, 19 Cal.4th p. at 167.) *Schad* went much deeper. It rejected the defendant's argument

> because the fact that the jury's "third option" was second-degree murder rather than robbery does *not diminish the reliability* of the jury's capital murder verdict. To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to *ensure the verdict's reliability*. That is not to suggest that *Beck* would be satisfied by instructing the jury on *just any lesser included offense*, even one without any support in the evidence. *Cf. Roberts v. Louisiana*, 428 U.S. 325, 334-335, 96 S.Ct. 3001, 3006-3007, 49 L.Ed.2d 974 (1976) (plurality opinion). In the present case, however, petitioner concedes that the evidence would have supported a second-degree murder conviction, Brief for

> Petitioner 18-19, and that is adequate to indicate that the verdict of capital murder represented no impermissible choice.

(*Schad v. Arizona*, *supra*, 501 U.S. at pp. 647-648 [italics added].)

Thus, *Schad's* controlling concern was whether instructing on second degree murder – but not robbery – diminished the reliability of the capital murder verdict. *Schad* rejected the defendant's farfetched argument that a jury, which did not believe the defendant was guilty of first or second degree murder, nonetheless would choose first degree murder over second degree murder because the jury believed that defendant was guilty of the non-instructed offense of robbery. Moreover, *Schad* understood that there could be occasions where the third option actually diminished the reliability of the jury's capital murder verdict because not "just any lesser included offense" would satisfy *Beck*. *Schad's* holding therefore did not merely dismiss the defendant's argument on the ground that the trial court had instructed on a single lesser included offense, but instead analyzed the issue in terms of whether the court's failure to instruct the jury on the lesser included offense identified by the defendant "enhance[d] the risk of an unwarranted conviction." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

In support of its interpretation of *Beck*, *Breverman* also cited *Hopkins v. Reeves* (1998) 524 U.S. 88, which held that *Beck* applies only to those offenses that have been deemed by the state to constitute lesser included offenses of the charged crime. (*Id.* at pp. 90-91.) As *Reeves* observed, "[t]he crucial distinction between *Beck* and [*Reeves*] is the distinction between a State's prohibiting instructions on *offenses* that state law recognizes as lesser included, and a State's refusing to instruct on offenses that state law does not recognize as lesser included." (*Id.* at p. 99,

fn. 7 [italics added].)

Reeves, a capital case, noted that almost all states provide instructions only on those "offenses" that have been deemed to constitute lesser included offenses, and that the high court has "never suggested that the Constitution requires anything more." (*Id.* at pp. 96-97.) Thus, *Reeves* shows that the United States Supreme Court is not simply concerned with a capital jury being instructed on a single lesser included offense, but is concerned that the jury be instructed on *all* lesser included offenses necessary to prevent the risk of an unwarranted capital conviction. (*Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1082 [unconstitutional *Beck* violation for court to refuse "instructions on offenses that state law recognizes as lesser included"]; *Andrews v. Collins* (5th Cir. 1994) 21 F.3d 612, 629 ["In a capital trial, a defendant is constitutionally entitled to instructions on lesser-included offenses"]; *Lord v. State* (1991) 107 Nev. 28, 36 [806 P.2d 548, 553] ["In capital cases, instructions on lesser included offenses are constitutionally required if requested by the defense"]; *Daniel v. Thigpen* (M.D. Ala. 1990) 742 F.Supp. 1535, 1548 ["Due process requires that a jury in a capital case be charged on lesser included offenses when the evidence warrants it"]; *Rembert v. Dugger* (11th Cir. 1988) 842 F.2d 301, 303 ["Due process requires that a defendant in a capital case receive instructions on lesser included offenses"].)

Accordingly, the question here is, even though the jury was instructed on other lesser included offenses, did the absence of heat of passion instructions "enhance[] the risk of an unwarranted conviction" in violation of due process and the Eighth Amendment? (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Spaziano v. Florida*, *supra*, 468 U.S. at p. 456 ["We reaffirm our commitment to the demands of reliability in decisions

involving death and to the defendant's right to the benefit of a lesser included offense instruction that may reduce the risk of unwarranted capital convictions"]; *Hopper v. Evans*, *supra*, 456 U.S. at p. 611 ["due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of *any crime* fairly supported by the evidence" (italics added)].) Given the facts of this case, the answer is yes.

But instead of permitting the jury to find that these were crimes of passion, the court misunderstood the conditions for heat of passion, and instructed the jury on the lesser included offenses of second degree murder, voluntary manslaughter based on unreasonable self-defense as to Lee Thompson (but not as to Robin Shirley so that no voluntary manslaughter instruction was given as to Ms. Shirley), and involuntary manslaughter. These instructions meant that the jury could find that the motive for the shootings was revenge and the crimes malicious, as argued by the prosecution (RT 2797-A ["He was . . . angry that Robin Shirley had gotten the promotion and he had not"]; RT 2804-A ["he was revengeful and he was going to take that out on Robin Shirley and Lee Thompson"]), and therefore first or second degree murder; that Sergio shot in unreasonable self-defense because he actually believed that Lee Thompson reached for a gun, something defense counsel did not even argue to the jury (RT 2811-2862); or that there was no intent to kill and the killings were involuntary, again something defense counsel did not argue after conceding in opening

statement and closing argument that Sergio was the shooter (RT 2813).[12]

These options given the jury by the court were unreasonable, wholly inadequate, and unreliable. According to the prosecutor, Sergio intended to kill Ms. Shirley because she received the promotion that he wanted.[13] The purported motive is highly implausible given that Ms. Shirley was promoted on July 11, 1993, and the killings did not occur until October 2, 1993, almost three months later. Moreover, as shown, Sergio cared deeply for Ms. Shirley.[14] Karen Horner, who called Robin Shirley "a whore and a bitch" (RT 2018), never heard Sergio say anything negative about Ms. Shirley. On the contrary, "He always stuck up for her," even when Ms. Horner spoke ill of her. (RT 1214, 1239.) Sergio confided in his roommate, Alex Cosey, that he was having problems at Target, but Sergio was not mad or upset with Robin Shirley for getting the promotion. (RT 1312.) It defies reason to believe that Sergio, a 19-year-old with no history

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[12]In light of the constraints placed by the trial court on arguing heat of passion, defense counsel effectively conceded intent to kill and therefore malice as to both victims (*People v. Rios*, *supra*, 23 Cal.4th 450, 460 [generally, the intent to unlawfully kill constitutes malice]), by only arguing that deliberation was lacking and the crimes were second degree murder. (RT 2818 ["The crux of this case is, did Mr. Nelson deliberate his conduct when he pulled the trigger?"].)

[13]The prosecutor argued to the second penalty phase jury that "Robin Shirley, a woman, had the audacity to apply for the promotion that Mr. Nelson deserved. That is what this case comes down to." (RT 5446.) At the hearing on Sergio's motion to modify the judgment, the trial court stated: "It is reasonable to infer that his motive for these murders is nothing more than to satisfy his ego, having been denied the promotion . . . ." (RT 5841.)

[14]The prosecutor conceded at the second penalty trial that Robin Shirley and Sergio were at least "good friends." (RT 5464.)

of violence,[15] described by Ms. Shirley's close friend as nice to everybody (RT 1835, 1838), killed the mother of two (RT 1918) in cold blood, as argued by the prosecutor, because she received a promotion and the accompanying raise that Sergio expected.[16]

The options offered by the court were also untenable and unreliable given the salient facts of this case, which scream out that these were crimes of passion, and not of revenge, in self-defense, or without an intent to kill, thereby making the lesser included instructions useless. (*People v. Breverman, supra*, 19 Cal.4th at p. 161, fn. 8 [recognizing that "[a] single third option may actually be of little value to either side if arbitrarily chosen and no closer to the jury's rational view of the evidence"].) An adolescent fell in love with his coworker, a relentless flirt who egged on the boy as she did others. He went to see her early one morning before she started work. He approached her truck, only to find it empty. Nearby was a brown car that the teenager did not recognize. He looked in the car and was shocked to see the object of his desire cuddling with a man. He was further shocked to see that the man was another coworker who was the youth's rival. Enraged and out of control, the teen used the gun that he carried for protection to shoot and kill the couple.

The verdicts in this case were not reliable because the trial court deprived the jury of instructions that would have allowed it to make the most reasonable interpretation of the evidence: Sergio killed both victims

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[15]The prosecutor acknowledged to the second penalty phase jury that Sergio "did not have a history of violence." (RT 5591.)

[16]Supervisor Kristin Strickland testified at the second trial that, had Sergio gotten the promotion, his raise would have been 75 cents to a dollar an hour. (RT 4342, 4368.)

in a heat of passion. Under these circumstances the capital murder verdicts and resulting death penalty were not reliable. Heat of passion instructions were needed to "reduce the risk of unwarranted capital convictions." (*Spaziano v. Florida*, *supra*, 468 U.S. at p. 456.) Hence, the trial court denied Sergio his constitutional rights under the Due Process Clause and the Eighth Amendment. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

F. The Court's Heat of Passion Errors Were Structural and Require Reversal of the Judgment.

Ordinarily, harmless error analysis must be applied to a jury instruction that omits an element of the offense. (*Neder v. United States*, *supra*, 527 U.S. at p. 10.) It is not applied, however, to cases that "contain a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" (*Id.* at p. 8 [quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310].)

Here, the trial court misdefined malice and thereby omitted the element from the first and second degree murder instructions. The court also deprived Sergio of his due process right to argue to the jury that he did not commit first or second degree murder on the ground that the prosecution failed to prove beyond a reasonable doubt that malice, an essential element of both first and second degree murder, was not negated by heat of passion. Moreover, the court denied Sergio his right to have his counsel argue that he was guilty of voluntary manslaughter based on heat of passion. Finally, the court refused to instruct the jury on the defense theory of the case, that murder was not committed, but that heat of passion voluntary manslaughter was.

Together, these errors deprived Sergio of effective assistance of counsel, his due process right to present a defense, and trial by jury on every

element of the murder charges. (*Conde v. Henry*, *supra*, 198 F.3d at p. 741.) And as in *Conde*, the very framework within which the trial proceeded prevented Sergio from presenting his theory of the defense and prevented the jury from determining whether all of the elements of murder had been proved beyond a reasonable doubt. (*Ibid.*) Accordingly, Sergio was deprived of a fair trial on the murder charges, and the judgment should be reversed for structural defect. (*Ibid.*; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [structural defects defy analysis by harmless error standards]; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201 ["The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error"].)

The trial court's mistakes constituted were reversible per se error for a second reason. In *Summerlin v. Stewart* (9th Cir.2003) 341 F.3d 1082 (en banc), revd. on other grounds *sub nom. Schriro v. Summerlin* (2004) __ U.S. __ [159 L.Ed.2d 442, 124 S.Ct. 2519], the Ninth Circuit held that under the Sixth and Eighth Amendments, and the Supreme Court's decision in *Ring v. Arizona* (2002) 536 U.S. 584, a death judgment is not subject to harmless error analysis, and must be automatically vacated for structural error where the death penalty decision is based on judge-made findings. (*Summerlin v. Stewart*, *supra*, 341 F.3d at p. 1116.) Clearly, if it is impermissible under the United States Constitution and reversible error per se to base a death judgment on judge-made findings, then the same would be true if this Court based a death judgment on a finding of harmless error in place of an actual finding of malice by a properly instructed jury. (*Id.* at p. 1118 ["Application of the heightened scrutiny commanded by the Eighth

Amendment in capital cases underscores the structural nature of this Sixth Amendment constitutional infirmity"].) Thus, harmless error analysis is inapplicable, and the verdicts must be reversed, along with the special circumstances findings and death judgment.

Finally, depriving a defendant, as here, of a lesser included offense instruction that would reduce the risk of unwarranted capital convictions is reversible per se. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 646.) Moreover, denying Sergio heat of passion instructions regarding murder and malice diminished the reliability of the guilt determinations and resulting death judgment. (*Id.* at p. 638.) Hence, the murder convictions, special circumstances, and death judgment must be reversed. (*Id.* at p. 646.)

Assuming, however, for the sake of argument, that the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18 governs here, then the trial court's errors were not harmless because respondent cannot "prove beyond a reasonable doubt that the error[s] complained of did not contribute to the verdict obtained." (*Id.* at p. 24; *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279 ["The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error"]; see also *Mitchell v. Esparza* (2003) 540 U.S. 12, 16 ["we have often held that the trial court's failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-error analysis"].)

As Justice Kennard noted in her dissent in *People v. Breverman*:

> The three most common circumstances in which it may be concluded that the verdict is "surely unattributable to the error" are (1) when the jury has necessarily resolved the omitted factual question under other properly given

> instructions, (2) when some factual finding the jury has made is the functional equivalent of a finding on the omitted factual question (because no rational jury could find the fact actually found without also finding the omitted fact), and (3) when the defendant admitted or affirmatively conceded the omitted factual question. None of these circumstances are present here. The jury did not resolve the question of whether defendant acted in the heat of passion under any of the instructions given, nor did the jury decide any question that was the functional equivalent of deciding whether defendant acted under the heat of passion. Defendant did not admit or affirmatively concede that he had not acted in the heat of passion. [¶] The omission of an instruction on voluntary manslaughter by reason of heat of passion was not harmless, and defendant's conviction is therefore unconstitutional.

(*People v. Breverman*, *supra*, 19 Cal.4th at p. 194 (dis. opn. of Kennard, J.) [citing *People v. Flood*, *supra*, 18 Cal.4th at pp. 503-507.) The identical analysis and conclusion apply here so that the trial court committed reversible error in failing to instruct the jury on heat of passion with respect to malice murder and voluntary manslaughter.

In addition, the prosecution repeatedly argued that the killings of Robin Shirley and Lee Thompson were motivated by revenge because Ms. Shirley obtained the promotion that Sergio sought. (RT 2804-A ["The reality is he was humiliated, he was upset, and he was revengeful and he was going to take that out on Robin Shirley and Lee Thompson. Lee Thompson may not have been as important to him as Robin Shirley. If he arrived that morning and only Robin Shirley was there, I don't know that he wouldn't necessarily wait for Lee, but he had it in against him."]; 2802 ["you have a motive. Humiliation and revenge."].) On its face this purported motive is highly questionable. It is simply not plausible that a 19-year-old, with no history of violence, would take the lives of a woman he

cared for and a former coworker because, three months before the killings, the teenager did not receive a promotion, but the woman did. (RT 1027, 1080, 1416, 1786, 4705.) What is plausible is that Sergio fell in love with Robin Shirley after spending considerable time together, that he went to see her before work, that he carried a gun for protection from a local criminal street gang, that he was shocked to see the woman he loved in an intimate moment with his rival, and that he lost control and killed them both because he felt betrayal and extreme jealousy.

But the trial court would not permit the argument and instructions that would have allowed the jury to reach this most reasonable explanation for Sergio's conduct. Thus, even assuming harmless error applies, the judgment should be reversed because respondent cannot prove beyond a reasonable doubt that the trial court's errors did not contribute to the verdicts. (*Chapman v. California*, *supra*, 386 U.S. 18 at p. 24; see also *People v. Marshall* (1997) 15 Cal.4th 1, 42 [applying *Chapman*, where evidence is not overwhelming, jury could have reasonable doubt].)

G. Conclusion

Defense counsel doggedly, but unsuccessfully, argued to the trial court that heat of passion instructions were critical in this case. He proposed five separate jury instructions emphasizing heat of passion. (RT 2539, 2669, 2671A, 2672; CT 309, 343, 345, 347, 348.) The court rejected them all. He repeatedly implored the court to understand that Sergio acted in a heat of passion. (RT 2535 ["present was severe emotional passions"]; 2539 ["he walks up to the car and there's the person he desired and the adversary in the car and he gets inflamed jealousy, we have several passions"]; 2548 ["We have the guy walking up to the car and guess who is in there with her – the other guy. We've got passions."].) But the judge –

trapped by the peculiar notion that heat of passion can only arise in extremely limited situations, such as where a husband finds his wife giving oral sex to another man – would not budge.

Despite defense counsel's tenacious efforts, the "completely befuddled" trial court (RT 2545) failed to see that *under the law* evidence of heat of passion was substantial in this case. The court's unreasonable refusal to instruct the jury on heat of passion demands reversal of the entire judgment.

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2.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON PROVOCATION, WHICH WOULD HAVE ALLOWED THE JURY TO FIND SECOND DEGREE MURDERS DUE TO A LACK OF DELIBERATION.

A. Introduction

The defense requested, but the court refused to instruct the jury with, CALJIC No. 8.73 (RT 2327, 2664), which reads: "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation." The court also refused the following special instruction proposed by the defense: "In deciding whether or not you are convinced beyond a reasonable doubt that the defendant deliberated and premeditated, you should consider the effects of provocation on the defendant at the time of the killings. This provocation may come from any person, including persons other than the victims." (CT 341, 346; RT 2671A-2672.) The court's failure to instruct the jury on provocation was prejudicial error, requiring reversal of the judgment in its entirety. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 29, 34; *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739-741.)

B. The Evidence Was Sufficient to Show That Sergio Was Subjectively Provoked into the Shootings by Unexpectedly Seeing Robin Shirley and Lee Thompson Together in an Intimate Setting.

At a defendant's request, the trial court is required to give the jury an instruction that pinpoints the defendant's theory of the case, when there is

substantial evidence that supports the theory. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142 [citing *People v. Saille* (1991) 54 Cal.3d 1103, 1119]; *People v. Elam* (2001) 91 Cal.App.4th 298, 308 ["The court must instruct the jury with respect to every defense theory of the case that is supported by substantial evidence"].) In addition, a criminal defendant has a federal constitutional right to adequate instructions on the defense theory of the case. (*Conde v. Henry, supra*, 198 F.3d at p. 739; *United States v. Mason* (9th Cir. 1990) 902 F.2d 1434, 1438 ["A defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence"].)

"CALJIC No. 8.73 is a 'pinpoint' instruction (see *People v. Saille* (1991) 54 Cal.3d 1103, 1119) that relates particular facts to an element of the charged crime and thereby explains or highlights a defense theory." (*People v. Mayfield* (1997) 14 Cal.4th 668, 778; cf. *People v. Johnson* (1993) 6 Cal.4th 1, 42-43 [CALJIC No. 8.73 must be given *sua sponte*].) Thus, the trial court was required to read to the jury CALJIC No. 8.73 or its equivalent if there was substantial evidence that Sergio "had formed the intent to kill as a direct response to the provocation and had acted immediately." (*People v. Wickersham* (1982) 32 Cal.3d 307, 329, overruled on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 200.)

In determining whether sufficient evidence supported the instruction, this Court does "not refer to the credibility of the evidence." (*People v. Middleton, supra*, 52 Cal.App.4th at p. 33 [citing *People v. Mayberry* (1975) 15 Cal.3d 143, 151.) Doubt as to the sufficiency of the evidence must be resolved in favor of the defendant. (*People v. Flannel* (1979) 25 Cal.3d 668, 685, fn. 12.)

Here, in denying the defense request for a voluntary manslaughter

instruction, the trial court stated, "the other guy comes up to the car and the other guy is there and he's got his zipper down; that's one thing." (RT 2548.) Thus, the court was suggesting that had Ms. Shirley and Mr. Thompson been engaged in a sex act, there would have been sufficient provocation to warrant voluntary manslaughter instructions, but short of that scenario, the evidence of provocation was insufficient.

Voluntary manslaughter requires "a passion as would naturally be aroused in the mind of an ordinarily reasonable person" (*People v. Steele* (2003) 27 Cal.4th 1230, 1252), which is an objective standard. (See also *People v. Middleton*, *supra*, 52 Cal.App.4th at p. 32 ["provocation as it applies to manslaughter is an objective rather than subjective test, and the Penal Code requires the jurors to consider whether a 'reasonable person' would respond in a similar manner"].) In contrast, a subjective standard applies when considering provocation and second degree murder: "the relationship between provocation and deliberate intent 'requires a determination of the defendant's subjective state.'" (*People v. Middleton*, *supra*, 52 Cal.App.4th at p. 32 [quoting *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295].) Thus, "'provocation which is not "adequate" to reduce the class of the offense [from murder to manslaughter] may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation.'" (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 329 [quoting *People v. Valentine* (1946) 28 Cal.2d 121, 132].)

Thus, the issue here is whether there was substantial evidence that Sergio was subjectively provoked into the shootings by unexpectedly seeing Ms. Shirley and Mr. Thompson together in an intimate setting. The record shows that there was.

Sergio was infatuated with Ms. Shirley. (RT 1897.) They might have even had an affair. (RT 2043.) Moreover, Sergio and Lee Thompson were rivals who disliked each other. (RT 1399-1400.)

The prosecutor argued that Sergio was at the parking lot that morning to carry out his plan to kill Ms. Shirley because she obtained the promotion that he wanted. (RT 2797-A ["He was . . . angry that Robin Shirley had gotten the promotion and he had not"].) Thus, according to the prosecutor, Sergio was there to see Ms. Shirley, not Mr. Thompson. (RT 2804-A ["Lee Thompson may not have been as important to him as Robin Shirley"].) Moreover, because Lee Thompson had rarely driven his mother's brown Plymouth to work during the less than three weeks that he and Sergio had both worked at Target, Sergio had no reason to believe that the car that he approached that morning belonged to Mr. Thompson. (RT 1377, 1498, 1526.) It follows that a jury could have reasonably concluded that Sergio was surprised to find Ms. Shirley sitting with Mr. Thompson, and only formed the intent to kill when he found them together. Some jurors might have also accepted as true Sergio's statement to Dr. Wells that he was provoked into the shootings because he saw Mr. Thompson bending down, reaching for a gun. (RT 2213, 2376.)

Because the focus here is on Sergio's subjective state of mind, his mental makeup in general is important to consider. Sergio was 19 years old at the time of the crimes. "A lack of maturity and an underdeveloped sense of responsibility are found in youth [and] often result in impetuous and ill-considered actions and decisions.'" (*Roper v. Simmons* (2005) __ U.S. __ [125 S.Ct. 1183, 1195] [quoting *Johnson v. Texas* (1993) 509 U.S. 350, 367].)

Dr. Wells, Orange County's Chief of Forensic Psychology for 14

years, opined that, for most of his adolescent life, Sergio experienced a depressive condition called dysthymia, a type of long-standing depression. As a result of his early childhood development, Sergio manifested a number of different personality disorders that tended to cause him to function in psychologically impaired ways, including acting impulsively. (RT 2155-2156, 2172.) Dr. Wells also found that Sergio doubted himself as a man, doubted himself sexually, and doubted himself for his color and short stature. (RT 2129, 2165, 2412.)

Sergio had a history of suicidal thoughts and impulsive behavior. By the time he was 15 years old, he was contemplating suicide. (RT 2042.) By age 16, he went beyond merely thinking about it. On March 10, 1991, Sergio slit his wrist with a knife and sought treatment at the Pomona Valley Hospital Medical Center. (Exh. F; RT 2608.) In March 1992, Sergio was hospitalized after taking an overdose of medicine. (RT 2047-2048.) An emergency room physician referred Sergio for a psychiatric evaluation. (RT 2047, 2049.) Dr. Herb Glazeroff evaluated Sergio and concluded that Sergio had acted "impulsively" and made the "suicide gesture" of taking an overdose because he suffered from an "adjustment disorder with depressed mood." (RT 2063-2064, 2067, 2077-2079.) Dr. Wells concurred that Sergio's suicide gesture was an impulsive act. (RT 2169, 2172.)

During April and May 1992, Sergio's severe depression persisted and he appeared to be starving himself to death. He talked about going away for a long time and not wanting to see anyone. He thought he was "no good" and unwanted. (RT 1868, 1872, 1885.)

The day before Ms. Shirley was elevated to supervisor, manager Kristin Strickland announced over the store loudspeakers to all the push crew members that Ms. Shirley would receive the promotion. (RT 1418.)

Before Ms. Strickland announced that Robin Shirley would be promoted, Ms. Strickland told Sergio that he would not get the job. Sergio became upset because he thought the other employees might make fun of him. (RT 1464-1466, 1507.)

And indeed, when they heard the news, some employees began to taunt and tease Sergio for not getting the promotion. (RT 1415, 1419.) Sergio was so distraught that he broke down crying in front of supervisor Alejandro Sandoval. (RT 1422, 1437.) As a result, Sergio sunk back into a deep depression. (RT 1128, 1234, 1420; 1438, 1509, 1510, 1521, 1847, 1867-1868, 1870, 1910, 1912.)

According to Dr. Wells, everything was hopeless to Sergio and he was now a complete failure. Sergio felt completely unloved and absolutely frustrated. He began to develop symptoms such as insomnia, anxiety, and agitation. (RT 2177.) He lost a good deal of weight and seemed to be starving himself. (RT 2178.)

On September 11, 1993, Sergio resigned from Target. (RT 1498.) He later told the police that he quit his job because of "self-esteem [and] mentally he couldn't handle it." (RT 1750.)

After Sergio resigned from Target, his aunt lost her job, and asked Sergio to help pay the household bills. Sergio became very withdrawn and quiet. He stopped eating and lost more weight. Sergio's personality changed, as if there were two different Sergios. (RT 1937-1940, 1951.)

On Thursday night, September 30, 1993, Sergio went to the Los Angeles County Fair. (RT 2304.) An individual, who appeared to be a gang member, hit Sergio's friend, whom Sergio sought to defend by fighting the assailant. At one point the attacker pointed a gun at Sergio. (RT 2029, 2304-2307; 2311, 2319-2322.)

Sergio told Dr. Wells that the next night, he had trouble sleeping and rode out to Target on his bicycle, without any clear idea of what he was going to do, although he thought of killing himself with his gun. (RT 2213, 2381-2382.) Sergio carried the gun to protect his family from a local street gang. (RT 1309, 1317-1318, 1358-1360, 1693, 1695-1697, 1763, 1937.) Dr. Wells determined that Sergio was in the early stages of paranoid schizophrenia. (RT 2155-2156.)

When the bodies of Robin Shirley and Lee Thompson were found, it appeared that they had been sitting very close together in the front seat of the car. (RT 1080, 1084, 1086, 1558, 1570-1571.) Both Ms. Shirley and Mr. Thompson had their shoes off. (RT 1096.) A pair of socks and a plaid jacket were on the back seat. (RT 1585-1586.) Thus, at the time of the crimes, Sergio was a very immature, emotionally troubled teenager, who was under tremendous financial stress and may have been in the early stages of paranoid schizophrenia. Sergio was afraid of a local criminal street gang, who had threatened him and his family, so he carried a gun. The night before the shooting, a gang member pointed a gun at Sergio. He went to Target to see Robin Shirley, with whom he was infatuated and may have had a sexual relationship. He was surprised to find her sitting close to his rival, Lee Thompson. In this hyper vigilant, emotionally unbalanced state, Sergio may well have been provoked by seeing Ms. Shirley and Mr. Thompson, and could have responded by shooting without any deliberation. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1142 ["hot anger" may negate the *mens rea* (equivalent to premeditation or deliberation) for lying in wait].)

Thus, the court should have instructed the jury to "consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation." (CALJIC No. 8.73.) The

court's failure to do so deprived Sergio of his federal constitutional right to adequate instructions on the defense theory of the case. (*Conde v. Henry*, *supra*, 198 F.3d at 739.) Moreover, the court deprived Sergio of his right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-333; *Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

C. The Error Was Prejudicial.

Per se reversal is required when a trial court fails to instruct on the defendant's theory of the case. (*Conde v. Henry*, *supra*, 198 F.3d at pp. 740-741; *United States v. Escobar DeBright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202.) Even if the *Chapman* standard were applicable, there is a reasonable probability that the omitted instruction contributed to the first degree murder verdicts. (*People v. Middleton*, *supra*, 52 Cal.App.4th at p. 34.)

In instructing the jury, the court made no mention of provocation whatsoever. In fact, the court omitted the reference to "provocation" from CALJIC No. 8.50, which distinguishes murder from manslaughter, when reading the instruction to the jury. (RT 2723.) And, although the court told the jury, "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon preexisting reflection and not under sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree," (CALJIC No. 8.20; RT 2717), the court failed to explain heat of passion to the jury (CALJIC No. 8.42), despite a request by the defense to do so (RT 2669-2670).

Moreover, evidence of first degree murder was not strong. The prosecutor argued that Sergio had planned the October killing of Robin Shirley out of revenge because Sergio did not receive the July promotion. (RT 2799A [defendant was planning two or three weeks before to kill], 2804A ["he was revengeful"], 2802 ["humiliation and revenge"], 2803 ["He planned that"], 2804 ["He rode six miles to carry out a plan that he had made"], 2805 ["it was a plan premeditated choice of action"], 2808 ["This is a planned killing of two counts of first-degree murder"].) Waiting almost three months to kill someone over a promotion is fairly farfetched. It was also improbable that the target of the revenge would be the person who received the promotion. A much more likely target would have been the person who made the decision not to promote Sergio; or the person who subjected Sergio to public humiliation in announcing over the loud speaker that Sergio would not receive the promotion; or the person who reprimanded Sergio, triggering his resignation. (RT 1415, 1418-1419, 1422, 1437, 1488, 1490, 1498.) That the same person – manager Kristin Strickland – did all these things, made her the obvious choice for revenge if Sergio's real motive for the crime was not receiving the promotion, as the prosecutor insisted it was.

A much more plausible motive for the crimes is the feelings of betrayal and extreme jealousy that Sergio experienced when he discovered Robin Shirley with his rival, Lee Thompson, which caused him to lose control. Sergio could always get another job. But he could not get Robin Shirley, who had spurned him for Lee Thompson.

In addition, this was a close case on the issue of Sergio's guilt for first or second degree murder. "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial

character should be resolved in favor of the appellant.' [Citation.]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) Although this case was not factually complex and involved only a single incident, the jury deliberated for approximately six hours (CT 255, 365), which suggests a close case. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907 [six hours of deliberations is evidence of a close case].) Even more telling that this was a close case is the fact that the jury deliberated for almost six hours on a single issue – deliberation – because defense counsel conceded that Sergio was the shooter, and merely argued that Sergio did not deliberate before the shootings. (RT 2818 ["The crux of this case is, did Mr. Nelson deliberate his conduct when he pulled the trigger?"].)

Finally, the jury requested read back of the testimony of three witnesses, Karen Horner, Dr. Wells, and Dr. Markman (CT 365), which again suggests a close case on the issue of deliberation, especially given that Doctors Wells and Markman provided psychological testimony on Sergio's state of mind (RT 2155-2156, 2460-2462, 2483.) (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["[j]uror questions and requests to have testimony reread are indications the deliberations were close]; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [request for read back of critical testimony].)

The jury should have been properly instructed that provocation could be a relevant factor in determining whether Sergio deliberated the crimes. Accordingly, the first degree murder verdicts were not "surely unattributable to the error" of failing to instruct the jury with CALJIC No. 8.73 or its equivalent. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) The judgment must be reversed.

3.

THE COURT ERRED IN ADMITTING PREJUDICIAL, SPECULATIVE TESTIMONY FROM A SEROLOGIST THAT ROBIN SHIRLEY WAS SHOT FIRST.

A. Proceedings Below

The prosecution called serologist Elizabeth Devine of the Los Angeles County Sheriff's Department to offer an opinion as to which victim was shot first. The prosecutor asserted that Ms. Devine was also an expert crime scene reconstructionist. Defense counsel objected that, as a serologist, Ms. Devine lacked the expertise to testify about shot sequence. Moreover, he argued that her testimony lacked foundation and was merely speculative. The court ordered the prosecutor to lay a foundation for Ms. Devine's testimony. (RT 1609-1610.)

Before the jury, Ms. Devine testified that she had a bachelor of science degree in biology from the University of California at Los Angeles, and a masters degree in criminalistics from California State University at Los Angeles. She worked for the sheriff's department for nine years as a criminalist. According to Ms. Devine, "[a] criminalist . . . is an individual that analyzes, collects, and uses scientific means to come to some determination about evidence." Assigned to the serology section, Ms. Devine analyzed blood and other bodily fluids. Her primary expertise was therefore in blood and blood stain pattern interpretation. She had been to approximately 300 crime scenes as a serologist collecting evidence. (RT 1612-1617, 1624, 1626.)

Ms. Devine attended a class where "some" reconstruction issues were addressed. Her mentor and former supervisor, Ronald Lenhart, a nationally and internationally known blood stain pattern expert, did "quite a

bit of reconstruction." Ms. Devine worked with Mr. Lenhart between "three to five years" before she did anything on her own. She evaluated evidence and photographs from crime scenes to answer questions relating to reconstruction in many cases. She had visited crime scenes and had seen photographs of crime scenes where there were dead bodies. Thus, according to Ms. Devine, she was an expert in crime scene reconstruction. (RT 1616-1620.)

Ms. Devine met with the detectives handling this case, looked at the car in which the victims were found, examined photographs of the victims' positions as they were found at the crime scene, read the autopsy protocols written by Dr. Ribe, looked at the autopsy photographs, and was provided a statement by an individual, whose name she could not recall. The condition of the car and the victims, the locations of the shell casings in and about the car, and the locations of the spent rounds of ammunition were described to her. She looked in the car and saw the location of some of the spent rounds of ammunition. (RT 1621-1623.)

Ms. Devine had qualified as an expert in court between 75 and 100 times, but she did not specify how many of those times were as a crime scene reconstructionist. The court ruled that based on Ms. Devine's education, training, and experience, she was qualified to testify as an expert, though the court did not say in what. (RT 1624-1626, 1631.)

Ms. Devine opined that the first bullet was shot through the left rear open window, entered the left side of Ms. Shirley's neck, exited the right side of her neck, and lodged in the passenger door. (RT 1632, 1636.) According to Ms. Devine, the second shot entered through Mr. Thompson's left temple, exited the right side of his head, and caused a grazing wound to Ms. Shirley's left shoulder. (RT 1633.) She did not have an opinion on the

sequence of the remaining shots. (RT 1647.)

Ms. Devine supported her opinions on the sequence of the first two shots by first assuming that Mr. Thompson was sitting with his back against the seat, which was tilted slightly backward. Ms. Devine further assumed that Ms. Shirley was sitting back in her seat. (RT 1633.)

According to Ms. Devine, "given" that Mr. Thompson was sitting back in his seat, the part of Ms. Shirley's shoulder where the grazing wound occurred would have been inaccessible "if" Ms. Shirley been sitting with her back against the seat; therefore, she had to have been shot first, causing her to slump slightly forward, so that the grazing wound could occur and the bullet could land behind her, where it was recovered. (RT 1633.) Ms. Devine testified that the main factor supporting her conclusion that Ms. Shirley was shot first was that if Mr. Thompson had been shot first, the bullet would not have grazed Ms. Shirley's shoulder. This theory required that both Mr. Thompson and Ms. Shirley were sitting with their backs against the seat when they were shot, assumptions that found no support in the record. (RT 1634.)

There *was* evidence that Mr. Thompson and Ms. Shirley spent a great deal of time together and may have been having an affair. (RT 1246, 1255, 1406, 1842, 1857, 1916, 1931.) When their bodies were found, both Ms. Shirley and Mr. Thompson had their shoes off. (RT 1096.) A pair of socks and a plaid jacket were on the back seat. (RT 1585-1586.) The front windows were closed, the back windows were rolled down about half way, and the radio was on. (RT 1084, 1096.)

B. Serologist Elizabeth Devine Was No Expert on Who Was Shot First.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an *expert on the subject to which his testimony relates*. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (Evid. Code, § 720(a) [italics added].) "In considering whether a person qualifies as an expert, *the field of expertise must be carefully distinguished and limited.*" (*People v. Williams* (1989) 48 Cal.3d 1112, 1136 [italics added, internal quotes omitted].) "The trial court's determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse." (*People v. Bolin* (1998) 18 Cal.4th 297, 321-322.) "However, the discretion to admit or exclude evidence is not unlimited. The discretion of a trial judge is . . . subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [T]he courts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion." (*Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 291-292 [internal quotes and citations omitted].)

Ms. Devine was not qualified to testify as an expert on the subject of shot sequence. In fact, Ms. Devine offered no testimony that she had ever before determined who was shot first in a multiple victim crime, or that she was aware of any other expert who was able to make such a determination. This might explain why appellate counsel was unable to find a single published decision from any jurisdiction where an appellate court approved

of an expert offering an opinion as to which victim was shot first.

Ms. Devine may have been an expert serologist, one who tests bodily fluids in a laboratory. (*People v. Allen* (1999) 72 Cal.App.4th 1093, 1096, fn. 2.) Some things about crime scene reconstruction might have even rubbed off on her after she spent "three to five years" with her mentor, a well-known blood stain pattern expert who also did "quite a bit of reconstruction." (RT 1617-1619.)

But clearly Ms. Devine was no *expert* in crime scene reconstruction. Strangely she did not tell the court how many or even approximately how many times she had qualified as an expert crime scene reconstructionist. Moreover, she had hardly become an expert in all crime scenes including, for example, those of sex crimes, burglaries, batteries, thefts, robberies, kidnappings, vehicular manslaughters, and crimes involving destructive devices and explosives. There is no way to discern from her testimony what crime scenes, if any, Ms. Devine was an expert in because her testimony was so lacking in detail. Certainly there was no evidence that Ms. Devine had ever been involved in reconstructing a multiple homicide crime scene involving gunshots.

This Court has stated that "[i]n considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited." (*People v. Williams*, *supra*, 48 Cal.3d at p. 1136 [internal quotes omitted].) Ms. Devine's expertise is not in the field of crime scene reconstruction. And more significant, her expertise is not in the field of crime scene reconstruction involving multiple homicide victims where the issue is who was shot first. The trial court therefore erred in admitting her opinion testimony under Evidence Code section 720(a) because, as defense counsel correctly stated, Ms. Devine, an analyzer of blood and bodily fluids,

lacked the expertise to testify about shot sequence involving multiple victims. (RT 1610.)

C. Ms. Devine's Assumptions – That Both Victims Sat Back in Their Seats Looking Straight Ahead – Were Mere Speculation.

To be admissible, an expert's testimony must be "[b]ased on matter . . . perceived by or personally known to the witness or made known to him at or before the hearing . . . ." (Evid. Code, § 801(b).) Defense counsel argued that Ms. Devine's testimony was mere speculation. (RT 1610.) Because he was right, her testimony should have been excluded. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1116 ["an expert's opinion based on assumptions of fact without evidentiary support, or on speculative or conjectural factors has no evidentiary value and may be excluded from evidence"].)

In *State v. Wright* (Tenn. 1988) 756 S.W.2d 669, a medical examiner opined that an uphill victim was shot first based on the fact that the second victim was found downhill and the assumption that the second victim had fled downhill. The Tennessee Supreme Court unanimously concluded that the trial court erred in admitting the opinion because the expert's conclusion that one victim was shot later than the other "was based on the assumption that [the second victim] had fled downhill. This conclusion is nothing more than speculation. Any police officer or other lay person could have ventured an opinion which would have been just as probative, and it would hardly be argued that an opinion from a lay witness on this subject would be admissible." (*Id.* at p. 673.)

Like the medical examiner in *Wright*, Ms. Devine simply assumed she knew the victims' positions when they were shot, despite the lack of any evidence in the record for her assumptions. No one testified that the victims

were sitting at attention with their backs against their seats, staring straight ahead at the windshield. On the contrary, the evidence strongly suggests just the opposite scenarios.

- It is reasonable to infer that the two suspected lovers were at least engaged in conversation, as the prosecutor told the jury. (RT 2807-A.) When people talk to one another, they generally face each other or one faces the other, the better to communicate.
- When their bodies were found, both Ms. Shirley and Mr. Thompson had their shoes off. (RT 1096.) Since they likely took their shoes off while in the car, one or both of them could have been leaning forward when they were shot.
- A pair of socks and a plaid jacket were on the back seat. (RT 1585-1586.) One or both victims could have been turning back, after having put the clothing in the back seat, when they were shot.
- The front windows were closed. One or both victims could have been leaning forward, rolling up the windows, when they were shot. (RT 1084.)
- The back windows were rolled down about half way. One or both victims could have been turning back, after rolling down the windows, when they were shot. (RT 1084.)
- The radio was on. Either victim could have been leaning forward to turn the radio on or change the volume or change the station, when he or she was shot. (RT 1096.)

Several assumptions could have been made about the positions of the victims when they were shot. Ms. Devine happened to choose one that

supported the prosecution's theory that Ms. Shirley was shot first. But the assumption was not based on any evidence in the record. Moreover, as assumptions go, it was the weakest. Two very good friends, perhaps lovers, were sitting in an empty parking lot at 3:45 a.m. There was nothing to draw their attention outside the car, no one walking by, no activity of any kind. It is most unlikely that the two young people sat in a rigid military pose talking to the windshield, rather than facing each other while speaking.

Ms. Devine's testimony, based on assumptions and unsupported by the evidence, should have been excluded. The court therefore erred in admitting it.

D. Admission of Ms. Devine's Unsupported Opinion That Ms. Shirley Was Shot First Violated Due Process.

In *Duncan v. Henry* (1995) 513 U.S. 364 (*per curiam*), the Court recognized that due process could be violated if admission of evidence was "so inflammatory as to prevent a fair trial." (*Id.* at p. 366.) In *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, the Ninth Circuit held that "[o]nly if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.'" (*Id.* at p. 920 [quoting *Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1465]; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1386 [reversing conviction where evidence was irrelevant, prejudicial, and violative of due process].)

Here, Ms. Devine's testimony was the only evidence that Ms. Shirley was shot first. As many appellate courts – including this one – have recognized, an expert like Ms. Devine has an "aura" or "mantle" of authority that can profoundly affect a jury's verdict. (See, e.g., *People v.*

Shirley (1982) 31 Cal.3d 18, 53; *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th at 1155, 1185; *Elsayed Mukhtar v. California State University, Hayward* (9th Cir. 2002) 299 F.3d 1053, 1063; *United States v. Arenal* (8th Cir.1985) 768 F.2d 263, 270.) This Court has also recognized the seemingly "scientific and infallible" nature of such evidence. (See, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 160; *People v. Webb* (1993) 6 Cal.4th 494, 524.)

Relying on Ms. Devine's authoritative testimony, the jury likely rejected out of hand any evidence that Sergio shot Mr. Thompson in imperfect self-defense because, according to Ms. Devine, Sergio did not shoot him first. Moreover, Ms. Devine's testimony could have been used by the jury as evidence that Ms. Shirley was the real target, and that Sergio therefore planned to kill her all along, making first degree murder convictions a virtual certainty. Because there was no basis in the evidence for Ms. Devine's testimony, its admission rendered Sergio's trial fundamentally unfair and violated his right to due process.

Moreover, by shifting the responsibility from the jury to Ms. Devine to find deliberation and premeditation, the trial court deprived Sergio of his right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-333), arbitrarily deprived him of the state-created protections of Evidence Code sections 210, 350, 720, and 801 (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), and distorted the fact-finding process to such an extent that the resulting verdicts do not possess the reliability required by the Eighth Amendment (*Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305).

E. Under Both *Chapman* and *Watson*, the Trial Court's Error in Admitting Ms. Devine's Testimony Was Prejudicial.

The trial court's federal due process error in admitting Ms. Devine's testimony was not harmless because respondent cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. 18, 24; *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279 [the issue is "whether the . . . verdict actually rendered in this trial was surely unattributable to the error"]; *Yates v. Evatt* (1991) 500 U.S. 391, 403 ["To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question"].) Morever, even assuming for the sake of argument that this Court finds no federal constitutional error, then under state law there is a reasonable probability or chance that a more favorable result – second degree murder convictions rather than first degree – would have been reached in the absence of Ms. Devine's testimony. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *College Hospital Inc. v. Superior* (1994) 8 Cal.4th 704, 715 ["We have made clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*" (italics in original)].) Hence, reversal is required.

No doubt the jury was duly impressed by Ms. Devine's expertise, particularly because the trial court expressly stated in the jury's presence that she was indeed an expert. (RT 1631 ["I think based on her education, training and experience that she's qualified to testify as an expert . . . ."].) The self-described scientist and UCLA graduate, possessed of a master's degree and experienced in examining 300 crime scenes, clearly had an aura of authority that very likely affected the jurors and their verdict in a

significant way. (*People v. Shirley*, *supra*, 31 Cal.3d at p. 53; *People v. Farnam*, *supra*, 28 Cal.4th at p. 160.)

Based solely on Ms. Devine's testimony that Ms. Shirley was shot first, the jury could have dismissed defense counsel's second degree murder argument – that Sergio did not deliberate the killings – because shooting Ms. Shirley before Mr. Thompson, who sat closer to Sergio, meant that Sergio must have planned to shoot her from the beginning. (See *People v. Hansen* (1994) 9 Cal.4th 300, 307 ["Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder"].) Ms. Devine's testimony was especially powerful as proof of a premeditated desire to kill Ms. Shirley in light of Sergio's statement that he saw Mr. Thompson with a gun, but, according to Ms. Devine, Sergio chose to shoot the unarmed Ms. Shirley first. Furthermore, as argued by the prosecutor, Ms. Devine's scientific and expert testimony was critical to the theory that Ms. Shirley's homicide was a deliberate, premeditated first degree murder. (RT 2745, 2808A ["Mrs. Devine testified [Sergio] fired his first round at Mrs. Shirley"], 2809A, 2878-2879.)

In the jury's view, Ms. Devine's expert testimony could have also negated the substantial evidence that Sergio was psychologically predisposed to acting impulsively. Dr. Wells opined that as a result of his early childhood development, Sergio manifested a number of different personality disorders that tended to cause him to function in psychologically impaired ways, including acting impulsively. (RT 2155-2156, 2172.) Dr. Herb Glazeroff evaluated Sergio and concluded that Sergio had acted "impulsively" in making the suicide gesture of taking an overdose because

he suffered from an adjustment disorder with depressed mood. (RT 2063-2064, 2067, 2077-2079.)

In addition, the jury could have used Ms. Devine's scientifically based judgment to offset the common-sense view that, because he was a teenager, Sergio acted impulsively in committing his crimes. (See *Roper v. Simmons* (2005) __ U.S. __ [125 S.Ct. 1183, 1195] ["'[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'"].)

Based on the manner of the homicides of Robin Shirley and Lee Thompson – five gunshots to Mr. Thompson and three to Ms. Shirley – the jury could have readily found that the killings were impulsive, without deliberation and premeditation, and therefore warranted second degree murder verdicts. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1345 ["that the manner of killing, ligature strangulation, might be somewhat more time-consuming than other methods, for example firing a weapon, does not obviate the conclusion that defendant might not have premeditated or deliberated before killing the victims"]; *People v. Hawkins* (1995) 10 Cal.4th 920, 956 [suggesting that a murder committed on impulse is similar to murder committed in a rage]; *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 165 ["[u]npremeditated murder resulting from spontaneous rage is normally second degree murder"]; see generally *People v. Anderson* (2002) 28 Cal.4th 767, 784 ["any killing, may or may not be premeditated, depending on the circumstances. If a person . . . kill[s] without reflection, the jury might find no premeditation and thus convict of second degree murder].)

Acting impulsively is the opposite of acting deliberately. (*People v. Hilton* (1946) 29 Cal.2d 217, 222 ["'The word "deliberate" is an antonym of "Hasty, impetuous, rash, impulsive" (Webster's New. Int. Dict. (2d. ed.)) and no act or intent can truly be said to be "premeditated" unless it has been the subject of actual deliberation or forethought (*id.*)'"].) Thus, defense counsel's sole argument against first degree murder was that Sergio acted impulsively on that night so that his conduct was not deliberate. (RT 2818 ["The crux of this case is, did Mr. Nelson deliberate his conduct when he pulled the trigger?"].) On the other hand, the prosecutor argued that Sergio "was revengeful and he was going to take that out on Robin Shirley and Lee Thompson. Lee Thompson may not have been as important to him as Robin Shirley. If he arrived that morning and only Robin Shirley was there, I don't know that he wouldn't necessarily wait for Lee, but he had it in against him." (RT 2804-A.) Evidence that Sergio shot the person who was farther away from him undermined the defense theory that the shooting was an impulsive, unplanned act, and supported the prosecution's view that Ms. Shirley was the principal target and Sergio was motivated by revenge.[17]

As a sampling of recent cases demonstrates, juries often return a second degree murder verdict even when there is evidence that could support a first degree murder verdict. (See, e.g., *People v. Robertson* (2004) 34 Cal.4th 156, 162-163 [defendant shot victim in back of head; prosecution sought first degree but jury returned second degree murder

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[17]Had the trial court instructed the jury on voluntary manslaughter as requested by defense counsel, then the jury could have reconciled shooting Ms. Shirley first with the theory that Sergio acted in a heat of passion after seeing Ms. Shirley and Mr. Thompson in an intimate moment and feeling betrayed by her. (See argument 1.)

verdict]; *People v. Karapetyan* (2003) 106 Cal.App.4th 609, 612, 622 [prosecution sought first degree murder verdicts based on evidence that defendant initiated gun battle; jury found two counts of second degree murder]; *People v. El* (2002) 102 Cal.App.4th 1047, 1051 [prosecution charged first degree murder because defendant waited 15 minutes after argument with victim to shoot and kill victim; jury returned second degree murder verdict]; *People v. Johnson* (2002) 98 Cal.App.4th 566, 570, 573 [defendant shot and killed victim who had turned his back to defendant; jury acquitted defendant of first degree murder and convicted him of second degree murder]; *People v. Crowe* (2001) 87 Cal.App.4th 86, 89-90, 97 [defendant went to hotel where he expected to find unarmed victim, whom he shot in the back; jury acquitted defendant of first degree murder and found second degree].)

Accordingly, the first degree murder verdicts were not "surely unattributable to the error" of admitting Ms. Devine's expert opinion that Ms. Shirley was shot first. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Moreover, the court's error in admitting the testimony was not harmless by any recognized measure. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The murder convictions should be reversed, the special circumstances findings should be set aside, and the death judgment should be vacated.

F. Due to the Erroneous Admission of Ms. Devine's Expert Testimony at the Penalty Phase Retrial, the Death Judgment Must Be Reversed Because There Is a Reasonable Possibility the Jury Would Have Rendered Life Without Parole Absent the Error.

At the penalty retrial, Ms. Devine repeated her testimony that Ms. Shirley was shot first. (RT 4276.) Assuming for the sake of argument that

the error in admitting her testimony at the first trial does not require reversal of the guilt verdicts, the erroneous admission of her testimony at the penalty retrial nonetheless requires reversal of the death judgment because there is a reasonable possibility that the error affected the death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447; see also *People v. Jones* (2003) 29 Cal.4th 1229, 1265, fn. 11 ["Our state reasonable possibility standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24"].)

The prosecutor's purpose in calling Ms. Devine for the penalty retrial was twofold: (1) to buttress the prosecution's claim that Sergio was more blameworthy because he did not simply form the mental states for first degree murder when he happened on Ms. Shirley and Mr. Thompson in the parking lot (see generally *People v. Young* (2005) 34 Cal.4th 1149, 1182 [the true test of premeditation and deliberation is not the duration of time as much as it is the extent of the reflection; thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly]), but had *planned* the killing of Ms. Shirley, as evidenced by the fact that he went out of his way to kill her first even though Mr. Thompson sat closer to Sergio when he fired the gun, and even though Mr. Thompson probably posed a greater physical threat to Sergio than Ms. Shirley; and (2) to erase any lingering doubt that the jurors might have about Sergio's guilt for the two first degree murders (*People v. Johnson* (1992) 3 Cal.4th 1183, 1252 [jury may consider any lingering doubt about guilt under factor (k) of Penal Code § 190.3]) because he might have acted impulsively (see, e.g., RT 5601 [defense counsel arguing that Sergio acted impulsively in committing the killings]) and been guilty of lesser second degree murders (*People v. Rodriguez, supra*, 66 Cal.App.4th 157, 165 [impulse killing is

usually second degree murder]).

Thus, in arguing the circumstances of the crimes to the jury, the prosecutor repeatedly emphasized that Sergio had planned the killing of Robin Shirley because she obtained the promotion that Sergio wanted. (RT 5432 ["planned, thought out ahead of time"]; 5444 ["how could you plan it, knowing that your plan was going to culminate in the death of someone, and you could continue to plan"]; 5450 ["He has got a plan"]; 5583 ["The killing . . . was not some impulsive act. It was a decision, thought out, considered, a plan of action"]; 5592 ["This case is a planned, premeditated, deliberate, carried out, carefully carried out homicide. Double homicide. There was no poor impulse control"]; 5597 ["Robin Shirley came to work every morning at a quarter to 4 . . . . So he knew when he got there, if she followed her normal habit, that he would have her alone with no witnesses and the ability to kill her"]; 5446 ["Robin Shirley, a woman, had the audacity to apply for the promotion that Mr. Nelson deserved. That is what this case comes down to"]; 5447 ["It was Robin's fault because she went for the promotion. Had she not gone for the promotion, he would have got it"]; 5566 ["That was the sole reason he took two people's lives. And if you believe that is the reason, that motive, in and of itself, can be so aggravating, I would submit to you is so aggravating, that he deserves the death penalty for what he did"].) Given the prosecutor's insistence that Sergio went to the parking lot intending to kill Robin Shirley, the prosecutor was implicitly suggesting that Lee Thompson was killed because he was a witness to the shooting of Robin Shirley.

If the prosecutor was correct, that this case came down to Sergio plotting and planning to kill the recipient of the promotion that Sergio coveted, then it was important to the prosecutor's penalty argument that Ms.

Shirley was shot first because, according to the prosecutor, Sergio's actual plan was to kill Ms. Shirley, not Mr. Thompson. But if Lee Thompson was shot first, that weakened the prosecutor's argument that Ms. Shirley was the real target, and the jury might have accepted a less blameworthy explanation for the deaths, that is, that Sergio formed the intent to kill only when he saw Ms. Shirley and Mr. Thompson together.

Ms. Devine's testimony provided the only evidence that Ms. Shirley was shot first, and the prosecutor relied on it mightily in arguing to the jury. (RT 5573 ["Elizabeth Devine testified that Robin Shirley was shot first through the neck, a through and through wound. . . . Isn't it most reasonable to conclude that he walked up and stuck the gun through the window and shot her in the back, or through the top of the head, and then turned the weapon on Mr. Thompson"]; RT 5577 ["Elizabeth Devine's testimony supports my interpretation"].) Accordingly, the importance of Ms. Devine's testimony to the prosecution's case alone dictates a reversal of the penalty verdict. (*People v. Cruz* (1964) 61 Cal.2d 861, 868 ["There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it"]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [reversal ordered where the prosecutor "exploited" erroneously admitted evidence during closing argument].)

On top of that, this was a very close case. (*People v. Beardslee* (1991) 53 Cal.3d 68, 113 [acknowledging possibility of "a close case on the question of penalty"]; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 ["'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation.]"].) At the first trial, the jury had failed to reach a verdict on the appropriate penalty (RT 417), suggesting a close case on the

question. (*People v. Brooks* (1979) 88 Cal.App.3d 180, 188 [finding *Watson* error where jury hung at first trial].) The second jury deliberated for 10 days without reaching a penalty verdict. (CT 470.) Only after the court discharged one of the two holdout jurors did the jury finally reach the death verdict (RT 5810, 5815; CT 526), suggesting that this was a *very* close case indeed. (*In re Martin* (1987) 44 Cal.3d 1, 51 [case was "evidently very close" where jury deliberated almost 22 hours over 5 days]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [jury deliberations of twelve hours was "a graphic demonstration of the closeness of this case"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [that the jury deliberated for nine hours evidenced the closeness of the question]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [almost six hours of jury deliberations were an indication that the issue was not "open and shut"].) When, as here, the jury is troubled by the case, the appellate court is required to take heed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279 [harmless error analysis requires the court to look at the impact of an error on the actual jury].)

The extensive mitigating evidence presented also supports the conclusion that this was a very close case and that Ms. Devine's expert testimony affected the death verdict.

Under Penal Code section 190.3(i), the age of the defendant at the time of the crime may be a mitigating circumstance. (*People v. Osband* (1996) 13 Cal.4th 622, 709 ["age may be considered either in aggravation or mitigation"].) Sergio's age on the day of the crimes was 19 years, 23 days. (RT 4705.) As the United States Supreme Court noted in *Roper v. Simmons*, *supra*, __ U.S. __ [125 S.Ct. 1183], because teenagers lack maturity and have an underdeveloped sense of responsibility, they often engage in impetuous and ill-considered actions. (*Id.* at p. 1195.) "The

relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" (*Id.* at p. 1196.) Furthermore, "the instability and emotional imbalance of young people may often be a factor in the crime." (*Id.* at p. 1200.) Thus, Sergio's youth and immaturity – Sergio cried when he did not get the promotion at the age of 18 and later when he was disciplined at the age of 19 (RT 4211, 4444, 4567, 4705) – offered jurors a profound reason to vote for life.[18]

In addition, witness after witness depicted Sergio as a very sweet, kind, caring, and mild-mannered boy, liked by everyone; a person who showed deep respect and sensitivity for others – from his grandmother and aunt to his surrogate father and co-workers, Sergio was always there to help. (RT 4152-4153, 4171, 4235, 4510, 4880-4881, 4902-4905, 4908, 4910, 4914, 5114-5118, 5120-5123, 5140-5142, 5146, 5152, 5180, 5195-5196, 5261-5270, 5274-5278, 5285-5286.) Sergio was also universally described by his colleagues, friends, and family as extremely hardworking

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[18]Although this Court concluded that the age of 19 may be mitigating or aggravating (*People v. Osband*, *supra*, 13 Cal.4th at pp. 660, 709), it is clear from the views of the United States Supreme Court that Sergio's youth could have only been considered mitigating under the Eighth Amendment. (*Roper v. Simmons*, *supra*, 125 S.Ct. at p. 1197 ["the mitigating force of youth [must not be] overlooked"]; see also *ibid.* [prosecutor's argument that defendant's age, 17, was aggravating constituted "overreaching" and "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18"]; *Johnson v. Texas* (1993) 509 U.S. 350, 367 ["[t]here is no dispute that a defendant's youth is a relevant mitigating circumstance"]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 116 ["the chronological age of a minor is itself a relevant mitigating factor of great weight"].)

and taking great pride in his job. (RT 4155-4157, 4221-4226, 4378-4380, 4508-4509, 4764-4768, 4774-4775, 4910, 4914, 5138.) Moreover, despite the tough neighborhood in which he was raised, Sergio did not belong to a gang, drink alcohol, or use drugs. (RT 4152-4153, 4188.) "In any capital case a defendant has wide latitude to raise as a mitigating factor 'any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*Roper v. Simmons*, *supra*, 125 S.Ct. at p. 1194 [citing *Lockett v. Ohio* (1978) 438 U.S. 586, 604].)

For most of his young life, Sergio was carefree and happy. (RT 5142-5144, 5231.) But at times Sergio was deeply troubled, subject to extreme depression and given to genuine thoughts of suicide, perhaps because his heroin-addicted father abandoned Sergio, and his mother abused and neglected him. (RT 4159-4160, 4184, 5090-5191, 5125, 5127, 5130-5142, 5158, 5188, 5222, 5231, 5239-5240, 5255, 5261-5268, 5329-5330.) At the time of the killings, Sergio was under tremendous stress – he no longer had the job that boosted his self-esteem, he had no income, he was committed to helping his grandmother make the mortgage payments on their home, and his household was experiencing a financial crisis because his aunt had lost her job. (RT 4439, 5178-5179, 5229, 5280-5283.) The jury was required to give appropriate weight to this mitigating evidence. (Pen. Code, § 190.3(d) ["the trier of fact shall take into account . . . [w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"].)

As the high court has stated: "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved

character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." (*Roper v. Simmons*, *supra*, 125 S.Ct. at pp. 1195-1196.) As shown, Sergio's life did not manifest the irretrievably depraved character of one who deserved the death penalty.

Because the prosecutor had to acknowledge that Sergio committed no other crimes of violence (RT 5436), and in fact "did not have a history of violence" (RT 5991), he relied on the circumstances of the crime in arguing for death (RT 5441). The prosecutor therefore focused on the fact that there were two homicides, and mentioned the impact on the victims' families only in passing. (RT 5436, 5442, 5464-5465.)

But a death verdict for multiple murder is not automatic. Juries have returned verdicts of life without the possibility of parole instead of the death penalty sought by the prosecution even when the juries have found multiple-murder special circumstances. (See, e.g., *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1255 [jury returned verdict of life without possibility of parole after finding defendant guilty of lying-in-wait first degree murder with a firearm, and an unrelated second degree murder with a knife]; *People v. Scott* (1991) 229 Cal.App.3d 707, 710 [defendant convicted of four counts of first degree murder with firearm; jury verdict of life without possibility of parole]; *People v. Brown* (1985) 169 Cal.App.3d 728, 731 [as a result of four-day crime spree, defendant convicted of two counts of murder, two counts of rape, two counts of forcible oral copulation, two counts of kidnapping, and six counts of robbery; jury found defendant used hand gun in each offense and reached verdict of life without

the possibility of parole].)[19]

"Capital punishment must be limited to those offenders . . . whose extreme culpability makes them 'the most deserving of execution.'" (*Roper v. Simmons*, *supra*, 125 S.Ct. at p. 1194 [quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 319].) Ms. Devine's unsubstantiated guess that Robin Shirley was shot first supported the prosecutor's argument that Sergio was a cold, calculating killer who planned his crime of revenge, and was therefore extremely culpable and deserving of execution. Absent her testimony, jurors had no reason to believe that Ms. Shirley was shot first. They

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[19]See also *People v. Singh* (Cal.App. 1 Dist.) 2003 WL 264698 (defendant convicted of three counts of murder while lying in wait; jury rejected death penalty in favor of life without possibility of parole); *People v. Lopez* (Cal.App. 2 Dist.) 2003 WL 22183862 (defendant convicted of first and second degree murder in shooting two victims; prosecution sought death penalty, but jury fixed penalty at life without the possibility of parole); *People v. Souliotes* (Cal.App. 5 Dist.) 2002 WL 1797243 (defendant convicted of three counts of murder, but jury rejected prosecution's request for death penalty).

These unpublished decisions are mentioned not for their authority or precedential value, because they have none under rule 977(a) of the California Rules of Court. Instead, they are offered to illustrate that juries have chosen life over death where defendants have killed more than once. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254, fn. 9 [citing depublished Court of Appeal opinion to indicate that Court's analysis had been adapted from that opinion]; *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 443, fn. 2 ["The message from the Supreme Court seems to be that unpublished opinions may be cited if they are not 'relied on.' (Cal.Rules of Court, rule 977(a).)"]; *Mangini v. Durand (J.G.) Int.* (1994) 31 Cal.App.4th 214, 219 [citing decertified opinions "simply to illustrate" that issue presented was recurring and remained unresolved].) The published cases cited in the text and the unpublished cases mentioned here do not include those multiple-murder cases where the jury hung on penalty and life without the possibility of parole was imposed, or the prosecution did not seek the death penalty.

therefore would have likely been more open to the defense argument that Sergio acted rashly and impulsively, like the teenager that he was, thereby mitigating Sergio's blameworthiness.

As Justice O'Connor acknowledged in her dissenting opinion in *Simmons*: "Adolescents as a class are undoubtedly less mature, and therefore less culpable for their misconduct, than adults." (*Roper v. Simmons*, *supra*, 125 S.Ct. at p. 1206 (dis. opn. of O'Connor, J.).) Sergio was a very immature, troubled adolescent who acted impulsively. He was not extremely culpable and the most deserving of execution. Accordingly, because there is a reasonable possibility that the erroneous admission of Ms. Devine's testimony affected the death verdict, the sentence must be reversed. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.)

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4.

THE COURT READ TWO ERRONEOUS INSTRUCTIONS THAT RELIEVED THE JURY FROM THE REQUIREMENT OF FINDING BOTH SPECIFIC INTENT AND THE MENTAL STATES OF FIRST DEGREE MURDER.

The trial court provided the jury with two modified CALJIC instructions that misstated the law on specific intent and the mental states of first degree murder. First, the court read a modified version of CALJIC No. 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State) to the jury:

> The specific intent *or* mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crimes charged unless the proved circumstances are not only consistent with the theory that the defendant had the required specific intent *or* mental state, but cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any such specific intent *or* mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent *or* mental state, and the other to the absence of the specific intent *or* mental state, you must adopt that interpretation which points to the absence of the specific intent *or* mental state.
>
> If on the other hand, one interpretation of the evidence as to such specific intent *or* mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.
>
> The specific intent *or* mental state as to each crime or lesser crime is defined elsewhere in these instructions.

(RT 2699-2700, CT 267-268 [italics added].) Thus, as instructed, the jury

could find Sergio guilty of first degree murder if he had the required specific intent *or* the mental state of first degree murder.

Next the court read an instruction, drafted by the prosecutor (RT 2564), that combined CALJIC Nos. 3.31 (Concurrence of Act and Specific Intent) and 3.31.5 (Mental State):

> In the crimes charged in the information and the lesser crimes there must exist a union or joint operation of act or conduct, and a certain mental state *or* specific intent in the mind of the perpetrator. Unless such mental state *or* specific intent exists, the crime to which it relates is not committed.
>
> The mental state *or* specific intent required are included in the definitions of the crimes set forth elsewhere in these instructions.

(RT 2714, CT 292 [italics added].) Thus, under the instructions given to the jury, the crimes charged in the information – first degree murders – were committed if the specific intent *or* the mental states of first degree murder existed.

As suggested by the italicized words above, this argument revolves around the improper use of the disjunctive in jury instructions. Because the court and prosecutor bollixed up the job of modifying CALJIC Nos. 2.02, 3.31, and 3.31.5, the jury was misinstructed on the essentials of first degree murder – intent to kill, malice, premeditation, and deliberation. (*People v. Lee* (1987) 43 Cal.3d 666, 676.) An error of this kind, which lightens the prosecution's burden of proof, violates the federal constitutional guarantees of due process and the right to a trial by jury. (U.S. Const., 5th, 6th & 14th Amends.; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740; see *In re Winship*, *supra*, 397 U.S. 358, 364.) Similarly, erroneous jury instructions that, as here, misdescribe an element of the offense violate the defendant's

due process right to a jury trial. (*Neder v. United States* (1999) 527 U.S. 1, 15; *People v. Flood* (1998) 18 Cal.4th 470, 491, 502-503; *Evanchyk v. Stewart* (9th Cir. 2003) 340 F.3d 933, 940.) Finally, the errors deprived Sergio of his right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-333; *Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

Premeditation, deliberation, intent to kill, and malice all must be present for a killing to be first degree murder, and an instruction stating these requirements in the disjunctive is erroneous. (*People v. Swain* (1996) 12 Cal.4th 593, 606, 608; *People v. Smith* (1973) 33 Cal.App.3d 51, 67.) Thus, citing *People v. Lizarraga* (1990) 219 Cal.App.3d 476, 481, the Use Note to CALJIC No. 2.02 states in part: "Where the crime requires both a specific intent and a particular mental state, the word 'and' rather than 'or' in the first paragraph must be used."

In *Lizarraga*, the trial court modified CALJIC No. 2.02 and instructed the jury that "'you may not find the defendant guilty of the offense charged in Counts I & II, unless the proved circumstances not only are consistent with the theory that he had the required specific intent or knowledge but cannot be reconciled with any other rational conclusion.'" The appellate court found error because the disjunctive, "or," relieved the jury from the requirement of finding both specific intent and knowledge. (*People v. Lizarraga*, *supra*, 219 Cal.App.3d at p. 481.)

Here, the trial court similarly instructed the jury that "you may not find the defendant guilty of the crimes charged unless the proved circumstances are not only consistent with the theory that the defendant had the required specific intent or mental state, but cannot be reconciled with

any other rational conclusion." (RT 2699.) Thus, the court erred because the instruction relieved the jury from the requirement of finding both specific intent and the mental states of first degree murder.

Likewise, when the prosecutor combined CALJIC Nos. 3.31 and 3.31.5, and the court instructed the jury that there need only be a "joint operation of act or conduct, and a certain mental state or specific intent" and that "[u]nless such mental state or specific intent exists, the crime to which it relates is not committed" (RT 2714), the court again erred because the instruction relieved the jury from the requirement of finding both specific intent and the mental states of first degree murder.

Reversal is mandated unless these erroneous instructions are deemed harmless beyond a reasonable doubt. (*People v. Lee, supra*, 43 Cal.3d at p. 676 [incorrect or inconsistent instructions on the element of specific intent require a reversal unless the error is deemed harmless beyond a reasonable doubt].) Jurors are presumed to follow the court's instructions. (*People v. Hardy* (1992) 2 Cal.4th 86, 208.) Thus, the jurors here presumably followed the court's instructions that relieved them from finding both specific intent and the mental states of first degree murder in returning first degree murder verdicts.

On the other hand, the court instructed the jury with CALJIC No. 8.20, that "[a]ll murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree." (RT 2716.) But nothing in the instructions makes clear to the jury that this instruction carried more weight than any other. "A reviewing court has no way of knowing which of the . . . irreconcilable instructions the jurors applied in reaching their verdict." (*Francis v. Franklin* (1985) 471 U.S. 307, 322; see also *United States v.*

Stein (9th Cir. 1994) 37 F.3d 1407, 1410 ["[w]here two instructions conflict, a reviewing court cannot presume that the jury followed the correct one"].)

Moreover, CALJIC No. 8.20 did not actually *require* that the jurors find deliberation, for example, before they could find first degree murder. Thus, CALJIC No. 2.02, as modified, and the combined versions of CALJIC Nos. 3.31 and 3.31.5 could be viewed by the jury as specific instructions that controlled over the more general CALJIC No. 8.20. (*People v. Stewart* (1983) 145 Cal.App.3d 967, 975 ["It has long been held that jury instructions of a specific nature control over instructions containing general provisions"].) The specific instructions given here permitted the jury to find first degree murder without finding deliberation so long as the jury found a specific intent to kill. (RT 2699, 2714.)

Furthermore, evidence of deliberation was not strong. The prosecutor argued that Sergio had planned the October killing of Robin Shirley out of revenge because Sergio did not receive the July promotion. (RT 2799A, 2804A, 2802, 2803, 2804, 2805, 2808.) Waiting almost three months to kill someone over a promotion is fairly farfetched. It was also improbable that the target of the revenge would be the person who received the promotion. A much more likely target would have been the person who made the decision not to promote Sergio; or the person who subjected Sergio to public humiliation in announcing over loud speakers that Sergio would not receive the promotion; or the person who reprimanded Sergio, triggering his resignation. (RT 1415, 1418-1419, 1422, 1437, 1488, 1490, 1498.) That the same person – manager Kristin Strickland – did all these things, made her the obvious choice for revenge if Sergio's real motive for the crime was not receiving the promotion, as the prosecutor insisted it was.

A much more plausible motive for the crimes is the feelings of betrayal and extreme jealousy that Sergio experienced, which caused Sergio to lose control when he discovered Robin Shirley with his rival, Lee Thompson. Sergio could always get another job. But he could not get Robin Shirley, who had spurned him for Lee Thompson.

In addition, this was a close case on the issue of deliberation. "'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation.]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) Although this case was not factually complex and involved only a single incident, the jury deliberated for approximately six hours (CT 255, 365), which suggests a close case. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907 [six hours of deliberations is evidence of a close case].) Even more telling was that the jury only had to deliberate on a single issue – deliberation – because defense counsel conceded that Sergio was the shooter, and merely argued that Sergio did not deliberate before the shootings. (RT 2818.) Of course, given the instructions under examination here, the jury could have spent the six hours discussing specific intent to kill, thereby obviating any need to discuss deliberation.

Finally, the jury requested read back of the testimony of three witnesses, Karen Horner, Dr. Wells, and Dr. Markman (CT 365), which again suggests a close case on the issue of deliberation, especially given that Doctors Wells and Markman provided psychological testimony on Sergio's state of mind (RT 2155-2156, 2460-2462, 2483.) (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["[j]uror questions and requests to have testimony reread are indications the deliberations were close]; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [request for read back

of critical testimony].)

Accordingly, because this was a close case on deliberation and therefore on first degree murder, misinstructing the jury with modified CALJIC No. 2.02 and combined CALJIC Nos. 3.31 and 3.31.5 was not harmless beyond a reasonable doubt. (*People v. Lee*, *supra*, 43 Cal.3d at p. 676.) The judgment must be reversed. (*Ibid.*)

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5.

THE COURT ERRED IN INSTRUCTING THE JURY WITH CALJIC NO. 2.70 BECAUSE GIVING THE INSTRUCTION SUGGESTED THAT SERGIO HAD CONFESSED TO AND WAS GUILTY OF FIRST DEGREE MURDER.

Although the trial court acknowledged that there had been no confession in this case, the court nonetheless instructed the jury with CALJIC No. 2.70 (Confession and Admission – Defined), over defense counsel's objection. (RT 2530-2533.) The court charged as follows:

> A confession is a statement made by a defendant, other than at his trial, in which he has acknowledged his guilt of the crimes for which he is on trial.
>
> In order to constitute a confession, such a statement must acknowledge participation in the crimes as well as the required criminal intent state of mind. An admission is a statement made by the defendant other than at his trial, which does not by itself acknowledge his guilt of the crimes for which such defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made a confession or an admission and if so, whether such statement is true in whole or in part.
>
> Evidence of an oral confession or an oral admission of the defendant not made in court should be viewed with caution.

(RT 2707-2708; CT 282; CALJIC No. 2.70.) The court erred in giving this instruction.

"It is of course error to give any instruction as to the weight of an admission when in fact there has been no testimony regarding an admission." (*People v. Wheelwright* (1968) 262 Cal.App.2d 63, 69; see

also *People v. Ramsey* (1962) 202 Cal.App.2d 856, 860 [error to give cautionary instruction regarding admissions where defendant made no oral admissions, and there was no evidence to support the instruction].) Similarly, it must be error to give an instruction as to the weight of a confession when there has been no testimony regarding a confession. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1131 ["unsupported theories should not be presented to the jury"]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386 ["[a] trial judge must only give those instructions which are supported by substantial evidence," citing *People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4 and *People v. Flannel* (1979) 25 Cal.3d 668, 684].)

Here, the court acknowledged: "There's no confession." (RT 2532.) Thus, advising the jury to view any evidence of a confession with caution was error.[20]

In addition, in *People v. Frye* (1998) 18 Cal.4th 894, this Court concluded that CALJIC No. 2.71 on admissions is "a cautionary instruction," the effect of which is "beneficial to defendant." (*Id.* at p. 959; *People v. Wheelwright*, *supra*, 262 Cal.App.2d at p. 70 ["It is an instruction intended to protect the defendant"].)[21] CALJIC No. 2.71 is similar to

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[20]Apparently the court gave the instruction so the jury would understand the difference between a confession and an admission (RT 2530-2531), as the court also instructed the jury with CALJIC No. 2.71 (Admission – Defined). (RT 2708; CT 284.)

[21]The main reason for giving the cautionary instruction "is the inability of a person to repeat exactly the words of another person" (*People v. Gardner* (1961) 195 Cal.App.2d 829, 832), which is why the instruction is not given when the admission is written (*People v. Britton* (1936) 6

(continued...)

CALJIC No. 2.70.[22] Hence, CALJIC No. 2.70 is a cautionary instruction that is beneficial to and intended to protect the defendant. A defendant should be permitted to waive an instruction that is for the defendant's benefit. Here, defense counsel tried to do so, but the court overruled his waiver/objection, even though the court conceded that Sergio had not confessed. (RT 2532-2533.)

More significant, the instruction suggested that Sergio was guilty of first degree murder, and was tantamount to a directed verdict. CALJIC No. 2.70 states that in a confession, the defendant has acknowledged his guilt of the crimes for which he is on trial. (RT 2707-2708.) The information charged Sergio with two first degree murders and no other crimes. (CT 149; RT 610.) Reasonable jurors receiving this instruction would have concluded that there must have been evidence presented of some statement

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[21](...continued)
Cal.2d 10, 13) or tape-recorded (*People v. Mayfield* (1997) 14 Cal.4th 668, 776).

[22]CALJIC No. 2.71 provides:

> An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.
>
> [Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]

made by Sergio that might constitute a confession to first degree murder, otherwise why would the court have given the instruction.

The defense introduced Sergio's statement to Dr. Wells that as Sergio approached the car, he thought he saw Mr. Thompson in the driver's seat, bending down as if he was picking something up from the floor. Thinking that Mr. Thompson was reaching for a gun and sensing immediate danger, Sergio fired at Mr. Thompson. (RT 1083-1084, 2213, 2376.) Sergio could not remember what immediately followed, although he remembered riding away on his bicycle. (RT 2214, 2376, 2378.)

Jurors must have believed that this was the out-of-court statement by Sergio referred to in the confession instruction because Sergio acknowledged that he shot and intended to shoot Lee Thompson. (CALJIC No. 2.70 ["In order to constitute a confession, such a statement must acknowledge participation in the crimes as well as the required criminal intent state of mind"].) Thus, the instruction suggested that Sergio had confessed to first degree murder, even though the court knew there had been no such confession.

"[A] trial court may not directly express an opinion on the ultimate issue of guilt or innocence of the accused at any stage of the trial . . . ." (*People v. Proctor* (1992) 4 Cal.4th 499, 542 [citing *People v. Rodriguez* (1986) 42 Cal.3d 730, 769-770 and *People v. Cook* (1983) 33 Cal.3d 400, 407, 413.) *Rodriguez* stated the rule that a "trial court may not . . . impliedly direct a verdict." (*People v. Rodriguez* (1986) 42 Cal.3d at p. 766.)

Courts have recognized that a defendant's rights to a jury trial under the Sixth Amendment and due process under the Fourteenth Amendment

prohibit a trial court from suggesting to the jury that the defendant is guilty and effectively directing a verdict. (*People v. Figueroa* (1986) 41 Cal.3d 714, 724-725 ["The prohibition against directed verdicts 'includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true.' [¶] The rule prohibiting verdicts directed against an accused emanates from the guarantee of due process and the right to a jury trial."]; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1249 [a trial judge's statements may deprive the defendant of a fair trial]; *Anderson v. Warden* (4th Cir. 1982) 696 F.2d 296, 299 [the due process clause of the Fourteenth Amendment requires impartiality and fairness in trial judge that can be destroyed by comments to jury]; *United States v. Martinez* (5th Cir. 1974) 496 F.2d 664, 668-669 [trial court's instruction to the effect that jury would be entitled to find that offense had been proved constituted impermissible directed verdict and reversible error]; *United States v. Dillon* (5th Cir. 1971) 446 F.2d 598, 600-601 [court's instruction, an indirect expression of guilt, was "tantamount to a directed verdict of guilt"]; *United States v. Musgrave* (5th Cir. 1971) 444 F.2d 755, 762 [no matter how conclusive the evidence, any instruction that suggests guilt is effectively a directed verdict and amounts to plain error].)

The United States Supreme Court has recognized that "[t]he influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling." (*Quercia v. United States* (1933) 289 U.S. 466, 470 [internal quotation marks omitted]; see also *United States v. Williams*

(5th Cir. 1987) 809 F.2d 1072, 1086 ("a trial judge has enormous influence on the jury and therefore must act with a corresponding responsibility"); *United States v. Womack* (5th Cir.1972) 454 F.2d 1337, 1343 ["It is well known, as a matter of judicial notice, that juries are highly sensitive to every utterance by the trial judge, the trial arbiter, and that some comments may be so highly prejudicial that even a strong admonition by the judge to the jury, that they are not bound by the judge's views, will not cure the error"].)

Here, the trial court acknowledged that there had been no confession, yet over defense counsel's objection, gave the jury an instruction that allowed them to find that Sergio had confessed to first degree murder. The instruction impliedly directed a verdict and thereby violated Sergio's rights under the Sixth and Fourteenth Amendments, and deprived Sergio of his right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-333; *Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The instruction, moreover, was prejudicial. (*Rose v. Clark* (1986) 478 U.S. 570, 576-578 [unconstitutional jury instructions are subject to *Chapman*].)

As repeatedly shown in this brief, this was a very close case on the issue of deliberation. (See argument 3 at pp. 80-84 and argument 4 at p. 99.) By instructing the jury with CALJIC No. 2.70, the court suggested to the jury that Sergio had confessed to first degree murder and therefore admitted the essential component of deliberation.

As this Court has often explained, "a confession operates as a kind of evidentiary bombshell which shatters the defense." (*People v. Cahill*

(1993) 5 Cal.4th 478, 503 [citations and quotations omitted].) "A confession is like no other evidence." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296.) "Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'" (*Ibid.* [quoting *Bruton v. United States* (1968) 391 U.S. 123, 139-140, dis. opn. of White, J.].)

As part of CALJIC No. 2.70, the court instructed the jurors that "[e]vidence of an oral confession . . . of the defendant not made in court should be viewed with caution." (RT 2708.) "To view 'with caution' is effectually to view with suspicion." (*People v. Wheelwright*, *supra*, 262 Cal.App.2d at p. 70.)

Although the purpose of CALJIC No. 2.70 is "to protect the defendant" (*ibid.*) from inaccurate restatements of the defendant's purported confession (*People v. Gardner*, *supra*, 195 Cal.App.2d at p. 832), a reasonable juror could have taken the instruction to mean that the part of the statement where Sergio said he shot in self-defense should be viewed with suspicion. This interpretation of CALJIC 2.70 is buttressed by the instruction's further charge that the jurors were "the exclusive judges as to whether [the confession] is true in whole or in part." (RT 2708.) And, because "self-incriminating statements are the most persuasive evidence of guilt" (*People v. Ellis* (1966) 65 Cal. 2d 529, 536), it is not likely that the jurors were suspicious of the part of the confession where Sergio admitted

shooting Lee Thompson.

Thus, in one fell swoop the court advised the jury to believe that Sergio was guilty of first degree murder and at the same time disbelieve that he killed in self-defense. The instruction was clearly prejudicial and requires reversal of the judgment in its entirety. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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6.

THE COURT VIOLATED SERGIO'S CONSTITUTIONAL RIGHTS WHEN IT FAILED TO HOLD A COMPETENCY HEARING DESPITE SUBSTANTIAL EVIDENCE THAT SERGIO MAY NOT HAVE BEEN COMPETENT TO PROCEED WITH TRIAL.

When there is a good faith doubt regarding the competence of a criminal defendant, the trial court must suspend criminal proceedings and hold a competency hearing. (*Pate v. Robinson* (1966) 383 U.S. 375, 385; *De Kaplany v. Enomoto* (9th Cir. 1976) 540 F.2d 975, 979 (en banc) ["*Pate* . . . held that where the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the trial judge on his own motion must empanel a jury and conduct a hearing to determine competency to stand trial"]; *Moore v. United States* (9th Cir. 1972) 464 F.2d 663, 666 ["Under the rule of [*Pate*,] a due process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial"].) The court's failure to take that step in this case, despite substantial evidence that Sergio may not have been competent to proceed, deprived Sergio of his rights to due process of law, a fair trial, trial by jury, confrontation and cross-examination, effective assistance of counsel, equal protection and a reliable penalty verdict as guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The death verdict must be vacated. (*Drope v. Missouri* (1975) 420 U.S. 162, 183.)

A. Proceedings Below

On May 10, 1994, after the guilt verdicts, Sergio's counsel filed a

motion asking for a competency hearing under Penal Code section 1368.[23] Defense counsel stated his belief that Sergio was "mentally incompetent." (CT 424.)

Defense counsel also attached a declaration stating as follows. During the guilt phase, Dr. Markman and Dr. Wells testified that paranoid schizophrenia was a debilitating disorder that grows worse over time. Sergio was now showing signs of gross paranoia and refusing to cooperate with the entire defense team. The court-appointed psychiatrist, Dr. Coburn, opined that Sergio exhibited signs of psychiatric disorder and was unable to cooperate with counsel in trying to save his life. Sergio told counsel that he was distrustful of him, and refused to discuss anything with him. Sergio was suspicious of counsel in that he believed counsel was delaying his trial to secure financial gain from book rights involving the sale of his life story. Sergio told counsel that to discuss the case or any of his thoughts pertaining to the case would emotionally harm him, and he refused to think about the

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[23]Section 1368 provides in relevant part: "(a) If . . . a doubt arises in the mind of the trial judge as to the mental competence of the defendant, he or she shall state the doubt on the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent . . . . At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings . . . to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time. [¶] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing . . . ." (See *People v. Pennington* (1967) 66 Cal.2d 508, 518 ["when defendant has come forward with substantial evidence of present mental incompetence, he is entitled to a section 1368 hearing as a matter of right under *Pate v. Robinson*, *supra*, 383 U.S. 375. The judge then has no discretion to exercise."].)

case. Sergio exhibited physical signs of emotional trauma. Sergio cried profusely when confronted about the incident and would not say anything, except that he did not want to think and could not discuss it. Due to this deep-seated emotional trauma, Sergio was unable to cooperate with counsel and unable to assist the defense in representing him effectively. (CT 425-426.)

The court held a hearing on defense counsel 's motion on May, 15, 1995. There, Dr. Michael B . Coburn, a psychiatrist for 25 years, testified that he had seen Sergio three times for approximately two hours. Very quietly, politely, and respectfully, Sergio declined to be interviewed in any depth. Dr. Coburn could see only a suicidal motive or depressive related motive for Sergio's inability to cooperate. Therefore, Dr. Coburn doubted that Sergio was competent to make decisions as to whether he could cooperate in the evaluation and testing that Dr. Coburn wanted Sergio to have. Dr. Coburn saw grossly illogical thinking in Sergio's apparent "decision" not to participate in a psychiatric or psychological evaluation. Sergio told Dr. Coburn that he wanted the death penalty. (RT 3305, 3307-3309, 3312-3314, 3316, 3318, 3325, 3330.)

Dr. Coburn saw evidence of depression, severe anxiety, and confusion, which inhibited Sergio's ability to allow Dr. Coburn to investigate Sergio's state of mind at the time of the offense and before. Dr. Coburn opined that Sergio's depression or anxiety was severe enough to cause a lack of ability to cooperate so that Sergio's decision not to cooperate was not a rational voluntary, manipulative decision. Dr. Coburn did not know with reasonable certainty why Sergio decompensated in jail. (RT 3309-3310.)

In Dr. Coburn's experience, it was relatively rare to see someone who, like Sergio, had become so totally unavailable to the doctor's efforts. That is one of the reasons Dr. Coburn wanted other personnel involved in the evaluation. He felt that they would be in a much better position to reach Sergio. (RT 3311.)

In Dr. Coburn's view, the decision not to fight the death penalty can be rational. (RT 3320.) But Sergio's "choice" not to cooperate with the defense team was more a function of terrible psychological discomfort than a rational decision to die. (RT 3321.) Dr. Coburn did not have enough data to conclude that Sergio could make a rational choice to accept the death penalty. In fact, the weight of the data from Dr. Coburn's standpoint was that Sergio could *not* make a rational decision. (RT 3330.)

Dr. Coburn read the testimony of Dr. Wells and Dr. Markman from the first trial, a report of Dr. Wells, and substantial portions of the discovery in the original case. (RT 3328.)

Dr. Coburn doubted Sergio's competence and asked for an independent adjudication of Sergio's competence. (RT 3329.)

The court ruled that it did not have a doubt as to Sergio's competency. To the court, Sergio apparently made a decision that he preferred the death penalty, a decision that the court did not find troublesome. Nevertheless, the court admitted that it did not know whether Sergio's unwillingness to discuss and explain his decision with Dr. Coburn made Sergio incompetent. (RT 3336-3337.)

Defense counsel then pleaded with the court, insisting that Sergio was not acting rationally and was not competent to make the decision not to fight the death penalty. (RT 3339-3340.) The court responded: "I don't

find based upon the information I have that he is incompetent." (RT 3341.) The court stated further: "I have no doubt in my mind he completely understands what we're talking about." (RT 3344.)

On June, 28, 1995, defense counsel renewed his request for a competency hearing under section 1368. Defense counsel stated that he had a serious doubt as to Sergio's ability to cooperate and felt that he was incompetent. He asked the court to stay the proceedings, get a psychological expert to evaluate Sergio, and render an opinion to the court. Defense counsel explained to the court that Sergio communicated in a confused manner. Sergio expressed to defense counsel that he could not speak because it hurt. (RT 3353.)

Dr. Coburn testified that since the May 15 hearing, he had met with Sergio, but he remained uncooperative. Dr. Coburn suspected, though not to a reasonable medical certainty, that Sergio had become paranoid. (RT 3355-3356.) Dr. Coburn could not answer whether Sergio's decision not to speak was rational. The only way to answer that would be for Sergio to be under psychiatric medication and observation for a period of time where psychiatric personnel could see him on a 24-hour basis. (RT 3356.)

Dr. Coburn reiterated that he had no complaint with somebody who makes a rational decision to die, but he had significant doubt that Sergio's actions were rational. (RT 3357.)

Dr. Coburn opined further that there was something emotionally wrong with Sergio. Sergio felt there was some kind of conspiracy against him. (RT 3361.)

Dr. Coburn urged the court to declare a doubt as to Sergio's competency, especially given the fact that this was a life or death situation.

(RT 3362.)

Defense counsel also urged the court to declare a doubt and represented to the court in good faith that he was not prepared to proceed with the penalty phase due to Sergio's lack of cooperation. (RT 3364.)

The court responded:

> I'm convinced, you know, the choice that he makes is a choice. And whether or not it's rational, I guess, it is subjective. [¶ And I don't know that, . . . having been completely through the trial, that there is any reason why we should not proceed. Therefore, to delay the proceedings further, I think, would accomplish no useful purpose. [¶] Mr. Nelson could change his mind tomorrow or might never. The theory being if we operate under the fact that just because he chooses not to communicate that we should delay these proceedings further . . . makes no real sense.

(RT 3364-3365.) The court ruled that the defense had failed to present substantial evidence that there was an issue of Sergio's competency and therefore the court was not declaring a doubt. (RT 3365.) The court stated further:

> I don't know whether [his choice is] voluntary or involuntary, whether that's really the way you should put it. I think choice, the word, choice, itself, implies voluntary. And I'm convinced that it is. As to whether it is rational or irrational, I don't know. I guess, again, that depends on the subjective evaluation of what it is that Mr. Nelson's goal happens to be. [¶] I think the goal of further delaying the proceedings is one that is uppermost in his mind. Therefore, I think the choice that he makes not to speak to us, at least, in his view is a rational one, hoping that it will delay the proceedings ad infinitum. Well, I'm not going to do that. [¶] We have a trial date of July 5.

(RT 3366.)

On July 5, 1995, defense counsel asked the court to consider a doubt

of Sergio's competence under section 1368. He explained that Sergio was still not communicating with him. (RT 3375, 3379.) Defense counsel stated: "It is my good faith belief this is a mental disorder as opposed to a voluntary will." (RT 3379.) The court ruled that the issue had been resolved. (RT 3380.)

B. The Death Penalty Verdict Must Be Vacated Because the Court Failed to Suspend Proceedings and Order a Competency Hearing after the Defense Presented Substantial Evidence that Raised a Good Faith Doubt about Sergio's Competency to Stand Trial.

In *Pate v. Robinson*, *supra*, 383 U.S. 375, the United States Supreme Court held that state procedures must be adequate to protect the federal due process right of a person not to be tried while legally incompetent. (*Id.* at p. 378.) Under *Pate*, a competency hearing is required if "there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial." (*Moore v. United States*, *supra*, 464 F.2d at p. 666.)

> Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court *sua sponte* must order an evidentiary hearing on the competency issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial.

(*Ibid.*; see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1064 [evidence is substantial if it raises a reasonable doubt about the defendant's competence

to stand trial].) Thus, "once good faith doubt exists, or should exist, its resolution requires a hearing." (*De Kaplany v. Enomoto*, *supra*, 540 F.2d at p. 979.) "The question to be asked by the reviewing court is whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." (*Id.* at p. 983; *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1087 ["We have held that a trial judge must conduct a competency hearing whenever the evidence before him raises a bona fide doubt about the defendant's competence to stand trial"].)

The *Pate* Court's determination that a competency hearing was required under due process was based primarily on the defendant's "history of pronounced irrational behavior." (*Pate*, *supra*, 383 U.S. at p. 386.) Moreover, *Pate* held that a competency hearing was required notwithstanding the lack of any expert testimony as to the defendant's possible incompetence. (*Id.* at p. 385, fn. 7.) In fact, in *Pate* the court held that a competency hearing was required despite the fact the defendant stipulated that a psychiatrist would testify that, in his opinion, the defendant knew the nature of the charges against him and was able to cooperate with counsel when the psychiatrist examined him two or three months before trial. (*Id.* at p. 383.)

In *Drope v. Missouri*, *supra*, 420 U.S. 162, the United States Supreme Court concluded that evidence that the defendant had previously received psychiatric treatment for bizarre behavior, had attempted to kill the prosecuting witness just before the trial, and had attempted suicide during the time he was on trial "created a sufficient doubt of his competence to

stand trial to require further inquiry on the question." (*Id.* at p. 180.) The *Drope* Court further explained:

> The import of our decision in *Pate v. Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

(*Ibid.*) In addition, the Supreme Court has clearly cautioned that "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." (*Id.* at p. 181.)

To be competent to stand trial, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." (*Dusky v. United States* (1960) 362 U.S. 402, 402; *People v. Lawley* (2002) 27 Cal.4th 102, 131 [defendant is mentally incompetent if he or she is unable to "assist counsel in the conduct of a defense in a rational manner"].) As the Ninth Circuit has explained:

> After all, competence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense. [Citation.] The judge may be lulled into believing that petitioner is competent by the fact that he does not disrupt the proceedings, yet this passivity itself may mask an incompetence to meaningfully participate in the process.

(*Odle v. Woodford, supra*, 238 F.3d at p. 1089.) Thus, evidence of irrational behavior may constitute sufficient evidence of incompetence to require further inquiry into a defendant's competence.

Once the defendant has presented substantial evidence of incompetence to stand trial, due process requires that a full competence hearing be held as a matter of right. In that event, the trial court has no discretion to exercise and must hold a full competence hearing. If the trial court fails to hold one, the judgment must be reversed. (*People v. Young* (2005) 34 Cal.4th 1149, 1216-1217.)

In resolving the question of whether, as a matter of law, the evidence raised a reasonable doubt as to the defendant's mental competence, this Court may consider all the relevant facts in the record including, of course, the opinion of defense counsel. (*Id.* at p. 1217, fn. 16; see also *Medina v. California* (1992) 505 U.S. 437, 450 ["defense counsel will often have the best-informed view of the defendant's ability to participate in his defense"]; *People v. Howard* (1992) 1 Cal.4th 1132, 1164 ["counsel's opinion is undoubtedly relevant"]; *Torres v. Runty* (9th Cir. 2000) 223 F.3d 1103, 1109 ["defense counsel was in the best position to evaluate [the defendant's] competence and ability to render assistance"].)[24] "When defense counsel has presented substantial evidence that a defendant is incompetent to stand trial, the trial court must declare a doubt as to the defendant's competence and suspend proceedings even if the court's own observations lead it to believe the defendant is competent." (*People v.*

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[24]Absent substantial evidence of the defendant's incompetence, the decision to order a competency hearing is left to the court's discretion. (*People v. Gallego* (1990) 52 Cal.3d 115, 163.)

Jones (1991) 53 Cal.3d 1115, 1153.) The court's failure to hold a hearing in this case, in the face of substantial evidence of incompetence, requires reversal of the penalty phase verdict.

Here, the trial court repeatedly stated its personal view that Sergio was competent. (RT 3336, 3341.) But the court's personal opinion that Sergio was competent was not the issue. As the Ninth Circuit has stated: "The function of the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency." (*Moore v. United States*, *supra*, 464 F.2d at p. 666.)

The court's own statements suggest that even the court had a reasonable doubt about Sergio's competency because the court admitted that it did not know whether Sergio's choice not to fight the death penalty was voluntary or involuntary, rational or irrational. The court first stated that it did not "know" whether Sergio's unwillingness to discuss and explain his decision with Dr. Coburn made Sergio incompetent. (RT 3336.) Later the court declared: "I am convinced that the choice that he makes is a choice. Whether or not it is rational, I guess, it is subjective." (RT 3364-3365.) The court stated further:

> I don't know whether his choice is *voluntary or involuntary*, whether that is really the way you should put it. I think the word, choice, implies voluntary. And I am convinced that it is. *As to whether it is rational or irrational, I don't know.* I guess that depends on the subjective evaluation of what it is that Mr. Nelson's goal happens to be. I think the goal of further delaying the proceedings is one that is uppermost in his mind. Therefore, I think the choice that he makes not to speak to us, at least, in his view is a rational one, hoping that

it will delay the proceedings ad infinitum. I'm not going to do that.

(RT 3366 [italics added].)

Thus, the court concluded that in Sergio's mind, Sergio had made a voluntary, rational choice not to fight the death penalty. But if Sergio's mind was not thinking rationally, then any choice Sergio made might not be rational. And contrary to the court's "guess," whether someone thinks rationally is not simply "subjective." Rational thinking means that one is "logical" and "capable of or reflecting the capability for correct and valid reasoning." (The American Heritage Dictionary of the English Language (4th ed. 2000) at pp. 1029, 1452.)

The defense presented substantial evidence in the first trial, the testimony of Dr. Coburn, and the statements of defense counsel that Sergio was not capable of correct and valid reasoning because he might be a paranoid schizophrenic.

At trial, Dr. Stephen Wells, Orange County's Chief of Forensic Psychology for 14 years, opined that, for most of his adolescent life, Sergio experienced a depressive condition called dysthymia, a type of long-standing depression. As a result of his early childhood development, Sergio manifested a number of different personality disorders that tended to cause him to function in psychologically impaired ways. (RT 2155-2156, 2172.)

Sergio had a history of suicidal thoughts. By the time he was 15 years old, he was contemplating suicide. (RT 2042.) By age 16, he went beyond merely thinking about it. On March 10, 1991, Sergio slit his wrist with a knife and sought treatment at the Pomona Valley Hospital Medical Center. (Exh. F; RT 2608.)

In March 1992, Sergio was hospitalized after taking an overdose of

medicine. (RT 2047-2048.) An emergency room physician referred Sergio for a psychiatric evaluation. (RT 2047, 2049.) Dr. Herb Glazeroff evaluated Sergio and concluded that Sergio had acted "impulsively" and made the "suicide gesture" of taking an overdose because he suffered from an "adjustment disorder with depressed mood." (RT 2063-2064, 2067, 2077-2079.)

Dr. Wells concluded that on the morning of October 2, 1993, Sergio was in the early stages of paranoid schizophrenia. (RT 2155-2156.) As Orange County's Chief of Forensic Psychology, Dr. Wells's "basic work [was] seeing late adolescents to early young adults developing symptoms of schizophrenia and becoming more and more dysfunctional." (RT 2129, 2208-2209.)

At the hearing on defense counsel's request for a competency hearing, Dr. Coburn, a psychiatrist for 25 years, testified that he could see only a suicidal motive or depressive related motive for Sergio's inability to cooperate. Therefore, Dr. Coburn doubted that Sergio was competent to make decisions as to whether he could cooperate in the evaluation and testing that Dr. Coburn wanted Sergio to have. Dr. Coburn saw grossly illogical thinking in Sergio's apparent "decision" not to participate in a psychiatric or psychological evaluation. (RT 3305, 3307-3309, 3312-3314, 3316, 3318, 3325, 3330.)

Dr. Coburn also saw evidence of depression, severe anxiety, and confusion, which inhibited Sergio's ability to allow Dr. Coburn to investigate Sergio's state of mind at the time of the offense and before. Dr. Coburn opined that Sergio's depression or anxiety was severe enough to cause a lack of ability to cooperate so that Sergio's decision not to

cooperate was *not a rational voluntary, manipulative decision*. (RT 3309-3310.)

In Dr. Coburn's view, Sergio's decision not to fight the death penalty was more a function of terrible psychological discomfort than a rational decision to die. (RT 3321.) From Dr. Coburn's standpoint, the weight of the data suggested that Sergio could not make a rational decision. (RT 3330.) Therefore, Dr. Coburn doubted Sergio's competence and asked for an independent adjudication of Sergio's competence. (RT 3329.)

Defense counsel insisted that Sergio was not acting rationally and was not competent to make the decision not to fight the death penalty. (RT 3339.)

On June, 28, 1995, defense counsel renewed his request for a competency hearing, stating that he had a serious doubt as to Sergio's ability to cooperate and felt that he was incompetent. Defense counsel explained to the court that Sergio communicated in a confused manner. Sergio expressed to defense counsel that he could not speak because it hurt. (RT 3353.)

Dr. Coburn testified that he suspected that Sergio had become paranoid. (RT 3355-3356.) Dr. Coburn reiterated that he had no complaint with somebody who makes a rational decision to die. He had significant doubt that it was rational in this case. (RT 3357.)

Dr. Coburn opined further that there was something emotionally wrong with Sergio. Sergio felt there was some kind of conspiracy against him. (RT 3361.)

Dr. Coburn urged the court to declare a doubt as to Sergio's competency especially given the fact that this was a life or death situation.

(RT 3362.)

On July 5, 1995, defense counsel explained to the court that Sergio was still not communicating with him. Defense counsel stated: "It is my good faith belief this is a mental disorder as opposed to a voluntary will." (RT 3375, 3379.)

Accordingly, the defense presented substantial evidence that Sergio was suicidal, paranoid, and thinking irrationally, raising a reasonable doubt about Sergio's competency. (*Pate v. Robinson*, *supra*, 383 U.S. at p. 385.) The trial court should have ordered a competency hearing; reversal of the death judgment is therefore mandated. (*Drope v. Missouri*, *supra*, 420 U.S. at p. 183.)

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7.

BY REJECTING "SHOULD" FOR "MAY" AND USING THE EXPRESSION, "AND/OR," IN MODIFYING CALJIC NO. 3.32, THE COURT FAILED TO INSTRUCT THE JURY THAT IT *SHOULD* CONSIDER SERGIO'S MENTAL DISORDERS IN DETERMINING THE ISSUES OF DELIBERATION, INTENT TO KILL, MALICE, AND PREMEDITATION.

The trial court instructed the jury with a modified version of CALJIC No. 3.32 (Evidence of Mental Disease – Received for Limited Purpose):

> Evidence has been received regarding a mental disease, mental defect or mental disorders of the defendant Sergio Nelson [at] the time of the commission of the crimes charged, namely first degree murder in count 1 and 2, and the lesser crimes thereto, namely second degree murder, voluntary manslaughter and involuntary manslaughter.
>
> You *may consider* such evidence solely for the purpose of determining whether of [sic] the defendant Sergio Nelson actually premeditated, deliberated, harbored malice aforethought, *and/or* intent to kill, which are elements of the crimes charged in counts 1 and 2, and one of which namely malice aforethought is an element of the lesser crime of second degree murder.

(RT 2724-2725; CT 310 [italics added].) In this instruction, the use of "may consider" instead of "should consider," and the use of "and/or," each constituted reversible error.

A. By Instructing the Jurors That They "May Consider" Sergio's Mental Disorders, the Court Improperly Permitted the Jury to Ignore Such Evidence.

Defense counsel proposed a special instruction in lieu of CALJIC No. 3.32 that would have informed the jurors that they "should consider"

Sergio's mental disorders in determining his guilt for first degree murder.[25] As the trial court noted, however, at the time of the trial in December 1994, CALJIC No. 3.32 provided: "You may consider such evidence . . . ." (RT 2694.) Apparently taking its cue from this Court's 1992 decision, *People v. Visciotti* (1992) 2 Cal.4th 1, 58 [the jury was properly instructed that it "should take into consideration" the evidence of abnormal mental state in determining whether the mental states of first degree murder were present]), CALJIC finally amended No. 3.32 in 1996 to state: "You should consider this evidence . . . ." (CALJIC No. 3.32 (6th ed. 1996); see also Penal Code § 28(a) ["Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice

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[25]Defense counsel proposed the following:

> In the crime of murder, which the defendant is accused, in count 1 and 2 of the information, express malice aforethought, premeditation, and deliberation are necessary mental state [sic] to a finding of first-degree murder.
>
> If you find that the defendant had a mental defect, disease, or disorder, at the time of the alleged crime, you should consider that fact in determining whether the defendant had such mental state.
>
> If from all the evidence you have a reasonable doubt whether the defendant formed any such mental state, you must find that he did not have such mental state.

(RT 2673.)

aforethought, when a specific intent crime is charged].)[26]

It is a fundamental tenet of the federal constitutional rights to fair trial by jury and due process that the jury consider exculpatory evidence on which the defendant relies to leave the jury with a reasonable doubt as to any element of the charge. (See, e.g., *Martin v. Ohio* (1987) 480 U.S. 228, 233-234 [instruction that jury could not consider self-defense evidence in determining whether there was a reasonable doubt about the State's case would violate *In re Winship* (1970) 397 U.S. 358]; *Rock v. Arkansas* (1987) 483 U.S. 44, 54 [rule of evidence may not be used to exclude crucial defense evidence]; *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1442 ["if a crime requires a particular mental state, the Legislature cannot deny a defendant the opportunity to prove he did not entertain that state"].) It follows that a trial court, too, cannot grant a jury the authority to ignore evidence that the defendant has introduced to prove that he or she did not

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[26]Since 1996 CALJIC No. 3.32 has provided:

> You have received evidence regarding a [mental disease] [mental defect] [or] [mental disorder] of the defendant (insert name of defendant if more than one) at the time of the commission of the crime charged [namely, _____] [in Count[s] _____][.] [or a lesser crime thereto, namely _____]. You should consider this evidence solely for the purpose of determining whether the defendant (insert name of defendant if more than one) actually formed [the required specific intent,] [premeditated, deliberated] [or] [harbored malice aforethought] which is an element of the crime charged [in Count[s] _____], namely, _____[.] [or the lesser crime[s] of _____].

have the required mental states of first degree murder.

But that is precisely what the court's version of CALJIC 3.32 permitted. It informed the jury that consideration of Sergio's mental disorders was permissive ("You may consider") rather than mandatory. To assure Sergio's constitutional right to consideration of all the evidence, the jury should have been instructed that it "must," or at the very least "should" consider the evidence of mental illness.

CALJIC No. 3.32 is a pinpoint instruction that is required to be given on request where the evidence supports the defense theory. (*People v. Moore* (2002) 96 Cal.App.4th 1105, 1115-1116 [citing *People v. Ervin* (2000) 22 Cal.4th 48, 91].) Moreover, a criminal defendant has a federal constitutional right to adequate instructions on the defense theory of the case. (*Conde v. Henry*, *supra*, 198 F.3d at p. 739; *United States v. Mason* (9th Cir. 1990) 902 F.2d 1434, 1438 ["A defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence"].)

Defense counsel requested that the court instruct the jury that it "should consider" evidence of Sergio's mental disorders. (RT 2673.) Instead, by using the words "may consider," the trial court informed the jury that even if it found that Sergio was mentally ill, it was entirely within the jury's unfettered discretion to consider this evidence in determining whether Sergio possessed all the mental states required for first degree murder. Obviously it would violate a defendant's constitutional rights for a jury not to at least *consider* defense evidence. Hence, the instruction was not adequate on the defense theory of the case, and for this reason alone, the judgment must be reversed. (*Conde v. Henry*, *supra*, 198 F.3d at pp.

740-741; *United States v. Escobar DeBright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202 [failure to instruct on the defendant's theory of the case is reversible per se].)

B. The Instruction's Use of "And/or" Made it Fatally Confusing.

In *Vilardo v. County of Sacramento* (1942) 54 Cal.App.2d 413, the plaintiff alleged that a judgment should be annulled because the judge was related to an "officer and/or agent" of the defendant. The court of appeal ruled that this was not an allegation that the relative was an agent of the defendant because "and/or" was ambiguous. (*Id.* at p. 419.)

The appellate court in *Rosenberg v. Bullard* (1932) 127 Cal.App. 315 held that an affidavit stating that an injury was "in consequence of fraud and/or other wrongful act" was "[o]bviously . . . uncertain and ambiguous as to whether the injury is due to either or both causes." (*Id.* at p. 321.)

In *In re Bell* (1942) 19 Cal.2d 488 (en banc), the defendants were charged with violating "any one 'and/or' any other provision of section 3" of an ordinance. (*Id.* at p. 491.) The defendants were found guilty as charged, making it impossible to discern which of the sections – some of which were found unconstitutional – the defendants had been convicted of violating. (*Id.* at p. 499.)

"The expression 'and/or,' which made possible a conviction couched in such general terms, has met with widespread condemnation" (*ibid.*), wrote Chief Justice Traynor, backing up that conclusion with a string of cites to 12 opinions from various jurisdictions. "It is true that the expression has proved convenient in contracts and other instruments where, by its intentional equivocation, it can anticipate alternative possibilities

without the cumbersome itemization of each one. [Citations.] It lends itself, however, as much to ambiguity as to brevity." (*Id.* at pp. 499-500.)

As these cases demonstrate, "and/or" is hopelessly ambiguous and confusing. By its use in the phrase, "[he] actually premeditated, deliberated, harbored malice aforethought, and/or intent to kill" (RT 2725), the instruction could have meant he actually premeditated, and he actually deliberated, and he actually harbored malice aforethought, and he "intent to kill." The instruction could have also meant he actually premeditated, or he actually deliberated, or he actually harbored malice aforethought, or he "intent to kill." Lastly, the instruction could have meant (he actually premeditated, and he actually deliberated, and he actually harbored malice aforethought), or (he "intent to kill").

The instruction was made even more befuddling by the words "actually," "harbored," and "intent to kill." Did "actually" only modify premeditated, or did it also modify deliberated, harbored malice aforethought, and intent to kill? Did "harbored" take as its object malice aforethought and intent to kill, or just malice aforethought? Did "intent to kill" mean intent to kill or intended to kill?

Add to these possible interpretations the fact that the court instructed the jurors that they "may consider such evidence *solely* for the purpose of determining" one, all, or some of the possibilities (RT 2725 [italics added]), and the instruction becomes incomprehensible. By this instruction the jurors had the option of considering Sergio's mental disorders solely for the purpose of determining, for example, premeditation, and nothing else. Thus, individual jurors need not have even considered whether Sergio's mental disorders prevented him from deliberating when he discovered

Robin Shirley and Lee Thompson together.

Accordingly, the trial court erred in giving the instruction because there is a reasonable likelihood that the jury was confused by the instruction and misapplied it by, for example, "solely" considering whether Sergio's mental disorders negated premeditation, but not the specific intent to kill or deliberation. (*People v. Avena* (1996) 13 Cal.4th 394, 417 ["for ambiguous instructions, test is whether there is a 'reasonable likelihood' the jury misunderstood and misapplied the instruction," citing *Boyde v. California* (1990) 494 U.S. 370, 380-381 and *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4].) An error of this kind, which lightens the prosecution's burden of proof, violates the federal constitutional guarantees of due process and the right to a trial by jury. (U.S. Const., 5th, 6th & 14th Amends.; *Conde v. Henry*, *supra*, 198 F.3d at p. 740; see *In re Winship*, *supra*, 397 U.S. 358, 364.) Moreover, the error deprived Sergio of his right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-333; *Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) And for the reasons stated in argument 3 at pages 80-84, argument 4 at page 99, and argument 5 at pages 106-108, the instruction was not harmless beyond a reasonable doubt, especially with respect to the issue of deliberation, and requires reversal of the judgment. (*People v. Lee*, *supra*, 43 Cal.3d at p. 676.)

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8.

THE COURT ERRED IN INSTRUCTING THE JURY ON A FACTUALLY INSUFFICIENT LYING-IN-WAIT THEORY OF FIRST DEGREE MURDER, AND BECAUSE THE JURY UNREASONABLY FOUND THE EQUALLY UNSUPPORTED LYING-IN-WAIT SPECIAL CIRCUMSTANCES, THE FIRST DEGREE MURDER VERDICTS AND LYING-IN-WAIT SPECIAL CIRCUMSTANCES MUST BE REVERSED.

The trial court erroneously instructed the jury on the first degree murder theory of lying in wait (Pen. Code, § 189) and the special circumstances of lying in wait (Pen. Code, § 190.2(a)(15)) because the evidence was insufficient to establish that Sergio murdered Robin Shirley and Lee Thompson by means of lying in wait or that he intentionally killed them while lying in wait. Because the jury acted unreasonably in finding the unsupported lying-in-wait special circumstances, the first degree murder convictions and special circumstances findings violated Sergio's right to due process under the Fourteenth Amendment to the federal constitution and article I, section 13 of the California Constitution, as well as his rights under the Eighth Amendment to the federal constitution and the correlative rights under the California Constitution. (*Griffin v. United States* (1991) 502 U.S. 46; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Guiton* (1993) 4 Cal.4th 1116; *People v. Green* (1980) 27 Cal.3d 1.) The murder convictions, special circumstances, and death judgment must be reversed.

A. The Court Erred in Instructing the Jury on Lying-in-Wait Murder Because the Evidence Was Insufficient to Support Convictions of First Degree Murder on That Theory.

"It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v.*

Guiton, *supra*, 4 Cal.4th at p. 1129.) Here, defense counsel objected to the lying-in-wait instructions as unsupported by the evidence. (RT 2583.) Thus, "the issue is whether the trial court should have instructed on lying in wait. [T]o decide the issue [this Court] must determine whether there was substantial evidence to support a jury verdict based on that theory." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139, fn. 1.)

In examining for substantial evidence, this Court "must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*Id.* at p. 1138 [quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578, and citing *Jackson v. Virginia* (1979) 443 U.S. 307].) In this case, a rational trier of fact could not have found that every element of lying in wait had been proven beyond a reasonable doubt, so the trial court erred in instructing the jury on lying in wait.

"To prove lying in wait, the prosecution must prove there was a concealment of purpose, a substantial period of watching and waiting for a favorable or opportune time to act, and that immediately thereafter the defendant launched a surprise attack on an unsuspecting victim from a position of advantage." (*People v. Gurule* (2002) 28 Cal.4th 557, 630.) Without conceding proof of the first and third elements, it is plain that the prosecution failed to prove with evidence, as opposed to mere conjecture, that Sergio spent "a substantial period of watching and waiting for a favorable or opportune time to act." (*Ibid.*) The prosecutor's argument to the jury conceded as much.

The prosecutor argued as follows:

[H]e chose an early morning time, . . . he didn't go there in the middle of the day when . . . they would work at the store to confront them. Look at the time and the place[] that he chose in order to commit the murders.

The time and place tells you something. Quarter to four, nobody else in the parking lot . . . .

When he went there and he was riding all this way after he has gotten this prepared, after he has his black bike out, after he has his gun, after he has his tires and after he has dark clothes on, after he rode six miles, with that intent *do you think it is **possible** he **might** have left just a little early so that he didn't miss them.*

Part of the lying in wait instruction said watching and waiting. Do you think he said, gee, they are usually there at a quarter of three [sic], probably, I can get there in about maybe an hour, maybe 45 minutes, I probably don't have to leave too early, I will get there as soon as they get there, or do you think there was some thought in his mind, I am going to get there, I am going to make sure nobody else is around, I am going to surveil the scene and make sure they are the only ones there . . . .

I am going to watch them pull in and see what they do before I approach and before I kill them.

Of course, he did. And it was a substantial period of time, it was substantial enough to carry out the plan that he had made.

[I]t takes enough time to hide the bike, to get in an area of conceal . . . and then watch them come in. Now we know that they park close together.

We know that Mrs. Shirley had enough time to get out of her truck, to get into the vehicle with Mr. Thompson. For

> the doors to be closed and for the two of them to sit there for some period of time.
>
> [If] you look at them, the positions of their bodies, the positions of their arms, it is totally consistent with two people who were caught completely unaware by Mr. Nelson and shot to death.

(RT 2812A-2813A [italics and bold added].) Thus, the prosecutor asked the jury to convict Sergio of first degree murder under a lying-in-wait theory based, not on evidence, but on the mere *possibility* that Sergio *might* have left his house with enough time to watch and wait for the arrival of Robin Shirley and Lee Thompson. Because, however, there was no evidence in the record of what time Sergio left his home, and there was no evidence of what time Ms. Shirley and Mr. Thompson arrived at Target, there was no evidence to support the prosecutor's guess that Sergio arrived before Ms. Shirley and Mr. Thompson.

Similarly, the prosecutor presented no evidence of when Ms. Shirley, who lived with her husband (RT 1836), left her home for work that morning. There was also no evidence of what time Mr. Thompson left his house.[27] Ms. Shirley and Mr. Thompson, who by all accounts had developed a close relationship and may have been having an affair (RT 1246, 1255, 1406, 1842, 1857, 1916, 1931), could have been parked in the lot for hours.

Moreover, there was evidence that Sergio arrived at Target *after* Ms. Shirley and Mr. Thompson. As the prosecutor acknowledged, Ms. Shirley

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[27]Mr. Thompson's mother drove her son to work when he did not drive her car or his motorcycle. (RT 2449.) The prosecutor offered no testimony from Mr. Thompson's mother as to the time Mr. Thompson usually left for work or what time he left that morning.

and Mr. Thompson were in the store parking lot for some time. Sergio told Dr. Wells that he rode out to Target on his bicycle, walked over to a car in the parking lot, and recognized Ms. Shirley and Mr. Thompson in the car. (RT 2213, 2376, 2381-2383.)[28] Thus, contrary to the prosecutor's mere conjecture, the evidence is that Sergio did not arrive before Ms. Shirley and Mr. Thompson.

Likewise, there was no evidence to support the prosecutor's argument that Sergio surveilled the scene, concluded that there was no one else around (how Sergio missed seeing Richard Hart, the prosecutor did not explain), and watched Ms. Shirley and Mr. Thompson drive into the parking lot. Although by his argument it is clear that the prosecutor understood his burden to show that Sergio spent a substantial period watching and waiting for a favorable or opportune time to act (*People v. Sims* (1993) 5 Cal.4th 405, 433 [defining "watchful" as "alert and vigilant in anticipation of [victim's] arrival so that defendant could take him by surprise"]), there was simply no evidence that Sergio did so.

Furthermore, none of the cases decided by this Court supports the conclusion that Sergio spent "a substantial period of watching and waiting for a favorable or opportune time to act." (*People v. Gurule*, *supra*, 28 Cal.4th at p. 630 [defendant and accomplice planned to rob service station, picked time (early morning) when fewer people would be about, waited

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[28]Though night, Sergio was able to recognize Ms. Shirley and Mr. Thompson because, as Detective Pickwith testified, the parking lot was "well lit" when Ms. Shirley and Mr. Thompson sat together. (RT 1812.) In fact the lights in the parking lot were so bright that Richard Hart was able to identify Sergio as the assailant from over 130 yards away. (RT 1048-1049, 1055, 1814.)

across street for victim to be alone; accomplice engaged victim in conversation; defendant surprised victim from behind, and stabbed victim]; see also, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1149-1150 [defendant waited outside for several hours for his ex-wife and victim to return to home, took ex-wife by surprise, quickly subdued her, then fatally shot victim in the shower]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501 [defendant watched and waited until victim was in vulnerable position, stabbing him while victim was urinating]; *People v. Carpenter* (1997) 15 Cal.4th 312, 388-389 [defendant passed victims on hiking trail, went to observation deck, peered at trail with binoculars, came back down to trail, waited around corner from victims in isolated location, appeared suddenly, and attacked victims]; *People v. Sims*, *supra*, 5 Cal.4th at p. 433 [defendant purchased clothesline and knife, rented hotel room, called for pizza delivery, lured deliverer into hotel room, bound him with clothesline, and killed him]; *People v. Ceja*, *supra*, 4 Cal.4th 1134, 1143 [defendant parked truck next to house hours before knocking on door and asking for victim, waited and watched until victim was alone with him before he struck]; *People v. Hardy* (1992) 2 Cal.4th 86, 120-123, 163-164 [while co-conspirator was out of town, defendants drove to victims' home after 2 a.m., parked on a side street so as to avoid drawing attention to their activities, waited for co-conspirator's wife and son to sleep, used key to unlock the front door around 3 or 4 a.m., from hallway heard victims snoring in bedroom, and killed victims while they slept in same bed]; *People v. Edwards* (1991) 54 Cal.3d 787, 825-826 [defendant entered campground three hours before shooting victims, reentered campground, observed victims walking in opposite direction, turned around, followed

them, waited for them to reach isolated area, and attacked them]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1020-1021 [defendant shot his wife from a concealed position almost immediately after she returned home]; *People v. Ruiz* (1988) 44 Cal.3d 589, 615 [defendant's wife and stepson were clothed in bedclothes, wrapped in bedding, buried in area a few feet outside their house, and shot in head from close range; jury could infer that defendant, who lived with victims, watched and waited until victims were asleep to attack].)

The prosecutor's lying-in-wait theory, including that it was "possible" that Sergio "might" have left his house early enough so he would not miss Ms. Shirley and Mr. Thompson, was based on sheer speculation and must be rejected because there was no evidence that (1) Sergio arrived at the store before Ms. Shirley and Mr. Thompson, and (2) he spent a substantial period watching and waiting for a favorable or opportune time to act. (*People v. Raley* (1992) 2 Cal.4th 870, 891 [an inference "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence."].) Accordingly, the evidence was insufficient to prove a lying-in-wait theory of first degree murder, and the court erred in instructing the jury on that theory. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.)

B. The Murder Convictions and Lying-in-Wait Special Circumstances Must Be Reversed Because the Jury Acted Unreasonably in Finding the Lying-in-Wait Special Circumstances, Which Were Not Supported by Substantial Evidence.

In *People v. Green*, *supra*, 27 Cal.3d 1, this Court stated the "settled and clear" rule on appeal that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*Id.* at p. 69.) "The same rule applies when the defect in the alternate theory is not legal but factual, i.e., when the reviewing court holds the evidence insufficient to support the conviction on that ground." (*Id.* at p. 70.)

In *Guiton*, the Court relied on *Griffin v. United States* (1991) 502 U.S. 46, and created the following exception to the *Green* rule: "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.) *Guiton* expressly based its holding on the following reasoning:

> In analyzing the prejudicial effect of error, . . . an appellate court does not assume an unreasonable jury. Such an assumption would make it virtually impossible to ever find error harmless. An appellate court necessarily operates on the assumption that *the jury has acted reasonably, unless the record indicates otherwise*. [¶] . . . Thus, if there are two possible grounds for the jury's verdict, one unreasonable and the other reasonable, we will assume, *absent a contrary*

indication in the record, that the jury based its verdict on the reasonable ground.

(*Id.* at p. 1127 [italics added].) The *Guiton* exception is therefore based on the assumption that the jury has acted reasonably and did not base a finding on insufficient evidence.

Here, however, the assumption that the jury acted reasonably does not apply because the record shows that the jury acted unreasonably in finding the lying-in-wait special circumstances based on insufficient evidence. As with the lying-in-wait theory of first degree murder, this Court reviews the evidence presented at trial in the light most favorable to the prosecution to determine whether any rational trier of fact would have found each essential element of the special circumstance beyond a reasonable doubt. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413-414.)

"The lying-in-wait special circumstance requires 'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. . . .' [Citations.]." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 388.) Because the lying-in-wait special circumstance adds additional requirements to the otherwise identical lying-in-wait theory of first degree murder (*People v. Ceja*, *supra*, 4 Cal.4th at p. 1140, fn. 2), the Court has often stated that the evidence for the lying-in-wait theory of first degree murder is necessarily sufficient when there is substantial evidence supporting the lying-in-wait special circumstance. (See, e.g., *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 500.) Conversely, where the evidence supporting the lying-in-wait theory of first degree murder is insufficient, the evidence supporting the

lying-in-wait special circumstance cannot be sufficient.

As shown, the evidence supporting the lying-in-wait theories of first degree murder was insufficient. It necessarily follows that the jury acted unreasonably in finding the lying-in-wait special circumstances. Thus, even assuming for the sake of argument that the evidence was sufficient to support the prosecutor's alternative theory of premeditated murder (RT 2757-2760), the *Guiton* exception does not apply so that under *Green*, the first degree murder verdicts must be reversed. (*People v. Green*, *supra*, 27 Cal.3d at p. 70; see also *In re Winship*, *supra*, 397 U.S. at p. 364 [conviction based on insufficient evidence violates defendant's constitutional right to due process of law]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 526 ["'[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside'"]; accord, *Martinez v. Garcia* (9th Cir. 2004) 379 F.3d 1034, 1035-1036, 1041; *Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053, 1062.)

Moreover, even under *Guiton*, each murder conviction must be reversed because there is "an affirmative indication in the record that the verdict actually did rest on the inadequate ground" (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129), given that the jury also found the lying-in-wait special circumstances. (See *People v. Marshall* (1997) 15 Cal.4th 1, 38 [evidence did not support robbery-murder theory of first degree murder, but true finding on allegation that murder was committed in course of attempted rape "necessarily" meant that jury found defendant guilty of felony-murder on that theory]; *People v. Kelly* (1992) 1 Cal.4th 495, 531 [trial court misinstructed on robbery as basis for first degree murder, but because jury

properly found rape-murder special circumstance, jury necessarily relied on rape-murder theory of first degree murder]; *People v. Hernandez* (1988) 47 Cal.3d 315, 351 [Court can tell that general verdict of guilt rested on rape and sodomy felony-murder because jury found rape and sodomy special circumstances].) Accordingly, the first degree murder verdicts, multiple murder and lying-in-wait special circumstances, and death judgment must be reversed.

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9.

THE COURT ERRED IN INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT.

Over defense counsel's objections (RT 2326-2327, 2522, 2529), the court instructed the jury with CALJIC Nos. 2.03 (Consciousness of Guilt – Falsehood), 2.06 (Efforts to Suppress Evidence), and 2.52 (Flight After Crime) which permitted the jury to infer consciousness of guilt by Sergio. CALJIC No. 2.03 read:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove the consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(RT 2700; CT 269.) CALJIC No. 2.06 provided:

> If you find that the defendant attempted to suppress evidence against himself in any manner, such as by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(RT 2701; CT 270.) CALJIC No. 2.52 stated:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his or her guilt, but is a fact which, if proved, may be considered by you in light of all the other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(RT 2706; CT 279.)

The instructions were erroneously given because they were unnecessary and argumentative. Moreover, they permitted the jury to draw irrational inferences against Sergio. The errors deprived Sergio of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstance and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) In this case, where Sergio's commission of the homicide was conceded (RT 2818), but the degree of the crimes was very much in doubt, delivery of these instructions was prejudicial. Accordingly, the judgment must be reversed in its entirety.

A. The Consciousness-of-Guilt Instructions Improperly Duplicated the Circumstantial Evidence Instructions.

The consciousness-of-guilt instructions were unnecessary. This court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle on which the jury already has been instructed should not be given. (*People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080, overruled on other ground, *People v. Hill* (1998) 17 Cal.4th 800.)

In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC instructions, Nos. 2.00, 2.01 and 2.02. (RT 2696-2699; CT 263-267.) These instructions informed the jury that it could draw inferences from the circumstantial evidence, that is, that it could infer facts tending to show Sergio's guilt – including his state of mind – from the circumstances of the alleged crimes.

There was no need to repeat this general principle in the guise of permissive inferences of consciousness of guilt, particularly since the trial

court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [holding that state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [holding that arbitrary preference to particular litigants violates equal protection].)

B. The Consciousness-of-Guilt Instructions Were Unfairly Partisan and Argumentative.

The consciousness-of-guilt instructions were not just unnecessary, they were impermissibly argumentative. The trial court must refuse to deliver any instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871), or "imply a conclusion to be drawn from the evidence" (*People v.*

Nieto Benitez (1992) 4 Cal.4th 91, 105, fn. 9), are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, the consciousness-of-guilt instructions given in this case were impermissibly argumentative. Structurally, they were almost identical to the instruction reviewed in *People v. Mincey*, *supra*, 2 Cal.4th 408, which read as follows: "If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated." (*Id.* at p. 437, fn. 5.)

Here two instructions – CALJIC Nos. 2.03 and 2.06 – told the jury that "[i]f you find" certain facts, then "you may" consider that evidence for a specific purpose, showing consciousness of guilt in this case. This Court found the instruction in *Mincey* to be argumentative (*id.* at p. 437), and should also hold CALJIC Nos. 2.03 and 2.06 to be impermissibly argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *People v. Mincey*, *supra*, 2 Cal.4th, 408, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" Nonetheless, this holding does not explain why instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and

defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon* (1973) 412 U.S. 470, 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay v. Normet, supra*, 405 U.S. at p. 77). Moreover, the prosecution-slanted instructions given in this case also violated due process by lessening the prosecution's burden of proof. (*In re Winship* (1970) 397 U.S. 358, 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instruction this Court has upheld (see, e.g., *People v. Nakahara, supra*, 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC Nos. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright, supra*, 45 Cal.3d at p. 1137.)

The alternate rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th, 495, 531-532, and a number of subsequent cases (e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instruction, noting that it tells the jury that the consciousness-of-guilt evidence is not sufficient by

itself to prove guilt. From this fact, the *Kelly* court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly*, *supra*, at p. 532.)

More recently, this Court abandoned the *Kelly* rationale, holding that the error in not giving a consciousness-of-guilt instruction was harmless because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) Moreover, the allegedly protective aspect of the instruction is weak at best and often entirely illusory. The instruction does not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. It thus permits the jury to seize on one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use that *in combination* with the consciousness-of-guilt evidence to conclude that the defendant is guilty.

Finding that a flight instruction unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming held that, in future cases, delivery of a flight instruction will always be reversible error. (*Hadden v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in the flight instruction.

Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E,2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d

1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App. 1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[29]

The reasoning of two of these cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E.2d 1230, the Supreme Court of Indiana relied on that state's established ban on argumentative instructions to disapprove delivery of flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Supreme Court of Kansas cited a prior case which had disapproved delivery of a flight instruction (*id.* at p. 748) and extended its reasoning to cover all similar consciousness of guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes

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[29]Other state courts have also held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [holding that the reasons which led to the disapproval of flight instructions also applied to an instruction on the defendant's false statements].)

The argumentative consciousness-of-guilt instructions invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution, placing the trial court's imprimatur on the prosecution's theory of the case, and lessening the prosecution's burden of proof. It therefore violated Sergio's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

C. The Consciousness-of-Guilt Instructions Permitted the Jury to Draw Irrational Permissive Inferences about Sergio's Guilt.

The consciousness-of-guilt instructions suffer from an additional constitutional defect – they embody improper permissive inferences. The instruction permits the jury to infer one fact, such as Sergio's consciousness of guilt, from other facts, e.g., false statements (CALJIC No. 2.03). (See *People v. Ashmus* (1991) 54 Cal.3d, 932, 977.) A permissive inference instruction can intrude improperly on a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without

considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (en banc).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also *id.*, at p. 900 (conc. opn. Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend'"].) This test is applied to judge the inference as it operates under the facts of each specific

case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

In this case, the consciousness-of-guilt instructions and the resulting arguments of the prosecutor permitted irrational inferences that Sergio premeditated and deliberated the crimes. After the court provided the jury with the consciousness-of-guilt instructions, the prosecutor acknowledged to the jury that Sergio's counsel had conceded that he committed the homicides. (RT 2746.) Therefore, according to the prosecutor, the issue was "what the crimes are. That all is going to come down ultimately to what was going on inside his head when the crimes were committed and before the crimes were committed, what we refer to as mental state or specific intent." (RT 2746.) The prosecutor then immediately explained to the jurors that the three consciousness-of-guilt instructions under examination here – false statements (RT 2748), concealing evidence (RT 2749), and flight after crime (RT 2752) – would help them analyze the evidence and understand "even what was really going on in his mind at the time that he committed the crimes." (RT 2748.)

Although the consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of the defendant's state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) As this Court explained, "evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime. (*Id.* at p. 33.)[30]

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[30]Professor LaFave makes the same point:

(continued...)

Therefore, Sergio's actions after the crimes, on which the consciousness-of-guilt inferences were based, simply were not probative of whether he harbored the mental states for murder at the time he shot Robin Shirley and Lee Thompson. There was no rational connection – much less a link more likely than not – between Sergio's purported lies, concealment of evidence, and flight and his consciousness of having committed the homicides with malice aforethought, premeditation, and deliberation. CALJIC No. 8.20 [Deliberate and Premeditated Murder].)

This Court has previously rejected the claim that consciousness-of-guilt instructions permit irrational inferences concerning a defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52].) Nevertheless, Sergio respectfully asks this Court to reconsider and overrule these holdings, and to hold that in this case delivery of the consciousness-of-guilt instructions was reversible constitutional error.

The foundation for these rulings is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, which noted that the consciousness-of-guilt

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[30](...continued)

> Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing.

(LaFave, Substantive Criminal Law (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482 [original italics, fn. omitted].)

instructions do not specifically mention mental state and concluded that "[a] reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.'" (*Id.* at p. 871.) The *Crandell* analysis is mistaken for three reasons. First, the instruction does not speak of "consciousness of some wrongdoing;" it speaks of "consciousness of guilt," and *Crandell* does not explain why the jury would interpret the instruction to mean something it does not say. Elsewhere in the instructions, the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., RT 2697 ["a finding of guilt as to any crime;" "guilty of the crime;" "the defendant's guilt must be proved beyond a reasonable doubt;" "an inference essential to establish guilt"]; 2698 [defendant's guilt and . . . innocence;" "points to his guilt;" "find the defendant guilty of the offenses charged"].) In fact, while the first sentence of CALJIC No. 2.03 mentions "consciousness of *guilt*," the very next sentence states that "such conduct is not sufficient by itself to prove *guilt*," meaning, of course, guilt of the crimes charged. Contrary to *Crandell's* view, a reasonable juror would believe that the word "guilt" has the same meaning in each sentence, and would not understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the crimes charged." Thus, it would be a violation of due process if the jury could reasonably interpret that instruction to mean that Sergio was entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship*, *supra*, 397 U.S. at p. 364; see *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 323-324.)

Second, although the consciousness-of-guilt instruction does not specifically mention the defendant's mental state, it likewise does not specifically exclude it from the purview of permitted inferences or otherwise hint that any limits on the jury's use of the evidence may apply. On the contrary, the instruction suggests that the scope of the permitted inferences is very broad. It expressly advises the jury that the "weight and significance" of the consciousness-of-guilt evidence "if any, are matters for your" determination.[31]

Third, this Court itself has drawn the very inference that *Crandell* asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of defendant's mental state at the time of the killing, expressly relying on consciousness-of-guilt evidence among other facts, to find an intent to rob. (*Id.* at p. 608.)[32] Since this

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[31]In a different context, this Court repeatedly has held that an instruction that refers only to "guilt" will be understood by the jury as applying to intent or mental state as well. It has ruled that a trial court need not deliver CALJIC No. 2.02, which deals specifically with the use of circumstantial evidence to prove intent or mental state, if the court has also delivered CALJIC No. 2.01, the allegedly "more inclusive" instruction, which deals with the use of circumstantial evidence to prove guilt and does not mention intent, mental state, or any similar term. (*People v. Marshall* (1996) 13 Cal.4th 799, 849; *People v. Bloyd* (1987) 43 Cal.3d 333, 352.)

[32]In *Hayes*, this Court wrote:

> There was also substantial evidence, apart from James' testimony, that defendant killed Patel *with the intent to rob him* and then proceeded to ransack the motel's office and the manager's living quarters. *Defendant demonstrated consciousness of guilt by fleeing the area and giving a false statement when arrested*, the knife that killed Patel was found

(continued...)

Court considered consciousness-of-guilt evidence to find substantial evidence that a defendant killed with intent to rob, it should acknowledge that lay jurors might do the same.

Because the consciousness-of-guilt instructions permitted the jury to draw irrational inferences of guilt against Sergio, use of the instructions undermined the reasonable doubt requirement and denied him a fair trial and due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15.) The instructions also violated Sergio's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16); and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the instructions violated his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

D. Reversal is Required.

Giving the consciousness-of-guilt instructions was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, Sergio's convictions and the special circumstances finding must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see

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[32](...continued)
in the manager's living quarters, defendant was seen carrying a box from the office to James' car, and four days later defendant committed similar crimes against James Cross.

(*People v. Hayes*, *supra*, 52 Cal.3d at p. 608 [italics added].)

Schwendeman v. Wallenstein, supra, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

The error in this case was not harmless beyond a reasonable doubt. As shown the prosecutor expressly argued that because Sergio conceded the shootings, the issue was his state of mind, and the consciousness-of-guilt instructions allowed the jury to discern that state of mind. (RT 2746-2749.) Thus, for the reasons stated in argument 3 at pages 80-84, argument 4 at page 99, and argument 5 at pages 106-108, the evidence of deliberation, premeditation, and malice aforethought was not overwhelming and the judgment must be reversed in its entirety.

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10.

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED ON MOTIVE ALONE.

The trial court instructed the jury under CALJIC No. 2.51 (Motive):

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt, absence of motive may tend to establish innocence. You'll therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(RT 2705; CT 278.) This instruction improperly allowed the jury to determine guilt based on the presence of an alleged motive and shifted the burden of proof to Sergio to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

A. The Instruction Allowed the Jury to Determine Guilt Based on Motive Alone.

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove

theft or robbery].)

The motive instruction was in stark contrast to another standard evidentiary instruction, CALJIC No. 2.03, which expressly admonished the jury that a wilfully false or deliberating misleading statement was "not sufficient by itself to prove guilt." (RT 2700; CT 269.) Because CALJIC No. 2.51 is so obviously aberrant, it prejudiced Sergio during deliberations. The instruction appeared to include an intentional omission allowing the jury to determine guilt based on motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.] [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. Accordingly, the

instruction violated Sergio's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends; Cal. Const., art. 1, §§ 7 & 15.)

B. The Instruction Impermissibly Lessened the Prosecutor's Burden of Proof and Violated Due Process.

The court instructed the jury that intent to kill and malice aforethought were elements of first degree murder (RT 2716; CT 297), and that express malice was an "intention unlawfully to kill" (RT 2715; CT 295). By informing the jurors that "motive was not an element of the crime," however, the trial court reduced the burden of proof on an element of the prosecutor's case, that is, that Sergio harbored malice aforethought. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

There is no logical way to distinguish motive from intent in this case. Therefore, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

The distinction between "motive" and "intent" is difficult, even for judges, to maintain. Various opinions have used the two terms as synonyms:

> An aider and abettor's fundamental purpose, *motive and intent* is to aid and assist the perpetrator in the latter's

> commission of the crime. He may so aid and assist with knowledge or awareness of the wrongful purpose of the perpetrator [citations] or he may so act because he has the same evil intent as the perpetrator. [Citations.]"

(*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87, italics added.)

> "A person could not kidnap and carry away his victim to commit robbery if the *intent* to rob was not formed until after the kidnaping had occurred." [citation] . . . . Thus, the commission of a robbery, the *motivating* factor, during a kidnaping for the purpose of robbery, the dominant crime, does not reduce or nullify the greater crime of aggravated kidnaping.

(*People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008, italics added.)

> [T]he court as a part of the same instruction also stated to the jury explicitly that mere association of individuals with an innocent purpose or with honest *intent* is not a conspiracy as defined by law; also that in determining the guilt of appellants upon the conspiracy charge the jury should consider whether appellants honestly entertained a belief that they were not committing a wrongful act and whether or not they were acting under a misconception or in ignorance, without *any criminal motive*; the court further stating, "Joint evil *intent* is necessary to constitute the offense, and you are therefore instructed that it is your duty to consider and to determine the good faith of the defendants and each of them." Considering the instruction as a whole, we think the jury could not have misunderstood the court's meaning that a corrupt *motive* was an essential element of the crime of conspiracy.

(*People v. Bowman* (1958) 156 Cal.App.2d 784, 795, italics added.)

> In *Union Labor Hospital v. Vance Lumber Co.* [citation], the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the *intent* to subserve their own interests. The Supreme Court said [citation]: 'But if this were not so, and their *purpose* were to injure the business of

> plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil *motive* which may inspire the doing of an act not unlawful will not of itself make the act unlawful.'"

(*Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6, italics added.) Accordingly, it is clear that "motive" and "intent" are commonly interchangeable under the rubric of "purpose."

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be "'motivated by an unnatural or abnormal sexual interest or intent.'" (*Id.* at pp. 1126-1127.) The court of appeal emphasized, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.) It found that giving the CALJIC No. 2.51 motive instruction – that motive was not an element of the crime charged and need not be proved – was reversible error. (*Id.* at pp. 1127-1128.)

There is a similar potential for conflict and confusion in this case. The jury was instructed to determine if Sergio had the intention unlawfully to kill, but was also told that motive was not an element of the crime. As in *Maurer*, the motive instruction was federal constitutional error.

C. The Instruction Shifted the Burden of Proof to Imply That Sergio Had to Prove Innocence.

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on Sergio to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived Sergio of his federal constitutional rights to due process and fundamental fairness. (*In re*

Winship, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing Sergio to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

D. Reversal is Required.

Here, under CALJIC No. 2.51, the prosecutor was relieved of proving intent; he need only have shown motive for the jury to conclude that Sergio committed murder. Accordingly, this Court must reverse the judgment in its entirety because the erroneous motive instruction – affecting a key issue before the jury – was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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11.

CALJIC NO. 2.90 WAS CONSTITUTIONALLY DEFECTIVE.

A. Introduction

Because this case presented the jurors with closely balanced factual issues to resolve, an accurate definition of reasonable doubt and of the burden of proof was critical. The jury in this case was read CALJIC No. 2.90. (RT 2713; CT 291.) The judgment should be reversed because the definitions of reasonable doubt and the burden of proof in this instruction were constitutionally deficient in a number of ways.[33]

B. The Instruction Erroneously Implied That Reasonable Doubt Requires the Jurors to Articulate Reason for Their Doubt.

The second paragraph of CALJIC No. 2.90 given to Sergio's jury defined reasonable doubt as follows: "Reasonable doubt is defined as follows: it is not a mere possible doubt; because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." (RT 2713; CT 291.)

"In state criminal trials, the Due Process Clause of the Fourteenth

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[33]There was no objection to the instruction below. Nevertheless, the issue on appeal is not waived. Instructional errors that affect a defendant's fundamental rights are reversible without objection at trial. (Pen. Code, § 259.)

Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' [Citations.]" (*Cage v. Louisiana* (1990) 498 U.S. 39, 40; *see also In re Winship* (1970) 397 U.S. 358, 364. The reasonable-doubt standard "plays a vital role in the American scheme of criminal procedure." (*Winship*, 397 U.S. at p. 363; *see also Cage*, 498 U.S. at p. 40.) "Among other things, 'it is a prime instrument for reducing the risk of convictions resting on factual error.' [Citation.]" (*Cage* at p. 40.) An essential conceptual underpinning of the presumption of innocence is that the accused bears no burden of proof whatsoever. It is not the obligation of the accused to "raise" or "create" any specified threshold of doubt. (*People v. Loggins* (1972) 23 Cal.App.3d 597, 601-04.) Nor is the jury required to "find" any particular degree or amount of doubt before it may acquit. Rather, the jurors must acquit under all circumstances unless they find that the prosecution has proven every fact essential to conviction beyond a reasonable doubt. (*In re Winship*, *supra*, 397 U.S. at p. 364.)

Accordingly, it is constitutionally erroneous to require jurors to articulate concrete reasons for their doubt. (*People v. Antommarchi* (N.Y. 1992) 80 N.Y.2d 247, 252 [604 N.E.2d 95, 98, 590 N.Y.S.2d 33].) When jurors are required to articulate reasons for acquitting "[t]he burden . . . is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt." (*State v. Cohen* (Iowa 1899) 108 Iowa 208 [78 N.W. 857, 858].) In short, "jurors are not bound to give reasons to others for the conclusion reached. [Citations.]." (*Id.* at p. 858.)

Moreover, the essence of reasonable doubt is a failure of proof: "It is the want of information and knowledge that creates the doubt." (*Siberry*

v. State (Ind. 1893) 33 N.E. 681, 688.) Such "want of knowledge" is not necessarily capable of expression as an affirmative or logical "reason" for the doubt that is felt. This would require the juror to "prove a negative." Hence, such an instruction unconstitutionally misstates the burden of proof. "It is the lack of information and knowledge satisfying the members of the jury of the guilt of the accused, with that degree of certainty required by the law, which constitutes a reasonable doubt, and if jurors are not satisfied of the guilt of the accused with such degree of certainty as the law requires, they must acquit, whether they are able to give a reason why they are not satisfied to that degree of certainty or not." (*Id.* at p. 689.)

In the present case the jurors were not expressly instructed that they must articulate reason and logic for their doubt. Nevertheless, the instructional language implied as much. By requiring more than "mere possible or imaginary doubt" the instruction suggested to the jurors that the reason and logic for their doubt should first be articulated and then evaluated against the "mere possible or imaginary" standard. As reasonably interpreted by the jurors (*Estelle v. McGuire* (1991) 502 U.S. 62), the instructions required an articulation of their doubts before such doubts could be considered sufficient to acquit.

C. CALJIC No. 2.90 Unconstitutionally Admonished the Jury That a Possible Doubt Is Not a Reasonable Doubt.

The language of CALJIC No. 2.90 admonishing the jury that "reasonable doubt . . . is not a mere possible doubt . . ." was unconstitutional because it failed to adequately limit the scope of possible doubt. Unlike an imaginary doubt, a possible doubt may be based on fact. When driving on a two-lane road, reasonable drivers do not pass on a blind

curve because it is "possible" that a car may be coming in the other lane. Cautious investors regularly give up higher returns and opt for the lower return of an insured bank account because it is "possible" they may lose principal in a more lucrative but riskier investment. In other words, merely because a doubt is only possible does not make it unreasonable or insignificant. The question of reasonable doubt should be measured by reasonable reliance rather than possibility. If the doubt is sufficient to cause a juror to reasonably rely on it in making important decisions, then the doubt is reasonable, even if it is merely possible. (See, e.g.,*Victor v. Nebraska* (1994) 511 U.S. 1, 20-21 [hesitate to act language "gives a commonsense benchmark for just how substantial such a [reasonable] doubt must be"].)

This formulation of reasonable doubt was approved in *United States v. Wilson* (1914) 232 U.S. 563, 570, and has since been endorsed by a number of state and federal courts. (See, e.g., *Holland v. United States* (1954) 348 U.S. 121, 140; *Hilbish v. State* (Alaska App. 1995) 891 P.2d 841, 850-851.) The federal circuits that provide for definition of reasonable doubt and many states use the *Wilson* hesitation concept. For example, the Eighth Circuit clarifies the "possible doubt" by relating it to the notion of reliance: a reasonable doubt is a doubt based on reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act on it. Nevertheless, proof beyond a reasonable doubt does not mean proof beyond all possible doubt. (*8th Circuit Model Jury Instructions – Criminal*

(Reasonable Doubt) (2000) No. 3.11; *see also* Kevin F. O'Malley, Jay E. Grenig & William C. Lee, *Federal Jury Practice and Instructions* (Presumption of Innocence, Burden Of Proof, and Reasonable Doubt) (5th ed. 2000) § 12:10.[34]

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[34]Other jurisdictions include similar definitions. (See e.g., *Pennsylvania Suggested Standard Criminal Jury Instructions*, Pa. SSJI (Crim) 7.01 ¶ 3, sent. 2 (Presumption Of Innocence: Burden Of Proof; Reasonable Doubt) (Pennsylvania Bar Institute, PBI Press); *South Carolina Criminal Jury Instructions* 1-14 (Reasonable Doubt Charge) (South Carolina Bar, 1995); W. Scott Carpenter, & Paul J.McClung, *McClung's Texas Criminal Jury Charges*, § 1 (II)(B)(2) ¶ 4 (proper.chg) (James Publishing, 2000); *Criminal Jury Instructions For The District of Columbia*, Instr. 2.09, (Reasonable Doubt) (Bar Association of the District of Columbia, 4th ed. 1993); *South Dakota Pattern Jury Instructions - Criminal*, SDCL 1-6-2 & 1-6-3 (Reasonable Doubt (Alternates 1 & 2)) (State Bar of South Dakota, 2000); *Alaska Pattern Criminal Jury Instructions*, 1.52 (Presumption Of Innocence, Burden Of Proof Beyond A Reasonable Doubt) (Alaska Bar Association, 1987); *Arkansas Model Jury Instructions - Criminal,* AMCI 2d 110 (Introductory Instructions-Reasonable Doubt) (Lexis, 2nd ed. 1997); *Colorado Jury Instructions*, COLJI - Crim 3:04 (Presumption Of Innocence-Burden Of Proof Generally-Reasonable Doubt) (West, 1983); *Connecticut Selected Jury Instructions - Criminal* 2.8 (General Jury Instructions-Reasonable Doubt) (The Commission on Official Legal Publications Judicial Branch, 3rd ed. 1996); *Idaho Criminal Jury Instructions*, ICJI 103A (Reasonable Doubt (Alternative)) (Idaho Law Foundation, Inc., 1995); *Maryland Criminal Pattern Jury Instructions*, MPJI-Cr 1.04 (Reasonable Doubt) (Micpel, 1999); *New Mexico Uniform Jury Instructions - Criminal*, UJI Criminal 14-5060 (Presumption Of Innocence; Reasonable Doubt; Burden Of Proof) (Lexis, 1998); *Instructions for Virginia & West Virginia* 24-401 (Reasonable Doubt Defined Generally) (Lexis, 4th ed. 1996); *Wisconsin Jury Instructions - Criminal*, WIS-JI-Criminal 140 (Burden Of Pool And Presumption Of Innocence) (University of Wisconsin Law School, 2000); *6th Circuit Pattern Jury Instructions - Criminal* 1.03 (Presumption Of Innocence, Burden Of Proof, Reasonable Doubt) (1991).

Alternatively, it may be said that reasonable doubt "does not mean a captious or speculative doubt, or a doubt from mere whim, caprice, or groundless conjecture." (*Siberry, supra*, 33 N.E. 681 at p. 689.) Nevertheless, in the present case, reasonable doubt was not so defined. Instead, the jury was admonished that a doubt is not reasonable if it is merely possible. Such a definition unconstitutionally allowed the jurors to reject a doubt as unreasonable even if they would reasonably have relied on a similar degree of doubt in their own important affairs.

Moreover, by stating that merely possible doubt was unreasonable, the instruction unconstitutionally implied some obligation on the part of the accused to raise a probable doubt as to his or her guilt. It is unconstitutional to require the accused to assume any burden of proof as to reasonable doubt. (*In re Winship, supra*, 397 U.S. 358.)

D. The Instruction Was Deficient and Misleading Because the Instruction Failed to Affirmatively Instruct That the Defense Had No Obligation to Present or Refute Evidence.

The instructional language that defined and explained the presumption of innocence was the first paragraph of CALJIC No. 2.90, which provided as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (RT 2713; CT 291.) The instruction omitted one of the most fundamental underpinnings of the presumption of innocence, that is, that the accused need not present any evidence for the jury to have a reasonable doubt. This omission, in light of other

instructions, erroneously conveyed the impression that the evidence presented by the defense must raise a reasonable doubt.

The essence of the presumption of innocence is that the defense has no obligation to present evidence, refute the prosecution evidence or to prove or disprove any fact. (*In re Winship*, *supra*, 397 U.S. at p. 364; *see People v. Hill* (1998) 17 Cal.4th 800, 831 ["to the extent [the prosecutor] was claiming there must be some affirmative evidence demonstrating a reasonable doubt, she was mistaken as to the law, for the jury may simply not be persuaded by the prosecution's evidence"]; *see also State v. Miller* (W. Va. 1996) 197 W. Va. 588, 610 [476 S.E.2d 535, 557] [if requested court must instruct that defendant has no obligation to offer evidence]; *United States v. Maccini* (1st Cir. 1983) 721 F.2d 840, 843.)

As the judge told the jury in *Maccini*:

> I take this occasion to state to the jury one of the fundamental principles of American jurisprudence, which is that the burden is upon the [prosecution] in a criminal case to prove every essential element of every alleged offense beyond a reasonable doubt. That is, the burden is upon the [prosecution] to prove guilt beyond a reasonable doubt. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. There's no burden on [defendant] to produce any evidence. In every case, and I have no doubt in this case as well, the defendant will be presenting evidence by way of cross-examination of [prosecution] witnesses. The defendant relies upon evidence elicited by cross-examination. So that the opportunity that [defendant] will have, as the defendant in every case has, to bring out certain facts by way of cross-examination and by way of argument and analysis to the jury, does not in any way imply a necessity on the part of the defendant to produce any evidence. That's fundamental. There is no need of the defendant to produce any evidence. There is no need in law for him to take advantage of the

> opportunity. He doesn't have to put a single question on cross-examination if counsel decides not to do so. The bottom line is that the burden is on the [prosecution] to prove guilt beyond a reasonable doubt. There is no burden on the defendant to prove his innocence, and there's no burden on the defendant to come forward with a single item of evidence or testimony.

(*Maccini, supra*, 721 F.2d at p. 843.) An instruction explaining that the defendant has no obligation to produce evidence is especially important in cases where, as here, the defense presents affirmative evidence because the jurors will be naturally inclined to view their duty as deciding whether the defense evidence has proven or disproven the facts in issue.

When considering the instructions as a whole (as required by the instructions (CT 1112; CALJIC 1.01) and presumed by the law[35]), the jurors were reasonably likely to assume that the defense had the burden of producing sufficient evidence to raise a reasonable doubt. The instructions from which such an erroneous assumption would have been made included the following:

CALJIC No. 1.00 – Respective Duties of Judge and Jury. (RT 2692; CT 257.) This instruction described the jurors' duties in terms of "determin[ing] the facts" and "reach[ing] a just verdict . . . ." These descriptions implied a weighing of the evidence presented by both parties to

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[35]"Out of necessity, the appellate court presumes the jurors faithfully followed the trial court's directions, including erroneous ones." (*People v. Lawson* (1987) 189 Cal.App.3d 741, 748; see also *People v. Hardy* (1992) 2 Cal.4th 86, 208.) "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin* (1985) 471 U.S. 307, 324-325, fn. 9.)

determine what actually happened that would be consistent with the jurors' natural intuition. Nevertheless, the jurors' duty under the presumption of innocence is not to determine the ultimate truth but rather to determine whether the prosecution had proved guilt beyond a reasonable doubt. Hence, this instruction was misleading.

CALJIC No. 2.11 – Production of All Available Evidence Not Required. (RT 2701; CT 271.) Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence. This "missing witness" instruction exacerbated the deficient presumption of innocence instruction by implying that the defense had the obligation to present evidence. By expressly telling the jury that neither side is required to "call . . . all" potential witnesses to an event or "produce all objects or documents," the instruction suggested that the production of some evidence by both sides was required. (See e.g., *Commonwealth v. Bird* (Pa. 1976) 240 Pa. Super. 587, 590 [361 A.2d 737, 739] [reversible error to instruct jury that it could draw inference against defendant for failure to call bystander as witness even though the instruction also permitted the jury to draw an inference against the prosecution for its failure to call the same witness); *State v. Mains* (1983) 295 Or. 640, 647 [669 P.2d 1112, 1117].)

CALJIC No. 2.01 – Sufficiency of Circumstantial Evidence Generally. (RT 2697; CT 265.) The circumstantial evidence instructions also exacerbated the deficiencies of the presumption of innocence instruction. True, paragraph 2 of CALJIC No. 2.01 stated that "each fact which is essential to complete a set of circumstances necessary to establish

the defendant's guilt must be proved beyond a reasonable doubt." (RT 2697; CT 265.) But, this paragraph reasonably addressed only the prosecution's evidence and did nothing to explain how the defense evidence should be considered in light of the prosecution's burden.

CALJIC No. 2.60 – Defendant Not Testifying - No Inference of Guilt May Be Drawn. (RT 2706; CT 280.) This instruction was limited to the defendant's failure to testify. It did not apply to the failure to present evidence. Hence, this instruction further reinforced the misconception that the defense had the burden of producing evidence to raise a reasonable doubt.

CALJIC No. 2.61 – Defendant May Rely on State of Evidence. (RT 2707; CT 281.) This instruction did discuss the defendant's reliance on a failure of proof by the prosecution: "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against him on any such essential element." (*Id.*) Nevertheless, by making the instruction specifically applicable to "deciding whether or not to testify," and by admonishing that "no lack of testimony on defendant's part will supply a failure of proof," the instruction, by implication, did not apply to the defendant's failure to present evidence.

In sum, the instructions as a whole perpetrated the misconception that the defense had the burden of raising a reasonable doubt.

E. The Instruction Was Constitutionally Deficient Because It Failed to Explain That Sergio's Attempt to Refute Prosecution Evidence Did Not Shift the Burden of Proof.

Given the instructional failure to explain that Sergio had no obligation to present affirmative evidence, it follows that the instructions erroneously failed to explain that Sergio's presentation of evidence did not alter the burden. The prosecution's burden of proof is not satisfied merely by the rejection or disbelief of the defense evidence. "[D]isbelief of a witness does not establish that the contrary is true, only that the witness is not credible. [Citations]." (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 704.) In other words, "rejection of testimony 'does not create affirmative evidence to the contrary of that which is discarded.' [Citation]." (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343; *see also Nishikawa v. Dulles* (1958) 356 U.S. 129, 137 ["disbelief of petitioner's story . . . [cannot] fill the evidentiary gap in the Government's case"]; *Moore v. Chesapeake & O.R. Co.* (1951) 340 U.S. 573, 576 [disbelief of a witness will "not supply a want of proof"]; *Mandelbaum v. United States* (2nd Cir. 1958) 251 F.2d 748, 752 ["the disbelief of a witness does not necessarily establish an affirmative case"]; *People v. Goodchild* (Mich. 1976) 68 Mich.App. 226, 235 [242 N.W.2d 465, 469-470] ["mere disbelief in a witness's testimony does not justify a conclusion that the opposite is true without other sufficient evidence supporting that conclusion"].)

Accordingly, when the prosecution has failed to present sufficient credible evidence to meet its burden of proof, the jury should not be permitted to utilize its disbelief of the defendant's evidence to conclude that the prosecution's burden has been met. The failure to adequately inform the

jury concerning this principle violated Sergio's federal constitutional rights to trial by jury and due process by allowing the jury to convict Sergio even though the prosecution did not meet its burden of proving him guilty beyond a reasonable doubt. (U.S. Const., amends. VI & XIV.)

F. The Jurors Should Have Been Told That a Conflict in the Evidence or a Lack of Evidence Could Leave Them With a Reasonable Doubt as to Guilt.

CALJIC No. 2.90 was incomplete and misleading because it failed to expressly inform the jury that reasonable doubt could be based on a conflict in the evidence, a lack of evidence, or a combination of the two. (See *Georgia Suggested Pattern Jury Instructions - Criminal Cases* (2nd ed. 2000) part 2 (D) at p. 7 (Instruction D).) This is so because two equally probable conflicting inferences do not overcome a burden of proof. When conflicting inferences are equally probable or, in other words, when the evidence is in equipoise, "the party with the burden of proof loses." (*Simmons v. Blodgett* (9th Cir. 1997) 110 F.3d 39, 41-42; see also *Estate of Obernolte* (1979) 91 Cal.App.3d 124, 129 ["Equal probability does not satisfy a burden of proof"].)

G. CALJIC No. 2.90 Failed To Inform the Jury That the Presumption of Innocence Continues Throughout the Entire Trial, Including Deliberations.

The presumption of innocence continues throughout the entire trial and applies to every stage, including deliberations. (See *Clarke v. Commonwealth* (Va. 1932) 159 Va. 908, 919 [166 S.E. 541, 545-546]; see also *State v. Goff* (W. Va. 1980) 166 W.Va. 47, 55 [272 S.E.2d 457, 463] [the burden never shifts to the defendant].) Hence, it is improper to give the jury the impression that the presumption of innocence continues until the jury, in its discretion, decides that it should end. (See *United States v.*

Payne (9th Cir. 1990) 944 F.2d 1458, 1462-63; see also *People v. Johnson* (Ill. App. Ct. 1972) 4 Ill. App.3d 539, 541 [281 N.E.2d 451, 453]; *People v. Attard* (N.Y. App. Div. 1973) 346 N.Y.S.2d 851; *State v. Tharp* (Wash. App. 1980) 27 Wash. App. 198, 211 [616 P.2d 693, 700].) "It has been held that an instruction as to the presumption of innocence which correctly told the jury that it attends the accused throughout the trial, but which the trial court qualified by adding, 'until such time, if at all, as it is overcome by credible evidence' is erroneous, because the jury may have inferred from this that, at some stage of the trial before its conclusion, sufficient evidence had been adduced to overcome the presumption, thus shifting the burden upon the accused. [Citations.]" (*Wisconsin Jury Instructions- Criminal, WIS-JI-Criminal* (2000) 140 [Burden of Proof and Presumption of Innocence] comment at p. 4.) Hence, CALJIC No. 2.90 as given here was deficient because it did not assure that the jury would not shift the burden to the defense at some point before completing its deliberations.

H. CALJIC No. 2.90 Improperly Described the Prosecution's Burden as Continuing "Until" the Contrary Is Proved.

The trial court used CALJIC No. 2.90 to instruct the jury, in pertinent part, as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved . . . ." (RT 2713; CT 291.) Use of the term "until" in this instruction undermined the prosecution's burden of proof. Use of the word "until" is less clear and definitive than "unless." That is, "until" implies that the proof will be forthcoming, while "unless" implies that sufficient proof might not ever be presented. In apparent recognition of how use of the term "until" fails to comport with *Winship* and thus risks misleading the jurors, other standard pattern instructions throughout the nation use "unless" or "unless and until." (See, e.g., *Idaho*

Criminal Jury Instructions ICJI No. 1501 ["unless"]; Oklahoma Uniform Jury Instruction Crim. (2nd ed.) No. 1 [same]; *State v. Hutchinson* (Tenn. 1994) 898 S.W.2d 161, 172 [same]; Criminal Jury Instructions – New York CJI (New York) (lst ed. 1983) No. 3.05 ["unless and until"]; Ky. Rev. Stat. § 532.025 [same]; *Criminal Jury Instructions For The District of Columbia* (4th ed. 1993) Instr. 1.03 [same]; Uniform Criminal Jury Instructions (Oregon) No. 1006 [same]; 1st Circuit Model Instructions Criminal No. 1.01 [same]; 8th Circuit Model Instructions, Criminal No. 1.01 [same].)[36]

Hence, the instruction in the present case was deficient because it implied that the prosecution would meet its burden. Moreover, the instruction also failed to assure that the presumption of innocence would remain in place throughout the trial and during deliberations.

I. The Errors Violated the Federal and State Constitutions.

For all of the above reasons, CALJIC No. 2.90 failed to properly instruct the jury on the prosecution's burden of proof. The failure to properly instruct on the prosecution's burden to prove every essential

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[36]Alternatively, it has been recommended that the jury be more directly instructed on this point as follows: "The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt." Leonard B. Sand, et al., 1 *Modern Federal Jury Instructions* (1994) § 4.01, Form 4-1.) Another option is the following instruction from *United States v. Walker* (7th Cir. 1993) 9 F.3d 1245: "The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty." (*Id.* at p. 1250.)

element of the charge beyond a reasonable doubt violated Sergio's state and federal constitutional rights to due process and fair trial by jury. (U.S. Const., amends. VI & XIV; Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *In re Winship, supra*, 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment clauses of the federal constitution, which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (U.S. Const., amends. VIII & XIV; *Beck v. Alabama* (1980) 447 U.S. 625, 627-646; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785.) Furthermore, verdict reliability is also required by the Due Process Clause of the federal Constitution. (U.S. Const., amend XIV; *White v. Illinois* (1992) 502 U.S. 346, 363-364; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.) Further, because Sergio was arbitrarily denied his state created right to proper instruction on the burden of proof under the state Constitution and Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (U.S. Const., amend. XIV; Evid. Code, §§ 500-502; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

J. The Judgment Should Be Reversed.

The giving of an instruction that dilutes the standard of proof for

conviction is reversible error per se. Any error in defining reasonable doubt for a jury cannot be deemed harmless because the error goes to the very heart of the system of criminal trials and deprives the criminal defendant of the right to be convicted only on a finding by the jury of guilt beyond a reasonable doubt as correctly defined. (*Sullivan* v. *Louisiana* (1993) 508 U.S. 275.) This court has reached a similar conclusion. (*People v. Vann* (1974) 12 Cal.3d 220, 225-26.) Moreover, because the error violated Sergio's federal constitutional rights, the judgment should be reversed unless the prosecution can demonstrate beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman*, *supra*, 386 U.S. at p. 24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-470 (*Chapman* standard applied to combined impact of state and federal constitutional errors); *People* v. *Williams* (1971) 22 Cal.App.3d 34, 58-59.) Given the closeness of the evidence on premeditation, deliberation, and malice aforethought, and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under *Chapman*. Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt.

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THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia*, *supra*, 433 U.S. at p. 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra* at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict Sergio on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

A. The Instructions on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt (CALJIC Nos. 2.90, 2.01, 2.02, 8.83, and 8.83.1).

The jury was instructed that Sergio was "presumed to be innocent until the contrary is proved" and that "[T]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (RT 2713; CT 291.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

(RT 2713; CT 291.)

The terms "moral evidence" and "moral certainty" as used in the reasonable doubt instruction are not commonly understood terms. While this same reasonable doubt instruction, standing alone, has been found to be constitutional (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 13-17), in combination with the other instructions, it was reasonably likely to have led the jury to convict Sergio on proof less than beyond a reasonable doubt in violation of his Fourteenth Amendment right to due process.

The jury was given four interrelated instructions – CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1 – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (RT 2697, 2699, 2732, 2733; CT 265, 267, 323, 325.) These instructions, addressing different evidentiary issues in almost identical terms, advised Sergio's jury

that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (See, e.g, CALJIC No. 2.01.) These instructions informed the jurors that if Sergio *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. This directive undermined the reasonable doubt requirement in two separate but related ways, violating Sergio's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th, & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Canella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

First, the instructions not only allowed, but compelled, the jury to find Sergio guilty on all counts and to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, 397 U.S. at p. 364.) The instructions directed the jury to find Sergio guilty and the special circumstance true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appeared]" to them to be "reasonable." (See, e.g., RT 2697.) An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 78 ["It would not satisfy the

Sixth Amendment to have a jury determine that the defendant is *probably* guilty" [italics added].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless Sergio rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314 [italics added, fn. omitted].) Mandatory presumptions, even those that are explicitly rebuttal, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, the instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (See, e.g., RT 2697.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. All the more, this Court should invalidate the instructions given in this case, which required the jury to

presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations. As the prosecutor acknowledged, given Sergio's concession that he was the shooter, the issue in this case was Sergio's state of mind. (RT 2746.) The prosecutor recognized further that the jurors were being called on to decide Sergio's mental state at the time of the commission of this offense "from circumstantial evidence because nobody can tell us what was in his head at the time. We don't know that by any evidence other than circumstantial evidence." (RT 2772-2773.) Clearly, then, the circumstantial evidence instructions were critical to the prosecutor's case.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced Sergio by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.)

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find Sergio's guilt on a standard that is less than constitutionally required.

B. Other Instructions Also Vitiated the Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.22, 2.27, 2.51, and 8.20).

The trial court gave five other standard instructions that individually

and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 1.00, regarding the respective duties of the judge and jury (RT 2692; CT 257); CALJIC No. 2.22, regarding weighing conflicting testimony (RT 2704; CT 276); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (RT 2705; CT 277); CALJIC No. 2.51, regarding motive (RT 2705; CT 278); and CALJIC 8.20, regarding deliberation and premeditation (RT 2716; CT 297). Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

As a preliminary matter, several instructions violated Sergio's constitutional rights as enumerated in subsection A of this argument by misinforming the jurors that their duty was to decide whether Sergio was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. For example, CALJIC No. 1.00 told the jury that pity or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (RT 2692.) CALJIC No. 2.01, discussed previously in subsection A of this argument, also referred to the jury's choice between "guilt" and "innocence." (RT 2697.) CALJIC No. 2.51, regarding motive, informed the jury that the presence of motive "may

tend to establish guilt," while the absence of motive "may tend to establish innocence." (RT 2705.) These instructions diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. They encouraged jurors to find Sergio guilty because it had not been proven that he was "innocent."[37]

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(RT 2704.) This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence

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[37]As one court has stated:

> We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone.*

(*People v. Han* (2000) 78 Cal.App.4th 797, 809 [original italics].) *Han* concluded there was no harm because the other standard instructions, particularly CALJIC No. 2.90, made the law on the point clear enough. (*Ibid.* [citing *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739].) The same is not true in this case.

that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." The *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (RT 2705), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." Indeed, this Court has "agreed] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encouraged] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated Sergio's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation . . . ." (RT 2716 [italics added].) The use of the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, rather than to raise a reasonable doubt about that element. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "'absolutely prevent'"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction on a lesser showing – that he or she must find Sergio not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in subsection A of this argument.

C. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions.

Although each one of the challenged instructions violated Sergio's federal constitutional rights by lessening the prosecution's burden and by

operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC Nos. 2.01 and 2.27, among others)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].)[38] While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable

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[38]Although this Court has not specifically addressed the implications of the constitutional error contained in CALJIC Nos. 2.22 and 2.51, the courts of appeal have echoed the pronouncements by this Court on related instructions. (See *People v. Salas*, *supra*, 51 Cal.App.3d at pp. 155-157 [challenge to former version of CALJIC No. 2.22 "would have considerable weight if this instruction stood alone," but the trial court properly gave CALJIC No. 2.90]; *People v. Estep*, *supra*, 42 Cal.App.4th at pp. 738-739 [citing *People v. Wilson* (1992) 3 Cal.4th 926, 943] [CALJIC No. 2.51 had to be viewed in the context of the entire charge, particularly the language of the reasonable doubt standard set out in CALJIC No. 2.90].)

likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075 [citing *People v. Westlake* (1899) 124 Cal. 452, 457] [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[39] It is just as likely that the

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[39]A reasonable doubt instruction also was given in *People v. Roder*, (continued...)

jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Sergio's jury heard nine separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: the oft-criticized and confusing language of Penal Code Section 1096 as set out in former CALJIC No. 2.90.[40] This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson*, *supra*, 3 Cal.4th at p. 943, citations omitted.) Under this principle, it cannot seriously be maintained that a single, quite imperfect instruction such as former CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary

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[39](...continued)
supra, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

[40]As this Court has noted, the statutory language – with its references to "moral evidence" and "moral certainty" – is problematic. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503.) In combination with the instructions discussed in this argument, it is reasonably likely that CALJIC No. 2.90 allowed the jurors to convict Sergio on proof less than beyond a reasonable doubt in violation of his right to due process. (*In re Winship*, *supra*, 397 U.S. 358.)

pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

D. Reversal Is Required.

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error that is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Canella v. California*, *supra*, 491 U.S. at pp. 266-267.) Here, that showing cannot be made. The dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, the judgment must be reversed in its entirety.

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13.

THE COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE LYING-IN-WAIT MURDER BECAUSE THE INFORMATION CHARGED SERGIO ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187.

After the trial court instructed the jury that Sergio could be convicted of first degree murder if he committed murder with deliberation and premeditation (RT 2716; CT 297) or by means of lying in wait (RT 2718; CT 299), the jury found Sergio guilty of the first degree murders of Lee Thompson and Robin Shirley (CT 351, 353). The instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the information did not charge Sergio with first degree murder and did not allege the facts necessary to establish first degree murder.[41]

Count 1 of the information alleged that "[o]n or about October 2, 1993, in the County of Los Angeles, the crime of murder, in violation of penal code section 187 (a), a felony, was committed by Sergio Nelson, who did willfully, unlawfully, and with malice aforethought murder Robin Shirley." (CT 146.) Count 2 of the information alleged that "[o]n or about October 2, 1993, in the County of Los Angeles, the crime of murder, in

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[41]Sergio is not contending that the information was defective. On the contrary, as explained hereafter, counts 1 and 2 of the information were entirely correct charges of second degree malice murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree premeditated murder and first degree lying-in-wait murder in violation of Penal Code section 189.

violation of section 187 (a), a felony, was committed by Sergio Nelson, who did willfully, unlawfully, and with malice aforethought murder Lee Thompson." (CT 147.) Both the statutory reference ("section 187(a)") and the description of the crime ("did willfully, unlawfully, and with malice aforethought murder") establish that Sergio was charged exclusively with second degree malice murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.[42]

Penal Code section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[43] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[44]

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[42]The information also alleged lying-in-wait special circumstances. (CT 147-148.) Nevertheless, this allegation did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661.)

[43]Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[44]In 1993, when the murders at issue allegedly occurred, Penal Code (continued...)

Because the information charged only second degree malice murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try Sergio for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7), which charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of Penal Code section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the

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[44](...continued)
section 189 provided in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 286, 288, 288a, or 289, . . . is murder of the first degree. All other kinds of murders are of the second degree.

language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[45] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

Nevertheless, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon*

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[45]This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in Penal Code section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in Penal Code section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony murder rule. A crime cannot both include another crime and be included within it.

(1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that Penal Code section 187 was *not* "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe [Penal Code] *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472 [italics added, fn. omitted].)

Moreover, in rejecting the claim that *People v. Dillon*, *supra*, 34 Cal.3d 441, requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394 [quoting *People v. Pride* (1992) 3 Cal.4th 195, 249]; accord, *People v. Box* (2000) 23 Cal.3d 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder (see Pen. Code, § 664(a) [referring to "willful, deliberate, and premeditated murder,

as defined by Section 189"]) or murder during the commission of a felony, and *People v. Dillon*, *supra*, 34 Cal.3d at p. 472, expressly held that the first degree felony-murder rule was codified in Penal Code section 189. Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712.) First degree murder of any type and second degree malice murder clearly *are* distinct crimes. (See *People v. Hart*, *supra*, 20 Cal.4th at pp. 608-609 [discussing the differing elements of those crimes]; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[46]

The greatest difference is between second degree malice murder and first degree felony murder. By the express terms of Penal Code section 187, second degree malice murder includes the element of malice (*People v.*

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[46]Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements for conviction*. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 [dis. opn. of Schauer, J.] [original italics].)

Watson, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189 (*id.* at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense" (*id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476 [italics added, citation omitted].)[47]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule (commission or attempted commission of a felony listed in Penal Code section 189 together with the specific intent to commit that crime) are facts that increase the maximum penalty for the

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[47]See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (Pen. Code, § 190(a).) Therefore, those facts should have been charged in the information. (See *United States v. Allen* (8th Cir. 2004) 357 F.3d 745, 758 [vacating death sentence because failure to allege aggravating factor in indictment was not harmless error]; *State v. Fortin* (N.J. 2004) 178 N.J. 540, 646, 843 A.2d 974, 1035 [holding prospectively that in capital cases aggravating factors must be submitted to grand jury and returned in the indictment].)

Permitting the jury to convict Sergio of uncharged crimes violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) The error also violated Sergio's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

These violations of Sergio's constitutional rights were necessarily prejudicial because, if they had not occurred, Sergio could have been convicted only of second degree murder, a noncapital crime. Therefore, Sergio's convictions for first degree murder, the special circumstances findings, and the death sentence must be reversed.

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14.

THE COURT SHOULD HAVE INSTRUCTED ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER WITH RESPECT TO BOTH VICTIMS BASED ON EVIDENCE THAT SERGIO'S MENTAL DISORDERS NEGATED MALICE.

Citing *People v. Molina* (1988) 202 Cal.App.3d 1168, which held that despite the abolition of the diminished capacity defense in 1981, murder could still be reduced to voluntary manslaughter by evidence of mental illness showing a lack of malice (*id.* at p. 1174), defense counsel repeatedly requested that the court give a voluntary manslaughter instruction with respect to both Robin Shirley and Lee Thompson based on evidence that Sergio's mental illness negated malice. (RT 2570-2578, 2612-2625, 2631-2642, 2659-2663, 2766-2768.) The court refused to so instruct and instead charged that mental illness could negate malice and intent to kill, and reduce murder to *involuntary* manslaughter. (RT 2726; CT 311.)[48] The court erred in refusing to instruct the jury as requested by the defense. (*People v. Breverman* (1998) 19 Cal.4th 142, 163; *id.* at p. 187 (dis. opn. of Kennard, J.) [when a defendant is charged with murder and there is sufficient evidence to support a conviction for voluntary manslaughter, failure to instruct on that theory violates the defendant's federal constitutional rights to a jury trial and to due process of law]; *Solis v. Garcia* (2000 9th Cir.) 219 F.3d 922, 929 [a defendant has a due process

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[48]The court instructed the jury: "If you find that the defendant was suffering from a mental illness at the time of the acts alleged and because of that mental illness did not actually have the mental state of malice and did not intend to kill, the defendant is not guilty of murder but is guilty of involuntary manslaughter." (RT 2725.)

right to a lesser included offense instruction if necessary to safeguard "the defendant's right to adequate jury instructions on his or her theory of the case"].)

In *Molina*, the court reviewed Penal Code sections 25, 28, and 29, and observed that under those sections, "evidence of mental problems is inadmissible to show that a defendant *lacked the capacity to form* the requisite mental state, but is admissible to show that the defendant *actually lacked the requisite mental state*." (*Id.* at p. 1173 [original italics].) The court then concluded: "The inclusion of the language in subdivision (a) [of section 28] regarding actual formation of mental states shows that the Legislature did not foreclose the possibility of a reduction from murder to voluntary manslaughter where malice is lacking due to mental illness, or a further reduction to involuntary manslaughter where intent to kill is not present for the same reason." (*Id.* at p. 1174.)

In *People v. Saille* (1991) 54 Cal.3d 1103, this Court found *Molina* unpersuasive because the appellate "court's analysis failed to consider the effect on the definition of malice of the amendment to section 188, which was part of the same legislative package as sections 25, 28, and 29." (*Id.* at p. 1113.) According to *Saille*, the amendment to section 188 made it clear that "once the trier of fact finds a deliberate intention unlawfully to kill, no other mental state need be shown to establish malice aforethought" (54 Cal.3d at p. 1113), and as a result, "express malice and an intent to unlawfully kill are one and the same" (*id.* at p. 1114).

The *Saille* Court also rejected defendant's argument that the statutory language requiring a "deliberate intention unlawfully" to take a life meant that express malice required "more than mere intent to kill." (*Ibid.*) *Saille*

relied on the reasoning of *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1440-1441, which analyzed the significance of the words "deliberate" and "unlawfully" in the definition of malice aforethought. *Bobo* found that "deliberate" implied nothing more than an intentional act and was "essentially redundant to the language defining express malice." (*Saille* at p. 1115 [quoting *Bobo* at p. 1440].) It further found that "unlawfully" meant "simply that there is no justification, excuse, or mitigation for the killing recognized by the law." (*Ibid.* [quoting *Bobo* at p. 1441].)

"In amending section 188 in 1981, the Legislature equated express malice with an intent unlawfully to kill. Since two distinct concepts no longer exist, there has been some narrowing of the mental element included in the statutory definition of express malice. A defendant, however, is still free to show that because of his mental illness . . ., he did not in fact form the intent unlawfully to kill (i.e., did not have malice aforethought). [Citation.] In a murder case, if this evidence is believed, the only supportable verdict would be involuntary manslaughter or an acquittal." (*Saille* at pp. 1116-1117.)

Nevertheless, since *Saille*, this Court has clarified the definition of express malice aforethought in section 188 to mean that "the statute requires an intent to act unlawfully or, put in everyday language, the defendant must have a wrongful intent," not merely a bare intent to kill as suggested by *Saille*. (*In re Christian S.* (1994) 7 Cal.4th 768, 778.) Thus, express malice under section 188 contains a subjective element beyond the simple intent to kill, that is, that the defendant must have subjectively intended to act unlawfully.

"California statutes have long separated criminal homicide into two

classes, the greater offense of murder and the lesser included offense of manslaughter. The distinguishing feature is that murder includes, but manslaughter lacks, the element of malice. (Compare § 187, subd. (a) ['[m]urder is the unlawful killing of a human being . . . with malice aforethought'] with § 192 ['[m]anslaughter is the unlawful killing of a human being without malice'].)" (*People v. Rios* (2000) 23 Cal.4th 450, 460.)

Mitigating circumstances, such as provocation or imperfect self-defense, can "reduce an intentional, unlawful killing from murder to voluntary manslaughter 'by negating the element of malice that otherwise inheres in such a homicide [citation].' Provocation has this effect because of the words of section 192 itself, which specify that an unlawful killing that lacks malice because committed 'upon a sudden quarrel or heat of passion' is voluntary manslaughter. (*Id.*, subd. (a).) Imperfect self-defense obviates malice because that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand." (*People v. Rios*, *supra*, 23 Cal.4th at p. 461 [citing *People v. Breverman* (1998) 19 Cal.4th 142, 154 and *People v. Flannel* (1979) 25 Cal.3d 668, 675 (plur. opn. of Tobriner, J.)].)

But, clearly, an actual belief that a lethal act was necessary to defend oneself is not the only mental state that obviates malice. Given that this Court stated in *Christian S.* that the defendant must have a "wrongful intent" for malice to exist (*In re Christian S.* (1994) 7 Cal.4th at p. 778), a mental disease or defect that prevents a person from appreciating the wrongfulness of his or her conduct would also obviate malice. (Pen. Code,

§ 28(a) ["Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually . . . harbored malice aforethought, when a specific intent crime is charged"].) Moreover, "a conviction of voluntary manslaughter can be sustained under instructions which require, and evidence which shows, that the defendant killed intentionally and unlawfully." (*People v. Rios*, *supra*, 23 Cal.4th at p. 463.) Thus, where a defendant has intentionally killed another, but the defendant was prevented by a mental issue from acting with malice, that is, a wrongful intent, then the defendant has committed voluntary manslaughter.

Here, Dr. Wells testified that Sergio was suffering from paranoid schizophrenia on the morning of the shootings. (RT 2155-2156.) He further opined that Sergio was "a very sick young," suffered "a severe mental disorder" (RT 2194), had tendencies to misinterpret social situations, and was delusional (RT 2199). Sergio told Dr. Wells that he thought he saw Mr. Thompson in the driver's seat, bending down as if he was picking something up from the floor. Thinking that Mr. Thompson was reaching for a gun and sensing immediate danger, Sergio fired at Mr. Thompson. (RT 1083-1084, 2213, 2376.) Although Sergio could not remember what immediately followed, the evidence shows that Sergio fired at Ms. Shirley as well. (RT 2214, 2376, 2378.) Dr. Wells explained that sometimes individuals lose temporary awareness ("dissociation") during, as here, a traumatic event. (RT 2377.)

Based on Dr. Wells's testimony, there was sufficient evidence for the jury to find that Sergio did not have the "wrongful intent" necessary for malice, that although he shot both victims with the intent to kill, he did not

intend to act unlawfully because he was suffering from paranoid delusions. Therefore, the jury could have found that Sergio committed the voluntary manslaughter of both Robin Shirley and Lee Thompson, and the court erred in failing to instruct the jury on the lesser included offense with respect to both victims. And for the reasons stated in section F of argument 1, the error was prejudicial and requires reversal of the entire judgment.

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15.

THE COURT COERCED THE DEADLOCKED JURY INTO A DEATH VERDICT AND DENIED SERGIO DUE PROCESS.

A. Introduction

Mindful that in capital cases "the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'" (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 238-239 [quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604]), the United States Supreme Court has stated that a capital defendant tried by a jury is "*especially* . . . entitled to the uncoerced verdict of that body." (*Id.* at p. 241 [italics added].) Whether a trial court's conduct and comments have coerced a verdict must be judged in their "context and under all the circumstances." (*Id.* at p. 237; *Early v. Packer* (2002) 537 U.S. 3, 9 [under the Fourteenth Amendment, state appellate courts must apply the *Lowenfield* totality of the circumstances test].)

Improper coercion can be explicit in the form of a jury instruction or implicit under the circumstances. (*Weaver v. Thompson* (9th Cir. 1999) 197 F.3d 359, 365.) Circumstances manifesting coercion occur when (1) the trial court inquires into the jury's numerical division (which *Lowenfield* said was "generally coercive"), (2) the court directs its comments towards the minority jurors, (3) the court effectively tells the jurors that they have to reach a decision, and (4) the jurors reach a verdict shortly thereafter. (*Lowenfield v. Phelps*, *supra*, 484 U.S. at pp. 238-241; *Weaver v.*

Thompson, *supra*, 197 F.3d at p. 366.)[49] After reviewing the record, the appellate court must make a de novo determination of the constitutional weight to be given the facts. (*Weaver v. Thompson*, *supra*, 197 F.3d at p. 366.)

California courts are even stricter than their federal counterparts in protecting jurors from coercion. (*Early v. Packer*, *supra*, 537 U.S. at p. 8 ["decisions from the California Supreme Court . . . impose even greater restrictions for the avoidance of potentially coercive jury instructions"].) In *People v. Gainer* (1977) 19 Cal.3d 835, this Court held that an *Allen* instruction "carries a potentially coercive impact," and is prohibited in California. (*Id.* at p. 842 [citing *Allen v. United States* (1896) 164 U.S. 492]; *People v. Guerra* (1984) 37 Cal.3d 385, 405 [*Gainer* "held it error to give the so-called "*Allen* instruction" to potentially deadlocked juries, primarily because it impaired the defendant's right to the independent judgment of each juror and a truly unanimous verdict, and exerted undue pressure on the dissenting jurors to vote with the majority simply to reach a verdict of any kind"].) "In the archetypal *Allen* charge context, the judge instructs a deadlocked jury to strive for a unanimous verdict." (*Weaver v. Thompson*, *supra*, 197 F.3d at p. 365 [citing *Jenkins v. United States* (1965)

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[49]See also *Tucker v. Catoe* (4th Cir. 2000) 221 F.3d 600, 611 (relevant considerations in detecting coercion include: "the charge in its entirety and in context; suggestions or threats that the jury would be kept until unanimity is reached; suggestions or commands that the jury must agree; indications that the trial court knew the numerical division of the jury; indications that the charge was directed at the minority; the length of deliberations following the charge; the total length of deliberations; whether the jury requested additional instruction; and other indications of coercion").

380 U.S. 445, 446; *Allen*, 164 U.S. at p. 501].)[50]

As will be shown below, the trial court in this case coerced a weary jury into reaching a verdict after the jury deliberated for nine days and deadlocked at 10-2 in favor of death. The court coerced the death verdict by informing the jury that they were making progress toward unanimity, thereby endorsing the majority position; requiring the jury to answer a questionnaire, drafted by the prosecutor, that repeatedly pressed the jury towards reaching a unanimous decision; permitting the questionnaire to invade the sanctity of the jury with questions that probed jurors' thought processes; discovering that the jury majority favored death (the minority was likely aware that the court had discovered this fact); instructing the jurors to ignore their own philosophical, moral, and religious beliefs in determining the penalty, and implicitly threatening to discharge any juror who did not; threatening to question each juror individually, without the support of their fellow jurors, and suggesting that the process would be embarrassing; aggressively examining the foreperson, and permitting the prosecutor to question him as well, further invading the sanctity of the jury and affecting deliberations in the process; allowing trial counsel to examine two additional jurors, including a minority juror, with questions that elicited their thought processes; not instructing the three jurors not to discuss their

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[50]The often criticized *Allen* instruction is known as the "dynamite" instruction because it is intended to "blast" a verdict out of a deadlocked jury. (*United States v. Clinton* (6th Cir. 2003) 338 F.3d 483, 487 [citing *Allen v. United States*, *supra*, 164 U.S. at pp. 501-502.) The term "*Allen* charge" is often used generically to describe a class of supplemental jury instructions given to a deadlocked jury. (*United States v. Mason* (9th Cir. 1981) 658 F.2d 1263, 1264, fn.1.)

examination, likely resulting in the other minority juror learning that the three had been subjected to examination by trial counsel; uncovering the identity of one and perhaps both minority jurors; declaring the two holdout jurors to be "problems" and discharging one of them, thereby causing a chilling effect on the other minority juror; and instructing the jury to deliberate as long as necessary to reach a verdict, thereby putting additional pressure on the final holdout to capitulate, especially because the jury had expected the trial to be over by that time.

The court therefore placed improper pressure on the jury to return the death verdict and violated Sergio's right to due process, a fair trial, and a unanimous jury under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution and sections 15 and 16 of article I of the state Constitution. (*Lowenfield v. Phelps*, *supra*, 484 U.S. at pp. 238-241; *Smith v. Phillips* (1982) 455 U.S. 209, 217; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Carpenter* (1990) 9 Cal.4th 634, 648; *People v. Superior Court (Thomas)* (1967) 67 Cal.2d 929, 932; *Hughes v. Borg* (9th Cir. 1990) 898 F.2d 695, 700.) Although the court's error was structural and therefore reversible per se (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *Smalls v. Batista* (S.D.N.Y. 1998) 6 F.Supp.2d 211, 222-223), it was also not harmless beyond a reasonable doubt and requires reversal of the death judgment under either standard. (*People v. Cleveland* (2001) 25 Cal.4th 466, 486; *People v. Bowers* (2001) 87 Cal.App.4th 722, 736; *People v. Barber* (2002) 102 Cal.App.4th 145, 153; see also *People v. Hinton* (2004) 121 Cal.App.4th 655, 660 [a conviction following a coercive charge given to a deadlocked jury is a miscarriage of justice under the California Constitution and must be

reversed].)

B. Analysis

1. Aware That the Jury Was Deadlocked at 10-2 After Deliberating Nine Days, the Court Coerced the Exhausted Jury and Endorsed the Majority Position by Stating That the Jury Was Making Progress Towards a Unanimous Verdict.

The jurors deliberated for nine days, and then informed the court that they appeared to be deadlocked. (RT 5661.)[51] The court in turn asked the jury to provide "the result of the last four ballots and the numerical breakdown without telling us which way they went." (RT 5662.) The court received the following note from the jury:

"After considerable deliberation, we appear to be deadlocked.

The ballots were broken down as follows:

1) 7-3-2

2) 9-2-1

3) 9-3

4) 10-2."

(CT 467; RT 5666.) In response to the court's inquiry, the foreperson explained that voting had taken place over the prior week. The court stated to the jurors that "it appears to us you have made some progress." The foreperson agreed. (RT 5667.) Given the progression in voting from 7 to 9 to 10 in favor of the same position, the plain implication was that the court considered it progress that the jurors were heading in the direction of unanimity.

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[51]The court stated later that the nine days "exhausted [the jury] quite thoroughly." (RT 5747.)

The foreperson further stated that "some of the jurors have already said that they have gotten to the point where they have talked and talked and there is no more changing their mind." (RT 5667-5668.) After the jury reported it had deadlocked, the court should have taken special care to ensure that none of the jurors felt forced to capitulate to the majority view. (*People v. Price* (1991) 1 Cal.4th 324, 467 ["When a jury indicates it has reached an impasse, a trial court that directs further deliberations must exercise great care to avoid the impression that jurors should abandon their independent judgment 'in favor of considerations of compromise and expediency'"].) But instead of exercising great care in ordering the jury to return the next morning, the court exacerbated the damage, caused by its statement that the jurors had "made some progress," by advising the jury:

> And let me indicate to you in the event that there . . . is any confusion as to . . . what the facts are or . . . your duties are, I think they are spelled out in the instructions that you received about mitigation and aggravation. [A]nd I think the instructions spell out what are mitigating factors and what are aggravating factors. [¶] And give you a chance to get a fresh start in the morning. *And we will find out before the morning is over whether or not we are getting anywhere.* [¶] . . . I think we owe you that, in as much as you have been out that long.

(RT 5668 [italics added].) Thus, the court's message to the jury – in essence an *Allen* instruction – was that making "progress" and "getting anywhere" meant heading towards a unanimous verdict. (*Rodriguez v. Marshall* (9th Cir. 1997) 125 F.3d 739, 750 ["An *Allen* charge is traditionally understood as an instruction to work towards unanimity"]; see also *Jones v. Norvell* (6th Cir. 1973) 472 F.2d 1185, 1186 [reversal following court's improper instruction to 11-1 deadlocked jury to see if they

could "make any progress"].)

At this point the court had already imposed enough pressure on the jury to reach a unanimous verdict that any subsequent death verdict would violate Sergio's due process rights. As the United States Supreme Court has observed, a trial court's words to the jury combined with polling of the jury might be coercive and deny a defendant a constitutional right. (*Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 241.) By polling the jury and informing the jurors that it appeared to everyone present that they were making progress, the court coerced the jury in this case into a death verdict.[52]

To illustrate, in *Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976, the state trial court met twice with the deadlocked jury. (*Id.* at pp. 978-979.) In the first meeting, the court asked how many votes had been taken, how the breakdown of the votes began and ended, and whether there had been any "movement." (*Id.* at p. 979.) When the foreperson replied that there had been movement, the court returned the jury to its deliberations. After further deliberations, the jury met again with the court and related that it was divided 11 to 1. The court noted that there had been "substantial movement" and sent the jury back to deliberate. Less than two hours later,

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[52]In *Brasfield v. United States* (1926) 272 U.S. 448, the United States Supreme Court concluded that inquiry into the jury's numerical division is inherently coercive and thus reversible per se, even where the number for conviction and acquittal is not requested or revealed. (*Id.* at p. 450.) "Although the decision in *Brasfield* was an exercise of [the Supreme] Court's supervisory powers, it is nonetheless instructive as to the potential dangers of jury polling." (*Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 239-240; but see *People v. Carter* (1968) 68 Cal.2d 810, 815 [approving inquiry into jury's numerical division].)

the jury returned with a unanimous verdict. (*Ibid.*)

In concluding that the defendant was denied a fair trial, the Ninth Circuit observed:

> In view of the disclosure after the second impasse that only one juror remained in the minority and the trial court's implicit approval of the "movement" toward unanimity, the judge's instruction to continue deliberating until the end of the day sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity.

(*Id.* at p. 981.) Similarly, in view of the fact that the trial court in this case knew that only two jurors were in the minority and implicitly approved the "progress" towards unanimity, the court's instruction to continue deliberating sent a clear message to the jurors in the majority to hold their position and persuade the two holdouts to join in a unanimous verdict.

According to both Witkin and the Center for Judicial Education and Research (CJER), a trial court may generally take two reasonable noncoercive steps to obtain a jury's agreement where the jury claims to be hopelessly deadlocked. First, the court may inquire as to the jury's numerical division, without seeking to discover in which direction the majority leans. (6 Witkin, Cal. Crim. Law 3d (2000) Crim. Judgm., § 34, p. 51, citing *People v. Morris* (1991) 53 Cal.3d 152, 227 [neutral inquiry into numerical division proper]; *People v. Breaux* (1991) 1 Cal.4th 281, 319 [inquiry into numerical division proper during penalty phase of capital case]; Cal. Judges Benchbook: Crim. Trials (CJER 1991) Jury Trials, § 3.27, p. 83.) Here, as noted, the trial court took that first step. (RT 5662.)

Second, the court may urge the jurors to attempt to reach an agreement, or order them to retire for further deliberation, so long as the

court's language does not contain any element of coercion to reach a verdict. (6 Witkin, Cal. Crim. Law 3d, *supra*, citing *People v. Tarantino* (1955) 45 Cal.2d 590, 599, 600; Cal. Judges Benchbook: Crim. Trials, *supra*, Jury Trials, § 3.28, p. 84.) Here, as shown, the court ordered the jury to return in the morning to deliberate further. (RT 5668.) But the court's language, "it appears to us you have made some progress" and "we will find out before the morning is over whether or not we are getting anywhere," contained the inappropriate element of coercion.

2. The Court Further Pushed the Jury Towards a Verdict by Giving the Jury a Questionnaire Drafted by the Prosecutor That Repeatedly Emphasized Unanimity.

The court aggravated the situation the next morning when, without the support of any authority and over defense's strenuous objection, it gave each juror an eight-part questionnaire that had been drafted by the prosecutor. The questionnaire asked:

1. "Do you believe that there is any reasonable likelihood that further deliberations will result in a *unanimous* verdict?"

2. "Do you feel that there is any clarification of the jury instructions or your duties as jurors [that] would assist you in arriving at a *unanimous* verdict?"

3. "Do you feel that the read back of the testimony of any witness or witnesses or portion thereof would assist you in arriving at a *unanimous* verdict?"

4. "Have any of the jurors refused to deliberate? That includes a refusal to be involved in the discussion and reasoning process."

5. "Has any juror based their present position on cases, information, or influence from any outside sources. That is, anything other than the evidence received in this courtroom or the jury instructions which I have given you. If so, in what manner has this occurred."

6. "Has any juror expressed the view that the death penalty is inappropriate in this case and based that view on anything other than the evidence and the law presented in this case? If so, what?"

7. "Has any juror expressed a view that life without parole is inappropriate in this case and based that view on anything other than the evidence and the law presented in this case? And if so, what?"

8. "Is there anything you might suggest that could possibly be done to assist you in achieving a *unanimous* verdict? If so, what?"

(RT 5687-5688 [italics added].)

Sergio's counsel argued that the final seven questions served only to intimidate the jurors and were akin to another *Allen* instruction. (RT 5676; see also RT 5683 [objecting to the entire questionnaire]; RT 5686 ["defense strongly objects to this procedure"].) Defense counsel especially objected to the questionnaire's repeated attempts to pressure the jury to reach a "unanimous" verdict. (RT 5677.) The defense further challenged those questions geared toward uncovering juror misconduct, when there had been no hint of any misconduct (RT 5679), and those that invaded the province of the jury by asking the jurors how they were deliberating (RT 5680).

Defense counsel was so insistent that the court would further breach the sanctity of the jury by requiring the jurors to answer the questionnaire, that the court observed: "You give the appearance of being petrified. I don't know that there is anything here that would raise any response that anyone would fear." (RT 5682.) As will be shown, the court was clearly wrong. Not only was there much to fear from the questionnaire, the jurors' answers proved that fear well-grounded.[53]

Thus, although the United States Supreme Court has instructed that, where the jury has been unable to agree on a verdict, "the most extreme care and caution [are] necessary in order that the legal rights of the defendant should be preserved" (*Burton v. United States* (1905) 196 U.S. 283, 307), rather than tread gently, the court took a hammer to the jury in an effort to force it to reach a unanimous verdict. The court was aware that two jurors held a minority view, and the minority jurors knew that the court knew that there were just two of them, but four of the eight questions – 1, 2, 3, and 8 – pressured those holdout jurors towards siding with the majority to reach a unanimous verdict.

"The urging of agreement in such circumstances of course creates in the jury the impression that the court, which has also heard the testimony in the case, agrees with the majority of jurors. Coercion of the jurors in the minority clearly results." (*People v. Carter* (1968) 68 Cal.2d 810, 816.) Moreover, combined with the court's earlier comments that progress had been made towards reaching a unanimous verdict, the questionnaire

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[53]Just before giving a questionnaire to each juror, the court learned from the foreperson (while all jurors and the alternates were present) that a fifth vote had been taken, with the same result as the fourth, 10-2. (RT 5685.)

encouraged the *majority* to hold fast to its position so that a unanimous verdict could be obtained. Because of the court's comments and conduct, any unanimous verdict that resulted would be coerced.

3. The Court Invaded the Sanctity of the Jury and Learned That the Jury Was Split 10-2 in Favor of Death.

Unsurprisingly, the questionnaire elicited responses from the jury that not only disclosed that the two jurors in the minority favored a life sentence, but also revealed jurors' thought processes. (*People v. Bowers*, *supra*, 87 Cal.App.4th at p. 733 ["although a trial court tries to circumscribe its investigation, the process of examining jurors to determine whether someone is refusing to deliberate often inadvertently and inappropriately reveals the jurors' thought process"].) The questionnaire therefore violated the "'general rule [that] no one – including the judge presiding at a trial – has a "right to know" how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror. The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system . . . .'" (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 481 [quoting *United States v. Thomas* (2d Cir. 1997) 116 F.3d 606, 618.)

In *People v. Engelman* (2002) 28 Cal.4th 436, this Court reiterated its concerns about intruding into the sanctity of jurors' thought processes.

> [A]n important element of trial by jury is the conduct of deliberations in secret, free from "'" intrusive inquiry into the sanctity of jurors' thought processes." [Citation.]"'" [Citation.] Secrecy affords jurors the freedom to engage in frank discussions, free from fear of exposure to the parties, to other participants in the trial, and to the public. [Citations.] The mental processes of deliberating jurors are protected, because "[j]urors may be particularly reluctant to express themselves freely in the jury room if their mental processes

> are subject to immediate judicial scrutiny. *The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations. The danger is increased if the attorneys for the parties are permitted to question individual jurors in the midst of deliberations.*"

(*Id.* at pp. 442-443, italics added [quoting *Cleveland, supra*, 25 Cal.4th at pp. 475, 476].) The questionnaire responses proved that the court recklessly invaded the sanctity of the jury and likely affected deliberations in doing so.

For example, in response to question 6 ("Has any juror expressed the view that the death penalty is inappropriate in this case and based that view on anything other than the evidence and the law presented in this case? If so, what?"), one juror wrote: "2 people feel that they might make a mistake and that guilt feelings of sentencing death would be hard to live with even though the aggravating factors are overwhelming." (Supp.III-CT 399.) Another juror answered question 6, "feeling." (Supp.III-CT 403.) To question 5 ("Has any juror based their present position on cases, information, or influence from any outside sources. That is, anything other than the evidence received in this courtroom or the jury instructions which I have given you. If so, in what manner has this occurred."), another juror responded, "their life experience." (Supp.III-CT 405.) Still another juror answered question 5, "life experience & feelings of the heart & also emotions & also not wanting to put someone to death if any question is in their mind of his state of mind, in case of mistake it's not someone's life." The same juror wrote in response to question 6, "Sergio does not have a history of murders so he must not be a murderer. He had a bad day & committed a crime." (Supp.III-CT 408.)

Additional responses support the conclusion that the two holdout

jurors favored life. In answer to question 6, concerning whether any juror had stated that the death penalty was inappropriate in this case, one juror wrote: "The juror claims that individuals (she/he) knows would have preferred [sic] the opposite of the majority vote at this time." (RT 398.) The same juror also wrote: "One juror . . . stated that she can't even argue her decision of life because the rest of us just don't understand." (Supp.III-CT 399.) The juror further answered that nothing could possibly assist the jury in achieving a unanimous verdict except "getting the 2 people opposing [sic] to validate there [sic] decision [sic] or give reasoning within the law." (*Id.*) Another juror, who wrote that a juror expressed the view that the death penalty was inappropriate in this case, suggested dismissing the two holdout jurors. (Supp.III-CT 408.) Thus, if it did not know before, the court clearly knew after receiving the questionnaire responses that the majority favored death.

4. The Court Misinformed the Jurors to Ignore Their Own Philosophical, Moral, and Religious Beliefs in Determining the Penalty, and Implicitly Threatened to Discharge "Any Juror" Who Did Not.

Questions 5 and 6 – which asked the jurors if they were influenced by outside sources, and in particular if their view that the death penalty was inappropriate *in this case* was based on anything other than the evidence and the law presented – implied that it was improper for them to base their vote against the death penalty in any part on their moral and religious beliefs. The court therefore effectively encouraged any juror who voted against the death penalty in this case to abandon that position in favor of the majority's pro-death view if the juror's vote was based in part on a moral or religious belief, which, of course, it almost certainly was. (*People v. Brown*

(2004) 33 Cal.4th 382, 400 [recognizing that the capital "'sentencing function is inherently moral and normative'"]; *People v. Danks*, *supra*, 32 Cal.4th at p. 311 ["nothing in our opinion is intended to convey that a juror's consideration of personal religious, philosophical, or secular normative values is improper during penalty deliberations"].)

But that is not the law. As this Court has repeatedly stated: "'Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system.'" (*People v. Danks* (2004) 32 Cal.4th 269, 302 [quoting *People v. Marshall* (1990) 50 Cal.3d 907, 950].) In fact, "it is to be expected . . . that 'jurors . . . consider their religious beliefs during penalty deliberations.'" (*Id.* at pp. 308-309 [quoting *People v. Lewis* (2001) 26 Cal.4th 334, 389].)

Questions 5, 6, and 7 also invaded the sanctity of the jury by examining the jurors on the reasoning behind their votes. (RT 5687-5688 ["Has any juror based their present position," "Has any juror expressed the view," ""Has any juror expressed a view"].) These questions directly contradicted this Court's command that the trial court's inquiry "should focus upon the conduct of the jurors, rather than upon the content of the deliberations." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.)[54]

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[54]The questionnaire also misled the jury as to the meaning of "refusal to deliberate," which question 4 defined as "includ[ing] a refusal to be involved in the discussion and reasoning process." As this Court has declared: "A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.) Thus, (continued...)

More important, questions 5, 6, and 7 suggested that the court was conducting an investigation and looking for "any juror" who based his or her penalty decision on any outside influence. The clear implication was that if the court discovered that any such juror existed, then the court would deal directly with that juror, perhaps with a discharge. Thus, the court threatened to discharge any juror who relied on their own philosophical, moral, or religious views in deciding to impose life or death.

5. To Resolve the "Problem" of a Hung Jury, the Court Threatened to Subject Each Juror Individually to Embarrassing Questions in Chambers.

After reviewing the jurors' responses to the questionnaire, the trial court concluded: "The impression that I get from having read these twelve is that the possibility of the holdouts, so to speak, being persuaded otherwise is zero." (RT 5697.) But rather than declare that the jury was deadlocked, as the defense had insisted (RT 5698), the court recessed the proceedings to give the prosecutor an opportunity to provide authority on how to address two concerns by the court: what to do with one juror who was "on drugs" (RT 5700),[55] and "how far do you go with inquiry of a jury that appears to be hung" (RT 5701).

Before recessing, the court stated to the jury: "[T]hank you very

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[54](...continued)
the trial court's definition of refusal to deliberate wrongly included instances where a juror had deliberated for a reasonable time, but then refused to be further involved in the discussion and reasoning process because the juror had reached a final decision.

[55]As discussed in the next argument, Annora Hall, diagnosed as bipolar, took lithium to treat the disorder.

much for having answered these questions. [¶] The questions, however, instead of resolving the problem has [sic] raised an issue or two, which we need to resolve. So what I'm going to do is release you, order you back Monday morning." (RT 5702.) Thus, with all present aware that the jury was deadlocked at 10 to 2 in favor of death, the court advised the jury that this was a "problem" that needed to be resolved. (Cf. *People v. Keenan* (1988) 46 Cal.3d 478, 534 [finding no coercion in part because the court did not insist that a deadlock be "resolved"].)

The court further acknowledged to the jury that "we had earlier indicated to you that the trial should not have lasted past today's date. . . . But we do have . . . the legal issue to resolve, and we're going to try and do that over the weekend and make a decision Monday morning as to how we next proceed." (RT 5702.) The court dismissed the jury, while recognizing that, "I know that may create a problem for some of you because we earlier indicated to you that we would release you by [today]." (RT 5703.)

The following Monday the defense requested a mistrial due to the jury's deadlock. (RT 5704.) The prosecutor responded by requesting that the court investigate whether one juror (Annora Hall) had misrepresented her health and gun ownership in responding to the original juror questionnaire, and had refused to deliberate. (RT 5704-5713.) According to the prosecutor, "it sounds like there probably is good cause to remove a juror." (RT 5713.)

Although the trial court admitted that the questionnaire drafted by the prosecutor "created more problems than we solved" (RT 5716), the court did not "really see" a refusal to deliberate as an issue (RT 5717). The defense again requested a mistrial and objected to any additional

investigation because it would violate the province of the jury and further coerce the jurors. (RT 5719, 5721, 5722.) The court then informed the jury:

> The questionnaire that we passed around to you Friday, rather than resolving issues, it raised some. So, unfortunately – we're going to have to resolve those before we continue. [¶] What I intend to do is to discuss some of the issues one at a time with each one of the jurors. [¶] Let me indicate to you that I am not inferring by this that anybody has done anything wrong. *It's just that we have to make sure that what we do is right*, if that makes any sense to you. [¶] So . . . I'll start with the foreman, Mr. Rodriguez. And we're going to do that in chambers. And we're going to discuss it with you one at a time so as *not to embarrass anyone and to make you feel uncomfortable*."

(RT 5723-5724 [italics added].) At this point the jurors must have concluded that one or more of them were being investigated for wrongdoing and could be subjected to so much embarrassment that a private session with the court and counsel was necessary.

6. The Court Aggressively Examined the Foreperson, and Permitted the Prosecutor to Question Him as Well, Further Invading the Sanctity of the Jury and Affecting Deliberations in the Process.

There was no basis for further investigation, however. As this Court has stated: "The hearing should not be used as a 'fishing expedition' to search for possible misconduct, but should be held only when [a party] has come forward with *evidence demonstrating a strong possibility that prejudicial misconduct has occurred*. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419 [italics added].)

As shown in the immediately preceding argument, the prosecutor did not come forward with evidence demonstrating a strong possibility that any juror had committed misconduct. Thus, the court erred by eventually subjecting three jurors – Rodriguez, Jackson, and Hall – to examinations in chambers.

"Moreover, any such inquiry could in itself have risked pressuring the dissenting juror to conform her vote to that of the majority." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1255.) Thus, this Court has "emphasized . . . that 'any investigation must be conducted with care so as to minimize pressure on legitimate minority jurors.'" (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 478 [quoting *People v. Keenan*, *supra*, 46 Cal.3d at p. 532].)

This Court also emphasized in *Cleveland* that "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. The injury should focus upon the conduct of the jurors, rather than upon the conduct of the deliberations." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.) Nevertheless, the trial court did not limit the scope of inquiry, but on the contrary, broadly questioned Mr. Rodriguez, who, in 22 transcript pages, provided a detailed account of jury deliberations, revealing much of the jurors' thought processes. (RT 5725-5747.)

For example, the court examined Mr. Rodriguez on whether a juror's comments pertained to lingering doubt. When Mr. Rodriguez, responded, "[e]xactly," the court disapprovingly inquired, "[i]n spite of the fact that the previous jury had found the defendant guilty, there was still this, quote, 'lingering doubt" issue?" After Mr. Rodriguez reassured the court that this

"was just a preliminary issue," the court responded: "Okay." (RT 5732.)

The court also read to Mr. Rodriguez one juror's answer to question 6, regarding the inappropriateness of the death penalty in this case: "'Yes, because Sergio Nelson doesn't have a history of murders, so he must not be a murderer. He had a bad day and committed a crime.'" The court then dismissed this juror's reasoning by commenting to Mr. Rodriguez: "That's putting it, you know, rather simply. Is that the position of some of the jurors or a juror?" (RT 5722-5723.) Thus, the court had not only improperly intruded into the thought processes of the jury, it was now disparaging those of one juror, and asking whether others had the same view.

When Mr. Rodriguez tried to defend the juror's position by stating that the court's quote was "not a fair statement as to what exactly they were trying to bring across," the court continued to argue with Mr. Rodriguez in asserting: "Well, it infers the two murders were insufficient." Here, the court was clearly expressing its view that two murders were quite sufficient, and that there was something wrong with the contrary view. Mr. Rodriguez against reassured the court: "Yeah. And I don't believe that was the case." The court then asked the leading question: "So that was not a strongly held position by anyone?" Mr. Rodriguez provided the expected answer: "No." The court closed with: "All right." (RT 5733.)

The court then asked Mr. Rodriguez a series of leading questions about whether any jurors knew anyone who had been in prison, which prompted the following exchange:

> The Court: . . . That come up during the course of a discussion, somebody who had people that were in custody and – and relate what it's like to be in custody or something?

Or to serve time?

The Foreman: There was – I'm trying to remember how the discussion came about. There was a discussion and it – to my knowledge, it didn't have anything to do with what it was like. It was sort of a reference to the one particular juror – I think it was maybe more that one had acquaintances or knew someone who knew someone who was in jail. But –

The Court: And?

The Foreperson: But it was – it was not an issue for – in deliberation or used to – to bolster their opinion or their position.

The Court: So just a comment?

The Foreperson: It was just a comment.

The Court: Okay.(RT 5734-5735.)

Next the court asked Mr. Rodriguez whether a juror's view was "[t]hat a person in custody would rather be alive in jail than receive the death penalty?" Mr. Rodriguez defended this discussion by stating he thought the subject "was brought up by more than one person, just – not – not for – for deliberation sake, but –." The court tried to finish Mr. Rodriguez's thought as follows:

The Court: Balancing the –

The Foreperson: – balancing the issue.

The Court: – the issue of which was the worse penalty?

The Foreperson: Right, trying to clarify that – in the instruction, I believe – in your instruction, that we should assume that the death penalty is the more severe punishment.

The Court: Okay. And, at least, initially, they weren't all so sure that it was the most severe?

The Foreperson: Initially, there was [sic] many ideas.

The Court: That they'd rather die than be in prison all their lives?

(RT 5735-5736.)

Later the court interpreted a questionnaire response to mean that one juror, a rape victim, had forgiven her rapist. The court then commented to Mr. Rodriguez: "And her nature is such that she can forgive people for their transgressions, I take it. . . . And not knowing the facts of the, quote, 'rape,' unquote, I guess it's difficult to – to quarrel with her position." (RT 5740.) Clearly the court was delving into areas that were not relevant to any legitimate inquiry.

Next the court and Mr. Rodriguez discussed the view of the two holdout jurors who voted for life. Although Mr. Rodriguez plainly told the court that in the opinion of the two holdouts, "the aggravating factors were not compelling," the court responded with the leading question, "[t]he aggravating factors were not *sufficiently* compelling," and having been led, Mr. Rodriguez dutifully replied, "[n]ot sufficiently compelling." (RT 5741 [italics added].) Thus, the court expressed its view to Mr. Rodriguez that the aggravating were indeed compelling, even though not sufficiently compelling to the two holdouts.

The prosecutor followed with an examination of Mr. Rodriguez about the then unnamed juror who owned a weapon and took medication. (RT 5742-5745.) But as this Court has stated, "permitting the attorneys for the parties to question deliberating jurors is fraught with peril and generally

should not be permitted." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485; *People v. Barber*, *supra*, 102 Cal.App.4th at p. 149 [trial court erred in allowing prosecutor to examine juror].)

The *court* then inquired into the name of the juror. When Mr. Rodriguez confirmed the prosecutor's suggestion that the juror was Annora Hall, the court inexplicably then asked Mr. Rodriguez whether Ms. Hall was one of the holdouts, to which Mr. Rodriguez answered: "Yes." (RT 5745.) Again the court erred. (*People v. Barber*, *supra*, 102 Cal.App.4th at p. 149 [trial court erred in asking questions to deadlocked jury that revealed identity of lone holdout juror].)

Finally, the court told Mr. Rodriguez: "The fact remains, this has been a very, very good jury. And, obviously, that period of time that they've taken has exhausted it quite thoroughly. So that's one of the reasons that we hate to give up, knowing that you worked so hard." (RT 5747.) When the court made these comments, Mr. Rodriguez knew, and was aware that the court knew, that 10 jurors had voted for death and two had voted for life, and that the two minority jurors had caused a deadlock in their refusal to vote with the majority. Mr. Rodriguez could fairly interpret the court's remarks to mean that the death penalty was a very good decision, and that the proponents of death should not give up in trying to convince the minority to relent. As the foreperson, Mr. Rodriguez very likely passed on the court's compliment to the other jurors. Because the court's comments endorsed the majority view again and heaped even more pressure on the minority, the court erred in making them. And because the remarks added a new extraneous reason for the jury to reach a verdict – the exhausted jury's hard work – the court erred. (*People v. Gainer*, *supra*, 19 Cal.3d at p. 852

[improper for court to inject extraneous considerations into the jury's deliberations].)

7. The Court Declared the Two Holdout Jurors to Be "Problems," and Discharged One of Them, Leaving the Second Holdout Isolated and Intimidated.

After hearing from Mr. Rodriguez, the court revealed to trial counsel that it considered the two jurors holding out for life to be problems – the court stating, "I assume that Miss Hall is the one that is one of the *two that we are having problems with.*" (RT 5750 [italics added].)

Next the court and counsel examined juror Juanita Jackson at length, again invading the sanctity of jury deliberations. (RT 5752-5768.) Remarkably, the court even asked Ms. Jackson with respect to another juror, "Did they ever indicate what was their – their reasoning process was?" (RT 5753.)

The court also questioned Ms. Jackson about the second "problem" juror who had voted for life. (RT 5750.) Although the court stated moments before that "the other one, I don't know who that one is" (RT 5750), and would later state on the record that it did not have the "vaguest idea" who the remaining holdout juror was (RT 5813), the court asked Ms. Jackson if she had any "problem with *her*?" (RT 5757 [italics added].) The court also asked Ms. Jackson if "she [the second holdout juror] made up her mind that the aggravating factors were not sufficient," but Ms. Jackson did not know. (RT 5757.)

After hearing from Ms. Jackson, but before speaking with Annora Hall, the court declared, "I'm satisfied that Mrs. Hall probably is – is – based upon her questionnaire and the indication from both Mr. Rodriguez and Mrs. Jackson, that she has misstated the information on her

questionnaire." (RT 5769.) In judging Ms. Hall, without hearing her explanations first, the court denied Sergio due process. (*People v. Barber*, *supra*, 102 Cal.App.4th at p. 151 ["The hearing was fundamentally unfair because the court restricted the evidence primarily to witnesses supporting the prosecution's position. Proceedings that exclude relevant defense witnesses are constitutionally inadequate."].)

Next the court and counsel extensively examined holdout juror, Annora Hall. (RT 5770-5804.) Before allowing her to leave for lunch with the other jurors, the court admonished Ms. Hall: "As I indicated to the others, now, I have no objection to you going back, that – that you indicate what it was we did, we just reviewed these questions. And we will make a determination as to – to find out whether or not there is anything we could do to help in the process." (RT 5804.) Thus, the court failed to instruct the three examined jurors not to discuss their questionnaire answers with the other jurors. Moreover, the three jurors were free to inform the other jurors that they had been questioned by the prosecutor.

Defense counsel in turn asked for a mistrial on the ground the court violated the sanctity of the jury by examining the three jurors. (RT 5815.) In the trenchant language of defense counsel: "These jurors have now been contaminated, for lack of a better word. These jurors cannot deliberate independent of the process that we have begun this morning. So we have invaded their province." (RT 5815-5816.) The court, however, denied the motion. (RT 5816.)

After lunch, the court discharged Annora Hall at the behest of the prosecution for purportedly making material misrepresentations on her

original questionnaire. (RT 5820.)[56]

8. The Court Coerced the Jury into a Death Verdict with a Misleading and Inadequate Instruction That Left the Exhausted Jury with the Understanding That Deliberations Could Last Indefinitely.

The court then explained to the jury, "we have allowed Mrs. Hall to be excused" (RT 5823). The court also instructed the jury, which now included the replacement juror, as follows:

> One of your number has been excused for *legal cause* and replaced with an alternate juror. You must not consider this fact for any purpose. You must not speculate as to why this juror has been replaced.
>
> The people and the defendant have a right to a verdict reached only after full participation of the 12 jurors who returned the verdict. This right may be assured only if you begin your deliberations again from the beginning.
>
> You should not feel like you are under any pressure to reach a verdict, if one can be reached, with any particular amount of time.
>
> *You should take whatever time you need to discuss the case*. You must, therefore, set aside and disregard deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place.
>
> You should not surrender a conscientiously held belief simply to secure a verdict for either side, but *you may change your decision after the newly constituted jury deliberates anew if you feel it appropriate.*

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[56]As shown in the next argument, Ms. Hall made no material misrepresentations and her discharge denied Sergio a fair trial.

> The fact that I have spoken with some of the jurors should have no impact on your deliberations and may not be considered in deciding this case.
>
> You should not consider the short questionnaire you answered on Friday or the questions asked of the jurors this morning in chambers for any purpose in your deliberations.
>
> You shall now retire and begin anew your deliberations in accordance with the instructions previously given.
>
> And the jury is specifically instructed they are not to speculate as to the purpose of the in camera inquiry and for the exclusion of a particular juror. This fact should not enter into your deliberations, nor should you speculate as to the reasons why these proceedings occurred.
>
> All right.
>
> Let me indicate to you that you have a new member of the jury, Mr. Dimmick. That, for all practical purposes, reconstitutes the jury.
>
> Let me indicate to you that as I have earlier indicated, you are required to start your discussions anew. I think the fact remains is although – *because you only have one additional juror, that, perhaps, you collectively can bring him up to speed and in the process cover what it is that you have covered previously in a matter of days and perhaps do it in a shorter period of time. Take all the time that you need.*

(RT 5824-5826 [italics added].) The jury adjourned at 4 p.m., resumed deliberations the following day at 9 a.m., and returned with a death verdict at 11:36 a.m. (RT 5827-5828, 5830.)

First, the court's discharge of Annora Hall and the instruction that followed put additional pressure on the holdout juror to capitulate. The court and the jurors knew that there was one holdout juror remaining for

life. And the jury was likely aware that the court knew there was one left because (a) at the request of the court, the foreperson disclosed that the vote was 10-2, (b) although the court instructed the jurors not to consult with each other *before* answering the prosecutor's questionnaire, it failed to instruct the jurors not to discuss their actual answers, which revealed that only two jurors voted for life (RT 5685, 5691), (c) the foreperson, who knew that the court was aware that the majority favored death, likely passed on the court's compliment that this was a very good jury (RT 5747), and (d) Ms. Hall, a holdout for life, was discharged. The court nonetheless instructed the jurors to deliberate further and reach a verdict.

The single voter for life must have felt that the court's comments about making progress and getting anywhere were meant to pressure the holdout into giving in to the majority to achieve a unanimous verdict. The lone juror must have also seen the court's push for unanimity in the questionnaire as an endorsement of the majority view. That the court also discharged Ms. Hall for "legal cause" (RT 5824) was merely the penultimate blow before the supplemental instruction, and must have left the holdout feeling quite alone, wondering if he or she would also be discharged, and believing that the court strongly favored the majority's view. (*Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1429, dis. opn. of Nelson, J. [the removal of a juror who is a lone holdout for acquittal "send[s] a strong message to the remaining 11 jurors that the trial court endorsed their proclivity for conviction and implicitly encouraged them to 'hold their position'].)[57]

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[57]Although the court stated that it did not have the "vaguest idea" (continued...)

Although the court instructed the jury not to consider Ms. Hall's discharge for any purpose or speculate as to why she had been replaced (RT 5824), the court demanded the impossible. The jurors had just spent over a month with Ms. Hall and had deliberated with her for nine days. They did not know her answers to the original questionnaire, and would have no reason to conclude that she had been discharged because the court found that she had made misrepresentations. But the jurors did know that the court favored the death penalty – by pushing for a verdict after it became aware that the majority wanted death – and the jurors knew that Ms. Hall had expressed her view against imposing the death penalty in this case.

Furthermore, jurors were aware that the questionnaire drafted by the prosecutor specifically asked whether "any juror based their present position on cases, information, or influence from any outside sources" and whether "any juror expressed the view that the death penalty is inappropriate in this case and based that view on anything other than the evidence and the law presented in this case?" Since, as the foreperson informed the court, Ms. Hall engaged in deliberations (RT 5727) – the court so found (RT 5717) – it must have appeared to the remaining holdout juror that Ms. Hall was discharged because she relied on outside influences. Therefore, given that questionnaire strongly suggested that it was improper to rely on outside sources, the holdout must have felt that he or she could only rely on the evidence and the instructions and not on his or her own morals in determining that the death penalty was inappropriate in this case.

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[57](...continued)
who the remaining holdout juror was (RT 5813), the prosecutor guessed it was Ms. Ortiz (RT 5812).

(*United States v. Burgos* (4th Cir. 1995) 55 F.3d 933, 940 ["the court's comments should be evaluated from the perspective of the minority jurors"].)

Second, although the court instructed the single holdout not to surrender a conscientiously held belief, it diminished the impact of the instruction by immediately following with, "you may change your decision after the newly constituted jury deliberates anew if you feel it appropriate." (RT 5825.) Furthermore, the court instructed the majority of 10 not to surrender their beliefs as well. Where the tally is ten against one, it is plain that the sole dissenter was the juror under enormous pressure to surrender first. (Cf. *United States v. Plunk* (9th Cir.1998) 153 F.3d 1011, 1027 [upholding *Allen* charge that included offsetting cautionary instruction not to change honest belief, where none of the "other indicia" of coercion was present].)

The court also failed to include language from CALJIC No. 17.40 that jurors "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." In the initial instructions, the court included that sentence from CALJIC No. 17.40. (RT 5624.) By excluding this sentence in the supplemental instruction, at the critical deadlock when this was the prominent instruction before the jury, the omission might have made jurors think that their responsibilities had changed and that now the minority could be influenced by the majority. (See, e.g., *People v. Barraza* (1979) 23 Cal.3d 675, 684 [reversal where the "*mini-Allen* instruction erroneously given herein was the central feature of instructions given to a deadlocked jury and thus involve[d] the heightened potential for prejudice we recognized in *Gainer*"].)

Third, although the court acknowledged that (a) the jury was "exhausted . . . quite thoroughly" (RT 5747), (b) jurors expected to be released by the previous Friday, August 11, 1995 (RT 5702), and (c) additional deliberations "may create a further problem for some" (RT 5703), the court instructed the new jury to "begin your deliberations again from the beginning," "take whatever time you need to discuss the case" (RT 5824), and "[t]ake all the time that you need" (RT 5826). Thus, the court was suggesting to the thoroughly exhausted and by now impatient jurors, who had devoted over a month (since July 5, 1995) to this case (RT 3375, 3401, 5704), and had been led to believe that their duty would have already terminated, that deliberations could take a very long time unless, of course, the holdout capitulated and the replacement juror agreed with the majority. The court's advice to "take all the time you need" simply added more pressure to the dissenting juror to relent. (*People v. Talkington* (1935) 8 Cal.App.2d 75, 89 ["'the decision of a juror [should never] be influenced by a fear of indefinite confinement in a jury-room, to his own and his associates' inconvenience and discomfort"].)

Moreover, like the improperly coercive threat of confinement in *People v. Savage* (1954) 128 Cal.App.2d 123, the threat of indefinite deliberations here "became a potent weapon in the hands of the [majority] jurors to force the one to agree with them." (*Id.* at p. 126; *Brown v. State* (Del. 1976) 369 A.2d 682, 684 [court's instruction that encouraged jury to reach verdict after jurors announced that they were unable, constituted reversible error where instruction "intimated that the jury would have to remain for a substantial period of time if a verdict were not reached"]; *State v. Albers* (Iowa 1970) 174 N.W.2d 649, 654-655 [reversible error to order

deadlocked jury to continue deliberations where jury asked how long it must continue and was told there was no specific time limit, which suggested that the jury must remain until a verdict was reached]); cf. *People v. Breaux*, *supra*, 1 Cal.4th at p. 320 [finding no coercion in part because the court "did not threaten to prolong the deliberations"].)[58]

Fourth, the court instructed the jury to deliberate "in accordance with the instructions previously given." (RT 5825.) Those previous instructions, copies of which were provided to the jurors (RT 5395), told the jury "you *must now determine* which of said penalties shall be imposed on the defendant" (RT 5397 [italics added]), "the people and the defendant *have the right* to expect that you'll . . . reach a just verdict" (RT 5398 [italics added]), "[i]t is now *your duty to determine* which of the two penalties, death or confinement in the state prison for life without the possibility of parole, shall be imposed upon this defendant" (RT 5626-5627 [italics added]), "to make a determination as to penalty, all twelve jurors *must agree*" (RT 5628 [italics added]), and "to reach a verdict, all twelve jurors *must agree* to the decision" (RT 5629 [italics added]). Thus, the court's supplemental instruction, coupled with the previous instructions, strongly encouraged the jurors to reach a unanimous verdict, even after all concerned

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[58]Instructing the jury to take all the time that they needed was also an abuse of discretion and clear violation of Penal Code section 1140, which requires the court, not the jury, to determine the amount of time to deliberate. (*People v. Price*, *supra*, 1 Cal.4th at p. 467 [whether the jury has had sufficient time to deliberate is determination committed to the sound discretion of the trial court under section 1140]; *People v. Bajo* (1963) 220 Cal.App.2d 741, 743 ["the determination as to what is a 'proper' period of deliberations is a matter which is reposed in the sound discretion of the trial court in each instance, and not in the jury itself"].)

were aware that only one remaining juror had voted for life, while 10 others favored death. (*People v. Sheldon* (1989) 48 Cal.3d 935, 959-960 ["There is always a potential for coercion once the trial judge has learned that a unanimous judgment of conviction is being hampered by a single holdout juror favoring acquittal. In such a case, the judge's remarks to the deadlocked jury regarding . . . the necessity of reaching a unanimous verdict, or even the threat of being 'locked up for the night' might well produce a coerced verdict."].)

In *People v. Walker* (1949) 93 Cal.App.2d 818, 825, after six hours of deliberation, the court asked for the jury's numerical division. The foreperson replied, "ten to two for conviction," and the court responded: "Talk it over fairly; ten one way and two the other – that is coming pretty close to agreement." The appellate court held that this was reversible error, because it suggested to the jurors who had voted for acquittal that the judge thought they should agree with the majority. The situation "was close to an agreement only if the two for acquittal would change their view." (*Id.* at p. 825.) Hence, the court's supplemental instruction in this case was also reversible error because the court told the jury it was making progress by coming close to a unanimous decision, learned that the majority favored death, and then exhorted the jury to reach a unanimous verdict. (*Rodriguez v. Marshall*, *supra*, 125 F.3d 739, 749 [implying that state trial judge's inquiry into numerical standing of jury would be coercive if court knew whether split favored conviction, knew identity of lone hold-out, and exhorted jury to reach unanimous verdict]; cf. *United States v. Ajiboye* (9th Cir. 1992) 961 F.2d 892, 893-894 ("If a [federal] trial judge inquires into the numerical division of the jury and then gives an *Allen* charge, the charge

is per se coercive and requires reversal"].)

Fifth, although the court instructed that there should be "full participation of the 12 jurors" to return a verdict (RT 5824), the court also instructed that the other jurors should bring the replacement juror "*up to speed and in the process cover what it is that you have covered previously* in a matter of days and perhaps do it in a shorter period of time." (RT 5826 [italics added].) Bringing the replacement juror up to speed on what was covered previously contradicts the court's instruction to "set aside and disregard deliberations and begin deliberating anew." (RT 5825; *People v. Cain* (1995) 10 Cal.4th 1, 67 [instruction should "command[] the jury in clear and certain terms to set aside any previous discussion . . ., and in general to deliberate on their penalty verdict as an integrated group, including any review they conducted of the . . . evidence"].) Even more important for our purposes here, the court plainly suggested to the other jurors that they should continue from where they left off, with 10 of them having already voted for death, and inform the replacement juror of that result, rather than truly beginning their deliberations anew. In so doing the court again implicitly endorsed the majority view and further pressured the holdout juror into surrendering.

Moreover, in instructing the other jurors to bring the replacement juror up to speed, the court "impaired the defendant's right to the independent judgment of each juror and a truly unanimous verdict" (*People v. Guerra*, *supra*, 37 Cal.3d at p. 405) because it "suggest[ed] the substituted juror should play less than an equal role in assessing the evidence." (*People v. Cain*, *supra*, 10 Cal.4th at p. 66.) Thus, if the replacement juror were inclined to vote for life, then he would have faced a

group of 10 jurors, emboldened by the court to hold their collective position and bring the new juror up to speed on that position. Again the court denied Sergio due process and an impartial jury. (*Id.* at p. 67 [citing *People v. Fields* (1983) 35 Cal.3d 329, 351].)

Sixth, because the court knew that 10 jurors favored death and 1 favored life, yet instructed the 11 to bring the replacement juror up to speed on that division, the court failed to provide a balanced instruction that should have told the 10 death jurors and 1 life juror to consider each other's views. (*United States v. Burgos*, 55 F.3d at p. 934 [holding that the failure to instruct explicitly "both the majority and minority to take each other's positions into account" was reversible error].)

Seventh, to countervail the court's earlier pressure to reach a verdict, the court should have instructed the new jury that it also had the choice *not* to reach a verdict. (*People v. Miller* (1990) 50 Cal.3d 954, 1009 [implying that when there is a jury deadlock as to the appropriate penalty, the court may be required to instruct the jury that it has the choice not to deliver any verdict]; *United States v. Hernandez-Albino* (1st Cir. 1999) 177 F.3d 33, 36-39 ["the instruction should acknowledge that the jury has the right not to agree"].)

C. Conclusion

In sum, it is clear that the verdict was coerced by a combination of factors: (1) the weary jury was deadlocked at 10-2 after nine days of deliberations; (2) the court implicitly endorsed the majority position by informing the jury that they were making progress, and therefore pressured the jury towards a unanimous decision; (3) the court required that the jury answer a questionnaire, drafted by the prosecutor, that repeatedly pressed

the jury towards reaching a unanimous decision; (4) the questionnaire invaded the sanctity of the jury with questions that probed jurors' thought processes; (5) the court, counsel and jury knew that the jury majority favored death, and each was aware of this fact; (6) the court misinformed the jurors to ignore their own philosophical, moral, and religious beliefs in determining the penalty, and implicitly threatened to discharge any juror who did not; (7) after requiring the jurors to reveal their thought processes on the questionnaire, the court threatened to question each juror individually, without the support of their fellow jurors, to resolve the "problem" of a hung jury, and suggested that the process would be embarrassing; (8) the court aggressively examined the foreperson and permitted the prosecutor to examine three jurors with questions that elicited their thought processes and further violated the sanctity of the jury; (9) the court failed to instruct the three jurors not to discuss their examination, and therefore the three likely told the other jurors that they were examined not only by the court, but also by trial counsel; (10) the court declared the two jurors to be problems and discharged one of them, causing a chilling effect on the sole remaining holdout juror; and (11) the court instructed the jury to deliberate as long as necessary to reach a verdict, thereby putting additional pressure on the holdout to capitulate, especially because the jury had expected the trial to be over by that time. Under all this pressure, the holdout surrendered and the jury quickly reached a verdict.

The court's undue coercion constituted prejudicial error. "[A] coercive *Allen* charge is akin to improper reasonable doubt instructions, a partial judge, or deprivation of the right to counsel, and therefore a 'structural error' to which harmless error analysis is inapplicable." (*Smalls*

v. Batista, *supra*, 6 F.Supp.2d at pp. 222-223.) Because the error here was structural, automatic reversal is mandated. (*Arizona v. Fulminante*, *supra*, 499 U.S. 279, 309.) But even if harmless error were applicable, the court's coercion was not harmless beyond a reasonable doubt and requires reversal of the death judgment because it caused the sole holdout for life to capitulate to the majority. (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 486.)

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16.

THE COURT ERRED IN DISCHARGING JUROR ANNORA HALL AS SHE DID NOT MISREPRESENT MATERIAL INFORMATION ON HER QUESTIONNAIRE TENDING TO SHOW BIAS AGAINST THE PROSECUTION TO A DEMONSTRABLE REALITY.

A. Introduction

After deliberating for nine days, the jurors announced that they were unable to reach a penalty verdict and deadlocked at 10 to 2 in favor of death. (RT 5632-5662, 5684-5685, 5735, 5738-5739, 5741.) The court responded by declaring that "we are having problems with" the two jurors who voted for life. (RT 5750.)[59]

After examining one of the "problem" jurors, Annora Hall, and finding that the two minority jurors were *not* refusing to deliberate (RT 5717, 5727, 5739, 5753, 5769, 5810, 5814), the court nonetheless discharged Ms. Hall for purportedly making intentional misrepresentations on her jury questionnaire concerning three subjects – gun ownership, a mental disability, and arrested acquaintances – which, the court found, precluded the prosecutor from asking Ms. Hall questions on voir dire in much greater detail. The court also found that Ms. Hall's questionnaire responses about her disability prevented the prosecutor from likely exercising a peremptory challenge based on that disability. Finally, the court found that Ms. Hall was not impartial, and dismissed her from the jury. (RT 5820-5822.)

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[59]The immediately preceding argument sets forth in detail the procedure followed by the court after being informed of the deadlock.

Because, however, Ms. Hall did not misrepresent or conceal material information on her questionnaire tending to show bias against the prosecution to a demonstrable reality, the court's dismissal of Ms. Hall was an abuse of discretion under Penal Code section 1089. (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.)[60] Furthermore, it violated Sergio's federal and state constitutional rights to trial by jury and a unanimous and reliable verdict. (*Id.* at p. 486 (conc. opn. of Werdegar, J.) ["substitution of a juror after the jury has retired to deliberate 'may trench upon a defendant's right to trial by jury'"]; *People v. Collins* (1976) 17 Cal.3d 687, 692 [same]; *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [under the state Constitution, "[e]very criminal defendant is entitled to a unanimous verdict"]; U.S. Const., Amends. VI, VIII, XIV; Cal. Const., art. I, § 16; see also *Lowenfield v. Phelps* (1988) 484 U.S. 231, 238-239) ["the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'"]; *Wade v. Hunter* (1949) 336 U.S. 684, 689 [defendant has a "valued right to have his trial completed by a particular tribunal"]; *People v. Hernandez* (2003) 30 Cal.4th 1, 8 [recognizing "policy . . . of assuring that trial is completed by a 'particular tribunal' or 'chosen jury'"].)

Sergio's Sixth and Fourteenth Amendment rights were also implicated by the trial court's misapplication of Penal Code section 1089. "The California process for substitution of jurors under Penal Code section

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[60]Penal Code section 1089 provides, in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, . . . the court may order the juror to be discharged . . . ."

1089 . . . preserves the essential features of the jury trial required by the Sixth Amendment and Due Process Clause of the Fourteenth Amendment." (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729.) The trial court's gross misapplication of section 1089 infringed on Sergio's Sixth and Fourteenth Amendment rights to an impartial jury and arbitrarily deprived him of a state-created liberty interest guaranteed by the Due Process Clause. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

Furthermore, after hearing from two other jurors, Mr. Rodriguez and Ms. Jackson, but before actually speaking with Annora Hall, the court declared, "I'm satisfied that Mrs. Hall probably is – is – based upon her questionnaire and the indication from both Mr. Rodriguez and Mrs. Jackson, that she has misstated the information on her questionnaire." (RT 5769.) In judging Ms. Hall without hearing from her first, the court denied Sergio due process. (*People v. Barber* (2002) 102 Cal.App.4th 145, 151 ["The hearing was fundamentally unfair because the court restricted the evidence primarily to witnesses supporting the prosecution's position. Proceedings that exclude relevant defense witnesses are constitutionally inadequate."].)

Accordingly, the court's error in discharging Ms. Hall requires that the death judgment be reversed. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-282; *United States v. Harbin* (7th Cir. 2001) 250 F.3d 532, 545; *People v. Cleveland*, *supra*, 25 Cal.4th at p. 486.)

B. Analysis

A sitting juror may be discharged only for illness or good cause. (Pen. Code, § 1089; *People v. Bowers*, *supra*, 87 Cal.App.4th at p. 729.) A trial court "may not remove a juror to accommodate the prosecution's desire

to exercise a peremptory challenge after a jury has been impaneled." (*Sanders v. Lamarque* (9th Cir. 2004) 357 F.3d 943, 948 [citing *McDonough Power Equip. Inc. v. Greenwood* (1984) 464 U.S. 548, 555].)

Although this Court reviews "a trial court's finding of good cause under the deferential abuse-of-discretion-standard" (*People v. Price* (1991) 1 Cal.4th 324, 400), this discretion is "'at most . . . limited'" (*People v. Collins*, *supra*, 17 Cal.3d at p. 696; *People v. Roberts* (1992) 2 Cal.4th 271, 325). To affirm the trial court's discharge of a sitting juror, the "juror's inability to perform as a juror must 'appear in the record as a demonstrable reality.'" (*People v. Johnson* (1993) 6 Cal.4th 1, 21 [quoting *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. omitted]; see also *People v. Cleveland*, *supra*, 25 Cal.4th at p. 488 (conc. opn. of Werdegar, J.) ["a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror failed or was unable to deliberate"]; cf. *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1426 ["Whether a trial court violates a defendant's Sixth Amendment right to a jury trial by excusing a juror for good cause and replacing that juror with an alternate is a question of law which we review de novo"].) A court must not presume the worst of a juror. (*People v. Lucas* (1995) 12 Cal.4th 415, 489; *People v. Bowers*, *supra*, 87 Cal.App.4th at p. 729.)

In *Price*, although a juror had been asked by questionnaire whether he had been involved in a criminal proceeding as a defendant, the juror failed to disclose that he had been convicted of assault with a dangerous weapon. He likewise failed to mention that after he served his sentence, he was charged in a separate matter with assault with a deadly weapon, which, the juror admitted, "had 'ruined a military career' for him." The juror had

also been asked whether he knew any of the prosecution witnesses, but failed to divulge that one prosecution witness had served as his parole officer. Finally, the juror failed to reveal that he had previously filed a lawsuit against the judge presiding in the trial. After explaining why he had not relayed this information during jury selection, the juror denied harboring any grudges against the system and said he could be fair and impartial to both sides. (*Id.* at pp. 400-401.)

The *Price* Court first stated the law that governs the removal of a juror who has withheld information during the selection process: "When the trial court discovers during trial that a juror misrepresented or concealed *material* information on voir dire *tending to show bias*, the trial court may discharge the juror if, after examination of the juror, the record discloses reasonable grounds for inferring bias as a '*demonstrable reality*,' even though the juror continues to deny bias." (*Id.* at p. 400 [italics added].) The Court then found the concealed information material, and held the failure to disclose provided sufficient grounds to conclude the juror was biased against the prosecution, despite his insistence that he could be fair. (*Id.* at pp. 400-401.)

This case is nothing like *Price*. Ms. Hall's jury questionnaire responses did not misrepresent material information that tended to show bias against the prosecution to a demonstrable reality.

First, as Ms. Hall explained to the court, she did not mention on her questionnaire that she owned a gun because she simply did not think about the gun, which had been in storage for years, and she could not even remember the last time that she saw it. (RT 5782-5784, 5787-5789.) Thus, her failure to disclose was not an intentional misrepresentation. (*People v.*

Jackson (1985) 168 Cal.App.3d 700, 705 ["to find misconduct where 'concealment' is unintentional and the result of misunderstanding or forgetfulness is clearly excessive"].)[61]

But even if Ms. Hall intentionally concealed it, gun ownership was not a proper subject of voir dire by the prosecution. "Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." (Code Civ. Proc., § 223.)[62] Prospective jurors individually may be challenged for cause on the following grounds:

> (A) General disqualification – that the juror is disqualified from serving in the action on trial.
> (B) Implied bias – as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror.
> (C) Actual bias – the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

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[61]As this Court has noted: "Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic." (*In re Carpenter* (1995) 9 Cal.4th 634, 655.)

[62]Beginning in 1912, lawyers were precluded from asking prospective jurors questions that pertained only to a possible peremptory challenge. (*People v. Edwards* (1912) 163 Cal. 752, 753.) In 1981, this Court abrogated the *Edwards* rule in *People v. Williams* (1981) 29 Cal.3d 392, 402-412. Then in 1990, Proposition 115 revived *Edwards* with the enactment of Code of Civil Procedure section 223. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 299.) Thus, prospective jurors in this case should have only been asked questions that aided in the exercise of cause challenges. (Code Civ. Proc., § 223.) Any other questions, including those about gun ownership, were immaterial.

(Code Civ. Proc., § 225(b)(1).)

Here, general disqualification was an inapplicable ground for a cause challenge, as was implied bias, which is limited exclusively to situations where the prospective juror has a connection to a party, a witness, a victim, the action, or the court; an unqualified opinion on the merits of the action; enmity towards a party; or opinions on the death penalty that would preclude the juror from finding the defendant guilty. (Code Civ. Proc., § 229.)

Gun ownership was also not evidence of an actual bias towards the prosecution that would provide a basis for a challenge for cause. Indeed, the conventional wisdom is that a gun owner tends to be a conservative, law-and-order advocate, exactly the kind of person a prosecutor would typically want as a juror. (See, e.g., Dolliver, *Dangerous or Not, Many Are Armed* (May 3, 2004) Adweek, at p. 26 [2004 WL 64805353] ["Conservatives are more likely to own guns than are people elsewhere on the political spectrum"]; Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime* (2002) 39 Hous. L. Rev. 1, 7 [recognizing stereotype of gun owner as political conservative]; Luna, *The .22 Caliber Rorschach Test* (2002) 39 Hous. L. Rev. 53, 75 & fn. 90 [citing studies and research to support conclusion that "[a]s a general matter, the pro-gun culture is politically conservative"].)

True to form, the prosecutor in this case accepted five jurors who owned guns (Supplemental II Clerk's Transcript ("Sup.II-CT") 2960 [Dobard]; 3492, 3498 [Almagro]; 3604, 3610 [Rutherford]; 3946 [Crow]; 4002 [Hecht]), and five other jurors who used guns (SupII-CT 2651 [Bays]; 2932 [Reyes]; 3296 [Webb]; 4024 [Dimmick]; 4108 [Ballard]). And

although the prosecutor claimed that if he had known about Ms. Hall's gun, he "would have wanted to know why she owns a gun or why she carries a gun" (RT 5807), the prosecutor asked no questions of the other jurors who owned guns about why they owned or carried them. Thus, in contrast to, for example, *People v. Holt* (1997) 15 Cal.4th 619, where the trial court did not abuse its discretion in granting a challenge for cause based on the fact that the juror had a lawsuit pending against the district attorney (*id.* at pp. 654, 656), Ms. Hall's gun ownership was not evidence of *actual bias* against the prosecution, and was not even a proper subject of voir dire by the prosecution because it could not aid in the exercise of a challenge for cause. (Code Civ. Proc., § 223.)[63]

Second, although the court found that Ms. Hall committed an intentional misrepresentation in failing to disclose "serious mental problems" (RT 5815), any failure to disclose her bipolar disorder was due to the wording of the questionnaire, mitigated by the fact Ms. Hall revealed that she saw a mental health professional, and immaterial given that the prosecutor failed to ask Ms. Hall a single question about her having seen a mental health professional. Moreover, any non-disclosure did not reflect a demonstrable bias against the prosecution. Finally, as will be shown, Ms. Hall's disability – bipolar disorder controlled by lithium – was not an appropriate subject of voir dire and would not have been a proper basis to challenge her as a juror in any event.

On her questionnaire, Ms. Hall answered "digestive problems" to the

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[63]Given that Ms. Hall revealed on her questionnaire that she had been shot (CT 3322), and on another occasion had been raped (CT 3329), the prosecutor no doubt would have approved of Ms. Hall's gun ownership as a matter of self-defense.

question, "Do you have any specific health problems or disabilities?" (SupII-CT 3324.) A fair inference is that Ms. Hall understood the question to refer to *physical* disabilities, particularly because (a) the purpose of the question was to determine if a health problem or disability "ma[d]e it difficult" for the prospective juror "to serve as a juror in this particular case;" (b) the remainder of the question asked about physical problems involving hearing and eyesight; and (c) another section of the questionnaire dealt with mental health. (SupII-CT 3324, 3332.) In that section Ms. Hall disclosed that she had seen a mental health professional and that the experience was favorable. (Sup.II-CT 3332.) Thus, Ms. Hall did not in any way attempt to conceal that she had been diagnosed as bipolar.

Nevertheless, the prosecutor stated, "clearly, if I had any idea that I had somebody who had . . . the problems she's got and is on lithium, there is no way I would even consider for a moment leaving that person on." (RT 5806.) The prosecutor apparently suffered from an irrational phobia of persons with bipolar disorder. As this Court has recognized, however, a lawyer diagnosed as bipolar, but who controlled the disorder with lithium, is perfectly capable of practicing law. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596.)[64] No doubt a person diagnosed with bipolar disorder and

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[64]Highly accomplished individuals reportedly diagnosed as bipolar include Winston Churchill, Rosemary Clooney, Mike Wallace, Ted Turner, Art Buchwald, and Jane Pauley. (*Pauley Reveals Struggle with Bipolar Disorder*, USA Today (Aug. 19, 2004) p. B-10 [2004 WL 58562706]; Anderson, *Healthy Living: 'Taking Away the Stigma' High-profile 'Blues Brothers' Panelists Urge Men Who Have Depression to Seek Treatment*, Atlanta Journal - Constitution (Apr. 27, 2004) p. E1 [2004 WL 77159607]; Davis, *We Need to Drop Stigma from Mental Illness*, Lexington, KY Herald Leader (Jul. 14, 2002) p. 1 [2002 WL 19706264]; Hutchins, *Friendship:*

(continued...)

controlling it with lithium, as Ms. Hall had for 19 years (RT 5797), would be perfectly capable of being an unbiased juror. Thus, even if the prosecutor had asked Ms. Hall why she saw a mental health professional and as a result had learned that she was bipolar, the prosecutor would have had no rational reason to conclude that Ms. Hall's condition would have caused her to be biased against the prosecution.

Moreover, because Ms. Hall disclosed that she had seen a mental health professional, it was incumbent on the prosecutor to examine her on her mental health, if the issue was material to him. (Cf. *People v. Compton* (1971) 6 Cal.3d 55, 59-60 [reversing where trial court failed to clarify ambiguous out-of-court remark by juror that "it would be hard to keep an open mind on a case such as this" because unclarified ambiguous remark did not establish juror was "unable to perform his duty" within the meaning of section 1089].) That the prosecutor failed to ask Ms. Hall a single question on the subject, and additionally failed to inquire about the mental health of the seven other jurors who had seen mental health professionals (Sup.II-CT 2659, RT 3914 [Bays]; SupII-CT 3304, RT 3612-3614 [Webb]; Sup.II-CT 3444, RT 3827 [Rodriguez]; SupII-CT 3752, RT 3936-3940 [Jackson]; SupII-CT 3836, RT 3885-3887 [Kirch]; Sup.II-CT 4004, RT 3974-3976 [Hecht]; Sup.II-CT 4032, RT 3955-3959 [Dimmick]), demonstrate that the issue was of no concern to the prosecutor and therefore was immaterial to his jury selection. (See *McDonough Power Equip. Inc. v. Greenwood*, *supra*, 464 U.S. at p. 555 ["A trial represents an important

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[64](...continued)
Good Medicine for Mental Illness, Rochester, NY Democrat & Chronicle (May 2, 2002) p. 9A [2002 WL 18001204].)

investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on voir dire examination"].) It should be obvious that the prosecutor only became concerned about Ms. Hall's mental health when he discovered that Ms. Hall preferred life, and stood in the way of a death verdict.

Furthermore, it would have been unabashed bigotry for the prosecutor to strike Ms. Hall merely because of her disability. At the time of the trial in this case, section 1(a)(2) of the Standards of Judicial Administration Recommended by the Judicial Council, entitled "Court's Duty to Prohibit Bias," provided in part: "To preserve the integrity and impartiality of the judicial system, each judge should [i]n all courtroom proceedings, . . . prohibit others from engaging in conduct that exhibits bias, whether that bias is directed toward . . . jurors, or any other participants." Effective January 1, 1998, this section expressly prohibits "bias based on disability." (See also Gov. Code, §§ 11135(a) ["No person in the State of California shall, on the basis of [mental] disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state"].)

"No one disputes that bipolar disorder counts as a mental impairment under the ADA [Americans with Disabilities Act]." (*Taylor v. Phoenixville School Dist.* (3d Cir. 1999) 184 F.3d 296, 306.) And under California law, "disability" includes the perception that one has a mental disability or

impairment. (Civ. Code, § 51(e)(1); Gov. Code, § 12926(i), (m); Bus. & Prof. Code, § 125.6(c).) Because California disabilities law is even broader than the ADA (*Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1026 [recognizing that California law provides more protection for individuals with disabilities than the ADA]), there is no doubt that Ms. Hall, diagnosed as bipolar, had a disability, and there is no doubt that, had the trial court permitted the prosecutor to exercise a peremptory challenge to remove Ms. Hall from the jury solely because of her bipolar disorder, the court would have violated the Standards of Judicial Administration. Hence, the court erred when it based its discharge of Ms. Hall on the finding that the prosecutor would have been entitled to use a peremptory challenge against Ms. Hall because of her disability. (RT 5821.)[65]

Third, contrary to the court's finding, Ms. Hall did not misrepresent on her questionnaire that she had no "acquaintances" who had been arrested. (RT 5815, 5820.) Indeed, the questionnaire did not even inquire about "acquaintances." Rather, it asked: "Have you, or anyone *close* to you, ever been arrested for or accused of a crime?" (SupII-CT 3326 [italics added].) Ms. Hall responded affirmatively and wrote, "friend – outstanding warrants and possession of stolen property." (*Id.*) During voir dire, the prosecutor asked her no questions about her friend who had been arrested,

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[65]See Code of Civil Procedure section 231.5, enacted in 2000 after the trial in this case: "A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or *similar grounds*." (Italics added.)

indicating that the matter was immaterial to *this* prosecutor's jury's selection. (RT 3810-3818.)

When the prosecutor interrogated her after the jury was unable to reach a verdict, Ms. Hall stated that her "old" babysitter's son was in jail and had been institutionalized all his life, the last time, she thought, for robbery, though she did not really know. (RT 5799-5800.) Ms. Hall added that her former brother-in-law had been in jail for a warrant, and she thought that he had not spent even two days in jail. (RT 5801.) Ms. Hall then mentioned the friend, previously disclosed on her questionnaire, who had been jailed for a short time on warrants. (RT 5800-5801.)

Clearly the court was wrong to conclude that Ms. Hall made any misrepresentation. A much fairer and accurate conclusion is that Ms. Hall did not consider her *old* babysitter's *son*, or her *former* brother-in-law, as someone who was "close" to her. Therefore, Ms. Hall answered properly in only disclosing on her questionnaire that a "friend" had been arrested. (*People v. Majors* (1998) 18 Cal.4th 385, 418-420 [juror did *not* conceal relevant facts during voir dire by (1) failing to disclose relationship with prison guards when asked whether any close friend was associated with law enforcement; although juror stated in post-trial interviews that he had talked with "buddies" who were prison guards about how defendant would be treated on death row, he later clarified that he considered those persons to be acquaintances rather than close friends; (2) failing to reveal that his sister's husband's brother had been slashed by an inmate while working as a correctional officer, when juror was asked whether any close friend or relative was associated with Department of Corrections or had ever been involved in an assaultive crime; although juror used term "cousin" in

post-trial interview to refer to that individual, he later clarified that he was using term loosely; and (3) by failing to reveal that his wife had dealt cocaine as a teenager in response to question, "Do you know anyone whom you believe to be a drug user or seller?"; wife's drug sales occurred before juror even knew her, and more importantly, question was clearly phrased in present tense]; *People v. Duran* (1996) 50 Cal.App.4th 103, 115 [a juror who casually dated an individual whose cousin was murdered did not commit misconduct by failing to disclose that relationship during voir dire where the jurors were asked whether anyone *close* to them had been the victim of a serious crime].)

C. Conclusion

In sum, Ms. Hall's failure to mention gun ownership on her questionnaire was immaterial to the prosecutor's jury selection and did not show bias against the prosecution to a demonstrable reality. Her response concerning digestive problems answered the question that was asked and did not intentionally conceal her mental condition, given that she disclosed that she had seen a mental health professional. Moreover, the issue was immaterial to the prosecutor and did not reflect any bias towards the prosecution. Finally, Ms. Hall made no misrepresentations concerning persons close to her who had been arrested.

Accordingly, because Ms. Hall's inability to perform as a juror did not appear in the record to a demonstrable reality, the court abused its discretion in discharging her. (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 474.) And, whether viewed as structural error (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282 [harmless error analysis inappropriate where jury given deficient reasonable doubt instruction]; *United States v. Harbin* (7th

Cir. 2001) 250 F.3d 532, 545 [prosecutor's mid-trial exercise of a peremptory challenge against a seated juror required automatic reversal]), which it was, or federal constitutional trial error (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 474; *People v. Hamilton* (1963) 60 Cal.2d 105, 128, disapproved on other grounds in *People v. Daniels* (1991) 52 Cal.3d 815, 864 ["if the record shows (as it does here), that, based on the evidence, that juror was inclined toward one side, the error in removing such a juror would be prejudicial to that side"]), the court's discharge of Annora Hall was prejudicial and requires reversal of the death judgment because the record plainly shows that she favored the defense.

In his concurring opinion in *In re Hamilton* (1999) 20 Cal.4th 273, Justice Chin called "for the Legislature to enact a comprehensive 'Juror Bill of Rights' designed to protect jurors from intrusive tactics while at the same time permitting reasonable means to expose the occasional genuine case of jury misconduct." (*Id.* at p. 308.) He was especially troubled by a juror having to defend herself against unfounded charges of misconduct after "perform[ing] one of the most onerous of civic duties," sitting as a juror in a capital case. (*Ibid.*) Any such Bill of Rights should also protect jurors from abusive and irresponsible charges by counsel.

Here, Annora Hall, a 43-year-old African American woman with a bachelor of science degree, who felt blessed to live in this country, a successful office manager for the Department of Motor Vehicles, where she worked for 17 years and supervised 45 employees, and a divorced mother raising five children (Sup.II-CT 3318, 3320, 3322, 3334) was unceremoniously dismissed from the jury after devoting 23 long days to this case, which included 9 difficult days of deliberation that, as Ms. Hall

described it, degenerated into an "interrogation." (RT 3802-5820; Sup.III-CT 401.) Moreover, after Ms. Hall had the courage to withstand her fellow jurors' examination, she was interrogated by the court *and* by the prosecutor, who charged in a public record that Ms. Hall "clearly lied," "clearly misrepresented to the court" (RT 5805), "lied in three places on the questionnaire" (RT 5807), had "a serious mental problem" (RT 5806), and "lied to me" (RT 5813). Ms. Hall lied to no one and capably performed her duties as a juror.

Finally, Annora Hall, described by the court as a "problem" because she voted against the majority, must have been devastated by her discharge, which could only have spawned a cynical contempt for a judicial system that dismissed her at the behest of the prosecutor, not because of a material misrepresentation that showed bias against the prosecution to a demonstrable reality, but, it must have seemed to Ms. Hall, because she voted for life. The injustice to Ms. Hall should not go unremedied.

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17.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES SERGIO'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates Sergio's Eighth Amendment right to be protected from the arbitrary and capricious imposition of capital punishment and also violates his Fourteenth Amendment right to equal protection of the law.

A. The Lack of Intercase Proportionality Review Violates the Eighth Amendment Protection Against the Arbitrary and Capricious Imposition of the Death Penalty.

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (*Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida* (1976) 428 U.S. 242, 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States

Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (*People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised on untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51, 104 S.Ct. 871, 879-880, 79 L.Ed.2d 29 (1984), the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.*, at 53, 104 S.Ct., at 881, quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (CA9 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris*.

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).) The time has come for *Pulley v. Harris* to be reevaluated since the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (conc. opn. of White, J.).)[66] Comparative case review is the most rational – if not

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[66]Sergio does not challenge the narrowing effect of California's (continued...)

the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[67]

The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks

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[66](...continued)
special circumstances in this automatic appeal because that factual question depends on an empirical showing that must wait for a petition for writ of habeas corpus. (Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1317-1318.)

[67] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. (*State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Even assuming, for purposes of this argument, that the scope of California's special circumstances is not so broad as to render the scheme unconstitutional, the open-ended nature of the aggravating and mitigating factors – especially the circumstances of the offense factor delineated in Penal Code section 190.3, factor (a) – and the discretionary nature of the sentencing instruction under CALJIC No. 8.88 grant a jury unrestricted (or nearly unrestricted) freedom in making the death-sentencing decision. (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.) .)

California's authorization of the death penalty for felony-murder works synergistically with its far-reaching and flexible sentencing factors and unfettered jury discretion at the selection stage to infuse the state capital sentencing scheme with flagrant arbitrariness. Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide Sergio with intercase proportionality review. The absence of intercase proportionality review

violates his Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

B. The Lack of Intercase Proportionality Review Violates Sergio's Right to Equal Protection of the Law.

The United States Supreme Court repeatedly has directed that a greater degree of reliability in sentencing is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact finding. (See, e.g., *Monge v. California, supra*, 524 U.S. 721, 731-732.) Despite this directive, California provides significantly fewer procedural protections for ensuring the reliability of a death sentence than it does for ensuring the reliability of a noncapital sentence. This disparate treatment violates the constitutional guarantee of equal protection of the laws. (U.S. Const., 14th Amend.)

At the time of Sergio's sentence, California required intercase proportionality review for noncapital cases. (Former Pen. Code, § 1170(d).) The Legislature thus provided a substantial benefit for all prisoners sentenced under the Determinate Sentencing Law (DSL) – a comprehensive and detailed disparate sentence review. (See generally *In re Martin* (1986) 42 Cal.3d 437, 442-444 [detailing how system worked in practice].) Nevertheless, persons sentenced to the most extreme penalty – death – are unique among convicted felons in that they are not accorded this review. This distinction is irrational.

In *People v. Allen* (1986) 42 Cal.3d 1222, this Court rejected a claim that the failure to provide disparate sentence review for persons sentenced to death violates the constitutional guarantee of equal protection of the

laws. The contention raised in *Allen* also contrasted the death penalty scheme with the disparate review procedure provided for noncapital defendants, but this Court rejected the argument. The reasoning of *Allen*, however, was flawed.

The *Allen* court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case is a jury: "This lay body represents and applies community standards in the capital sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal.3d at p. 1286.) Although the observation may be true, it ignores a more significant point, *i.e.*, the requirement that any death penalty scheme must ensure that capital punishment is not randomly and capriciously imposed. It is incongruous to provide a mechanism to assure that this type of arbitrariness does not occur in noncapital cases, but not to provide that same mechanism in capital cases where so much more is at stake for the defendant.

Further, jurors are not the only bearers of community standards. Legislatures also reflect community norms in the delineation of special circumstances (Pen. Code, § 190.2) and sentencing factors (Pen. Code, § 190.3), and a court of statewide jurisdiction is well situated to assess the objective indicia of community values that are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality remain alive in the area of capital sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses or offenders. (*Ford v. Wainwright* (1986) 477 U.S. 399; *Enmund v. Florida* (1982) 458 U.S. 782; *Coker v. Georgia* (1977) 433 U.S. 584.) But juries – like trial courts and counsel – are not immune from error, and

they may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

Jurors are not the only sentencers. A verdict of death always is subject to independent review by a trial court empowered to reduce the sentence, and the reduction of a jury's verdict by a trial judge is required in particular circumstances. (Pen. Code, § 190.4(e); *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the absence of disparate sentence review in capital cases cannot be justified on the ground that a reduction of a jury's verdict would render the jury's sentencing function less than inviolate, since it is not inviolate under the current scheme.

The second reason offered by the *Allen* Court for rejecting the defendant's equal protection claim was that the sentencing range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at 1287 [italics added].) The idea that the disparity between life and death is a "narrow" one, however, defies constitutional doctrine: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability [citation]. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North*

Carolina (1976) 428 U.S. 280, 305 [lead opn. of Stewart, Powell, and Stevens, JJ.].) The qualitative difference between a prison sentence and a death sentence thus militates for – rather than against – requiring the State to apply its disparate review procedures to capital sentencing.

Finally, this Court in *Allen* relied on the additional "nonquantifiable" aspects of capital sentencing when compared to noncapital sentencing as supporting the different treatment of persons sentenced to death. (*People v. Allen, supra*, 42 Cal.3d at p. 1287.) The distinction, however, is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered aggravating and mitigating circumstances in a capital case. (*Compare* Pen. Code, § 190.3, subds. (a) through (j) with Cal. Rules of Court, rules 421 & 423.) It is reasonable to assume that precisely because "nonquantifiable factors" permeate all sentencing choices, the legislature created the disparate review mechanism discussed above.

The equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees every person that he or she will not be denied fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 104-105.) In addition to protecting the exercise of federal constitutional rights, the equal protection clause prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The arbitrary and unequal treatment of convicted felons, like Sergio, who are condemned to death cannot be justified, as this Court ruled in *Allen*, by the fact that a death sentence reflects community standards. All

criminal sentences authorized by the Legislature, whether imposed by judges or juries, represent community standards. Jury sentencing in capital cases does not warrant withholding the same type of disparate sentence review that is provided to all other convicted felons in this state – the type of review routinely provided in virtually every death penalty state. The lack of intercase proportionality review violates Sergio's Fourteenth Amendment right to equal protection and requires reversal of his death sentence.

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18.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF.

The California death penalty statute, and the instructions given in this case, assign no burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death. They delineate no burden of proof with respect to either the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision. And neither the statute nor the instructions require jury unanimity as to the existence of aggravating factors. As shown below, these omissions in the California capital-sentencing scheme run afoul of the Sixth, Eighth, and Fourteenth Amendments.

A. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, That the Aggravating Factors Outweigh the Mitigating Factors, and That Death Is the Appropriate Penalty.

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3) and that "death is the appropriate penalty under all the circumstances" (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown* (1987) 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the

jury's satisfaction pursuant to any delineated burden of proof.[68]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders Sergio's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments. Although this Court has rejected similar claims (see, e.g. *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774), the issue must be revisited in light of recent Supreme Court authority that creates significant doubt about the continuing vitality of California's current death penalty scheme.

With the issuance of three opinions within the past five years, *Jones v. United States* (1999) 526 U.S. 227, *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court has dramatically altered the landscape of capital jurisprudence in this country in a manner that has profound implications for penalty phase instructions in California capital cases. As the Court has observed, "*in a capital sentencing proceeding*, as in a criminal trial, ""'the interests of the defendant are of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'"" [Citations.]" (*Monge v. California*, *supra,* 524 U.S. at p. 732 [italics added].)

Nevertheless, this Court has reasoned that, because the penalty phase determinations are "moral and ... not factual" functions, they are not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne*

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[68]There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Pen. Code, § 190.3, factor (b)) must be proved beyond a reasonable doubt.

(1992) 4 Cal.4th 43, 79.) As the above-quoted statement from *Monge* indicates, however, the Supreme Court contemplates the application of the reasonable doubt standard in the penalty phase of a capital case. It has made this point clear in the trilogy of cases that began with *Jones v. United States*, *supra*, 526 U.S. 227.

In *Jones*, the Court held that under the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment, any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. (*Jones v. United States*, *supra*, 526 U.S. at p. 243, fn. 6.) *Jones* involved a federal statute, but in *Apprendi v. New Jersey*, the Court extended to the states through the Fourteenth Amendment the holding of *Jones*, concluding:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range or penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490 [quoting *Jones v. United States*, *supra*, 526 U.S. at pp. 252-253].)

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute,

however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, where the jury determines guilt but has no participation in the sentencing proceedings, and concluded that the scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*: "[c]apital defendants, no less

than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)[69] The Court observed: "The 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. We hold that the Sixth Amendment applies to both." (*Ibid.*)

Despite the holding in *Apprendi*, this Court stated that "*Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder." (*People v. Ochoa* (2001) 26 Cal.4th 398, 454.) The Court reasoned that "once a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death." (*Ibid.*) After *Ring*, however, this holding is no longer tenable.

Read together, the *Jones-Apprendi-Ring* trilogy renders the weighing

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[69]Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 [conc. opn. of Scalia, J.].)

of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) As the Court stated, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Ibid.*) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely on a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Pen. Code, § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 [quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541 (dis. opn. of O'Connor, J.)].) To impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 [quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494]), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*,

supra, 536 U.S. at p. 610 [conc. opn. of Scalia, J.].) They thus trigger *Ring* and *Apprendi* and the requirement that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

The Court in *Ring* and *Apprendi* made an effort to remove the game of semantics from sentencing determinations. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 585-586.) Accordingly, whether California's weighing assessment is labeled an enhancement, eligibility determination, or balancing test, the reasoning in *Apprendi* and *Ring* require that this most critical "factual assessment" be made beyond a reasonable doubt.[70]

In addition, California law requires the same result.[71] The reasonable

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[70]It cannot be disputed that the jury's decision of whether aggravating circumstances are present, whether the aggravating circumstances outweigh mitigating circumstances, and whether death is the appropriate penalty are "assessment[s] of facts" for purposes of the constitutional rule announced in *Apprendi* and *Ring*. This Court has recognized that "penalty phase evidence may raise disputed factual issues." (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236.) The Court has also stated that the section 190.3 factors of California's death penalty law "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on [the defendant's] moral culpability." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 595; see *Ford v. Strickland* (11th Cir. 1983) 696 F.2d 804, 818 ["the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard"].)

[71]The practice in other states also supports this conclusion. Twenty-six states require that any factors relied on to impose death in a penalty

(continued...)

doubt standard is routinely applied in this state in proceedings with less serious consequences than a capital penalty trial, including proceedings that deal only with a prison sentence. Indeed, even such comparatively minor matters as sentence enhancement allegations, e.g., that the defendant was armed during the commission of an offense, must be proved by the standard of beyond a reasonable doubt. (See CALJIC No. 17.15.)

The disparity of requiring a higher standard of proof for matters of

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[71](...continued)
phase must be proved beyond a reasonable doubt, and three other states have related provisions. (Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 18-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Mont. Code Ann., §§ 46-18-302(b)(B), 46-18-305; Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann. §, 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).)

Moreover, in at least eight states in which the death penalty is permissible, capital juries are specifically instructed that a death verdict may not be returned unless the jury finds beyond a reasonable doubt that aggravation outweighs mitigation and/or that death is the appropriate penalty. (See Acker & Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes* (1995) 31 Crim. L. Bull. 19, 35-37, and fns. 71-76, and the citations therein regarding the pertinent statutes of Arkansas, Missouri, New Jersey, Ohio, Tennessee, and Washington.)

less consequence while requiring no standard at all for aggravating circumstances that may result in a defendant's death violates equal protection and due process principles. (See, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421 ["A state should not be permitted to treat defendants differently ... unless it has 'some rational basis, announced with reasonable precision' for doing so."].) Accordingly, both the *Jones-Apprendi-Ring* trilogy and consistent application of California precedent require that the reasonable doubt standard be applied to all penalty phase determinations, including the ultimate determination of whether to impose a death sentence.

In *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531], the United States Supreme Court applied *Apprendi* and *Ring*, and held that the state trial court's sentencing of a defendant to a 90-month sentence, more than three years above the 53-month statutory maximum of the standard range for his offense, on the basis of the sentencing judge's finding that defendant acted with deliberate cruelty, violated the defendant's Sixth Amendment right to trial by jury. (*Blakely, supra*, 124 S.Ct. at p. 2538.)

The Court ruled that the judge could not impose the 90-month sentence based solely on the facts admitted in the guilty plea because Washington law requires an exceptional sentence to be based on factors other than those used in computing the standard-range sentence, which was 53 months. (*Id.* at pp. 2537-2538.) The state had argued that there was no *Apprendi* violation because the relevant "statutory maximum" was not 53 months but the 10-year maximum for class B felonies under Washington law. Justice Scalia, writing for the majority, stated:

> In *Ring v. Arizona*, 536 U.S. 584, 592-593, and n. 1, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), we applied *Apprendi*

> to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi*, *supra*, at 491-497, 120 S.Ct. 2348; *Ring*, *supra*, at 603-609, 122 S.Ct. 2428. * * * ..... [T]he "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. See *Ring*, *supra*, at 602, 122 S.Ct. 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi*, *supra*, at 483, 120 S.Ct. 2348)); *Harris v. United States*, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. *Apprendi*, *supra*, at 488, 120 S.Ct. 2348 (facts admitted by the defendant). **In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings**. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," *Bishop*, *supra*, §§ 87, at 55, and the judge exceeds his proper authority.

(*Id.* at 2537 [bold emphasis added].)

Accordingly, the appropriate question regarding *Ring's* application to the California's capital weighing process is: What is the maximum sentence that could be imposed based on findings of all elements of first degree murder and at least one special circumstance? The maximum sentence "without any additional findings," that is, without a finding that aggravation outweighs mitigation, is life without possibility of parole. Without an additional finding that the aggravation outweighs the mitigation, the maximum sentence that can be imposed is a life sentence; therefore, a

jury must make this additional finding – and make it beyond a reasonable doubt.

B. The Sixth, Eighth, and Fourteenth Amendments Require That the State Bear Some Burden of Persuasion at the Penalty Phase.

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Sergio urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not.

Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Pen. Code, §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan*, *supra*, 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by

the trial court. Penal Code section 190.4(e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[72]

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence on which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."].) As explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d at p. 421.)

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[72]Of course, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v. Washington* (1984) 466 U.S. 668, 686-87; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.)

C. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require Juror Unanimity on Aggravating Factors.

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing Sergio's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 [plur. opn. of Souter, J.].)

Sergio recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, Sergio asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable

manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[73]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[74]

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[73]The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

[74]This Court has held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto* (2003) 30 Cal.4th 226, 265.) The Court, however, did fully address the arguments raised therein. Further, Sergio must raise this issue to preserve his rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

Applying the *Ring* reasoning here, jury unanimity is required 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.].) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1977) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra*, 524 U.S. at p. 732; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida* (1977) 430 U.S. 349, 359 [plur. opn. of White, J.]; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to

noncapital cases.[75] For example, in cases where 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., Pen. Code, § 1158(a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 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

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[75]The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).)

its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions.

D. Conclusion

As set forth above, the trial court violated Sergio's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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19.

THE INSTRUCTION DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED SERGIO'S CONSTITUTIONAL RIGHTS.

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88, read as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed upon this defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, [and] be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition, or event attending the commission of a crimes which increases its guilt or enormity, or adds to the injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, or condition, or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating

circumstances.

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(RT 5626-5628.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. Whether considered singly or together, the flaws in this pivotal instruction violated Sergio's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.), and require reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

A. The Instruction Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard That Failed to Provide Adequate Guidance and Direction.

Under the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on Sergio hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (RT 5628.) The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty . . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase violates the Eighth and Fourteenth

Amendments because it creates a standard that is vague, directionless, and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (*Id.* at p. 391; see also *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)

> In analyzing the word "substantial," the *Arnold* court concluded:
>
> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[76]

Sergio acknowledges that this Court has opined, in discussing the

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[76]The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 202.)

constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Nevertheless, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Of course, *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant, and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instruction here, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions that fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing

process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., 8th & 14th Amends.), the death judgment must be reversed.

B. The Instruction Failed to Inform the Jurors That the Central Determination Is Whether the Death Penalty Is the Appropriate Punishment, Not Simply an Authorized Penalty, for Sergio.

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, on weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) Nevertheless, CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole," the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether

it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" to mean "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, on weighing the relevant factors, that such a sentence was permitted. That is a far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate.

To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established. Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo*

(1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to a "justified and appropriate" penalty. (RT 5627 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate"].) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence Sergio to death if they found it "warrant[ed]."

The crucial sentencing instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) and denies due process (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), and must be reversed.

C. The Instruction 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.

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.)[77] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. By failing to conform to the specific mandate of Penal Code section 190.3,

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[77]The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.)

the instruction given to Sergio's jury violated the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281 [original italics].)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and Sergio respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955)133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[78]

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[78]There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the

(continued...)

People v. Moore (1954) 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527 [internal quotation marks omitted].)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it was a correct statement of law,

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[78](...continued)
State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 (1963); *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

the instruction at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in Sergio's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, Sergio can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool*

v. United States (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated Sergio's Sixth Amendment rights as well. Reversal of his death sentence is required.

D. The Instruction Failed to Inform the Jurors That Sergio Did Not Have to Persuade Them the Death Penalty Was Inappropriate.

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion."] That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations.]

(*Id.* at pp. 727-728.) Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprize the jury that no

such burden is imposed.

The instruction given in this case suffers from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

E. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the due process clause of the Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. Therefore, Sergio's death judgment must be reversed.

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20.

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER SERGIO'S DEATH SENTENCE UNCONSTITUTIONAL.

The jury was instructed on Penal Code section 190.3 with CALJIC No. 8.85, the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (RT 5398-5399) and CALJIC No. 8.88, the standard instruction regarding the weighing of these aggravating and mitigating factors (RT 5626-5628). These instructions, together with the application of these statutory sentencing factors, render Sergio's death sentence unconstitutional.

First, the application of Penal Code section 190.3, factor (a) resulted in arbitrary and capricious imposition of the death penalty on Sergio. Second, the failure to delete inapplicable sentencing factors violated Sergio's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. Third, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty.

Fourth, the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Fifth, the failure of the instruction to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law.

Finally, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Because these essential safeguards were not applied to Sergio's penalty trial, his death judgment must be reversed.

A. The Instruction on Penal Code Section 190.3, Factor (a) and Application of That Sentencing Factor Resulted in the Arbitrary and Capricious Imposition of the Death Penalty.

Penal Code section 190.3, factor (a), permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." The jury in this case was instructed to consider and take into account "the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." (RT 5398.) In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that – at least in the abstract – it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

An analysis of how prosecutors actually use section 190.3, factor (a) shows that they have subverted the essence of the Court's judgment. In fact, the extraordinarily disparate use of the circumstances-of-the-crime factor shows beyond question that whatever "common sense core of meaning" it once may have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decision making that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose

capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

As applied in California, however, section 190.3, factor (a), not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. This can be seen upon examination of a cross-section of cases before this Court.[79]

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. Thus, prosecutors have argued that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

- because the defendant struck many blows and inflicted multiple wounds,[80] or because the defendant killed with a single execution-style wound;[81]

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[79]Sergio respectfully requests that the Court take judicial notice of these records pursuant to Evidence Code section 452(d).

[80]See, e.g., *People v. Morales*, Cal. Sup. Ct. No. (hereinafter "No.") S004552, RT 3094-3095 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-2998 (same); *People v. Carrera*, No. S004569, RT 160-161 (same).

[81]See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT

(continued...)

- because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification),[82] or because the defendant killed the victim without any motive at all;[83]
- because the defendant killed the victim in cold blood,[84] or because the defendant killed the victim during a savage frenzy;[85]
- because the defendant engaged in a cover-up to conceal his crime,[86] or because the defendant did not engage in a cover-up and so must have been proud of it;[87]

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[81](...continued)
3026-3027 (same).

[82]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-969 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6760 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3543-3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[83]See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[84]See, e,g., *People v. Visciotti*, No. S004597, RT 3296-3297 (defendant killed in cold blood).

[85]See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy (trial court finding).

[86]See, e.g., *People v. Stewart*, No. S020803, RT 1741-1742 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[87]See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT
(continued...)

- because the defendant made the victim endure the terror of anticipating a violent death,[88] or because the defendant killed instantly without any warning;[89]
- because the victim had children,[90] or because the victim had not yet had a chance to have children;[91]
- because the victim struggled prior to death,[92] or because the victim did not struggle;[93]
- because the defendant had a prior relationship with the victim,[94] or because the victim was a complete stranger to the

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[87](...continued)
3030-3031 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[88]See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11, 125; *People v. Hamilton*, No. S004363, RT 4623.

[89]See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[90]See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[91]See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[92]See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[93]See, e.g., *People v. Fauber*, No. S005868, RT 5546-5547 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[94]See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-3067 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

defendant.[95]

These examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have had a "common sense core of meaning," that position can be maintained only by ignoring how the term actually is being used in California. In fact, prosecutors urge juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the circumstances-of-the-crime aggravating factor to embrace facts that cover the entire spectrum of facts inevitably present in every homicide:

- **The age of the victim** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[96]

- **The method of killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating

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[95]See, e.g., *People v. Anderson*, No. S004385, RT 3168-3169 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

[96]See, e.g., *People v. Deere*, No. S004722, RT 155-156 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips* (1985) 41 Cal.3d 29, 63 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-4716 (victim was "elderly").

circumstance because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire;[97]

- **The motive for the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all;[98]

- **The time of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day;[99]

- **The location of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home,

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[97]See, e.g., *People v. Clair*, No. S004789, RT 2474-2475 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an axe); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-6787 (use of a club); *People v. Jackson*, No. S010723, RT 8075-8076 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[98]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-970 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6761 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[99]See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-2604 (late at night); *People v. Lucero*, No. S012568, RT 4125-4126 (middle of the day).

in a public bar, in a city park, or in a remote location.[100]

The foregoing examples of how the factor (a) aggravating circumstance actually is being applied establish that it is used as an aggravating factor in every case, by every prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors that they argue to the jury as factors weighing on death's side of the scale.

Here, the prosecutor repeatedly argued that Sergio's motive for the killings was because Robin Shirley received the promotion that Sergio wanted. (RT 5446 ["Robin Shirley, a woman, had the audacity to apply for the promotion that Mr. Nelson deserved. That is what this case comes down to"]; RT 5447 ["It was Robin's fault because she went for the promotion. Had she not gone for the promotion, he would have got it"]; RT 5566 ["That was the sole reason he took two people's lives"].) He further argued that the motive was so aggravating that Sergio deserved the death penalty for this reason alone. (RT 5566 ["And if you believe that is the reason, that motive, in and of itself, can be so aggravating, I would submit to you is so aggravating, that he deserves the death penalty for what he did"].)

Motive is inevitably present in every homicide. Yet, here, the

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[100]See, e.g., *People v. Anderson*, No. S004385, RT 3167-3168 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-3711 (public bar); *People v. Ashmus*, No. S004723, RT 7340-7341 (city park); *People v. Carpenter*, No. S004654, RT 16,749-16,750 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

prosecutor used this essential aspect of every murder to argue that it alone required death. As this case illustrates, the circumstances-of-the-crime aggravating factor licenses indiscriminate imposition of the death penalty on no basis other than "that a particular set of facts surrounding a murder, ... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright*, *supra*, 486 U.S. at p. 363.) That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and Sergio's death sentence must be vacated.

B. The Failure to Delete Inapplicable Sentencing Factors Violated Sergio's Constitutional Rights.

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case.[101] The trial court, however, did not delete those

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[101]Those inapplicable factors included: factor (b) ("The presence . . . of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence"); factor (c) ("The presence . . . of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings"); factor (e) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"); factor (f) ("Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct"); factor (g) ("Whether or not the defendant acted under extreme duress or under the substantial domination of another person"); and factor (l) ("Whether or not the defendant was an accomplice to the offense and his participation in the

(continued...)

inapplicable factors from the instruction. Including these irrelevant factors in the statutory list introduced confusion, capriciousness, and unreliability into the capital decision-making process, in violation of Sergio's rights under the Sixth, Eighth, and Fourteenth Amendments. Sergio recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but he requests reconsideration for the reasons given below. In addition, Sergio raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) The "whether or not" formulation used in CALJIC No. 8.85 given in this case, however, suggested that the jury could consider the inapplicable factors for or against Sergio. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand, and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence Sergio to death because there was evidence in mitigation for "only" a few factors, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters

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[101](...continued)
commission of the offense was relatively minor"). (RT 5398-5399.)

unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an ad hoc determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived Sergio of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright*, *supra*, 477 U.S. at pp. 411, 414; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Reversal of Sergio's death judgment is required.

C. Failing to Instruct That Statutory Mitigating Factors Are Relevant Solely as Mitigators Precluded the Fair, Reliable, and Evenhanded Application of the Death Penalty.

In accordance with customary state court practice, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending on the evidence. Yet, as a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h) and (j) – was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

Without guidance of which factors could be considered solely as

mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate Sergio's sentence on the basis of nonexistent or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Failing to provide Sergio's jury with guidance on this point was reversible error.

D. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation.

The inclusion in the list of potential mitigating factors read to Sergio's jury of such adjectives as "extreme" (see factors (d) and (g); RT 5398-5399), and "substantial" (see factor (g); RT 5399), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

E. The Failure to Require the Jury to Base a Death Sentence on Written Findings Regarding the Aggravating Factors Violates Sergio's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law.

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jury to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived Sergio of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538,

543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California* (1984) 512 U.S. 967, 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland*, *supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* at p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (11 Cal.3d at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See also *People*

v. Martin (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170(c).) Under the Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643), and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[102] California's failure to require such findings renders its

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[102]Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); (continued...)

death penalty procedures unconstitutional.

F. Even If the Absence of the Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate to Ensure Reliable Capital Sentencing, Denying Them to Capital Defendants like Sergio Violates Equal Protection.

As noted previously, the United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in factfinding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. Chief Justice Wright wrote for a unanimous Court that "personal

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[102](...continued)
Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code art 27 § 413(i) (1992); Miss Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5 (IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the Due Process Clause, the right to life is the basis of all other rights ... It encompasses, in a sense, 'the right to have rights' (*Trop v. Dulles*, 356 U.S. 86, 102 (1958) ...." (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict, and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

In Argument 17, Sergio explained why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. He reasserts that argument here with regard to

the denial of other safeguards such as the requirement of written jury findings, unanimous agreement on particular aggravating factors, and the disparate treatment of capital defendants. The procedural protections outlined in these arguments, but denied capital defendants, are especially important in insuring the need for reliable and accurate factfinding in death sentencing trials. (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Withholding them on the basis that a death sentence is a reflection of community standards or any other ground is irrational and arbitrary and cannot withstand the close scrutiny that should apply when the most fundamental interest – life – is at stake.

G. Conclusion

For all the reasons set forth above, Sergio's death sentence must be reversed.

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21.

SERGIO'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT.

A few years ago, the Supreme Court of Canada placed the use of the death penalty in the United States for ordinary crimes into an international context:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan ... According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.) The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment

determination of evolving standards of decency, Sergio raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 [dis. opn. of Brennan, J.].)

A. International Law

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.)[103] Consequently, this Court is bound by the ICCPR.[104] The United States Court of Appeals for the Eleventh Circuit has

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[103]The International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976. The United States ratified the treaty on April 2, 1992, and the President deposited instruments of ratification on June 8, 1992. (See Sen. Res. 49, 138 Cong. Rec., pp. 4781-4784.)

[104]The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (See 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude Sergio's reliance on the treaty because, among other things, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (see Riesenfeld & Abbot, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 68

(continued...)

held that when the United States Senate ratified the ICCPR, "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Sergio's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on Sergio constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. He recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; see also *id.* at pp. 780-781 [conc. opn. of Mosk, J.]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (*United States v. Duarte-Acero, supra*, 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 [dis. opn. of Norris, J.].) Thus, Sergio requests that the Court reconsider and, in the context of this case, find Sergio's death sentence violates international law. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

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[104](...continued)
Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (see 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty (see Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582).

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of August 2002) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)[105]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 [dis. opn. of Field, J.] [quoting 1 Kent's Commentaries 1]; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.)

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[105]Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. (See Amnesty International's "List of Abolitionist and Retentionist Countries," *supra,* at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)

Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at pp. 315-316, fn. 57 [dis. opn. of Field, J.].)

"Cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming for the sake of argument that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary

punishment for extraordinary crimes – is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot, supra*, 159 U.S. 113; see also *Jecker, Torres & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and Sergio's death sentence should be set aside.

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22.

THE TRIAL COURT IMPROPERLY REJECTED SEVERAL PROPOSED PENALTY PHASE INSTRUCTIONS THAT WOULD HAVE GUIDED THE JURY'S DELIBERATIONS IN ACCORDANCE WITH THE LAW.

Defense counsel proposed the following penalty phase instructions, erroneously refused by the court:

- In determining whether to sentence the defendant to life imprisonment without the possibility of parole or to death, you may decide to exercise mercy on behalf of the defendant. (RT 5374.)
- If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may based on such sympathy and compassion alone reject death as a penalty. A mitigating factor does not have to be proved beyond a reasonable doubt. (RT 5387-5388.)
- In deciding whether death or life imprisonment without the possibility of parole is the appropriate sentence, you may not consider for any reason whatever the deterrent or non deterrent effect of the death penalty or the monetary loss to the state of either execution or maintaining a prisoner for life. (RT 5385.)
- Although proof of guilt beyond a reasonable doubt has been found, you may demand a greater degree of certainty for the imposition of the death penalty. The finding of guilt is not infallible and any lingering doubt you entertain on the question of guilt may be considered by you as a factor in

mitigation in determining the appropriate penalty. (RT 5377.)

- You may consider as a mitigating factor any lingering doubt that you may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and all possible doubt. (RT 5380.)
- Evidence of the defendant's character and background may be considered only a factor in mitigation and cannot be used as a factor in aggravation. The prosecutor may rebut evidence of good character or childhood deprivation or hardship with evidence relating directly to the particular incidence or character traits on which the defendant seeks to rely and may argue that mitigation factor is inapplicable, but such evidence may not be used. (RT 5385-5386.)

A criminal defendant is entitled on request to jury instructions that either relate the particular facts of the case to any legal issue or pinpoint the crux of the defense. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885; *People v. Sears* (1970) 2 Cal.3d 180, 190; see *Penry v. Lynaugh* (1989) 492 U.S. 302, overruled on another ground by *Atkins v. Virginia* (2002) 536 U.S. 304.) It is well settled that this right to request specially-tailored instructions applies to the penalty phase of a capital trial. (*People v. Davenport* (1985) 41 Cal.3d 247, 281-283.)

The requested instructions were properly designed to inform the jury as to its duty to weigh and consider penalty phase evidence, and correctly stated the law. Accordingly, the trial court erred in refusing to instruct the jury as requested, and reversal of the death sentence is required.

Mercy, Compassion, and Sympathy

A juror is permitted to use mercy, compassion, and sympathy in deciding what weight to give each mitigating factor. (*People v. Carter* (2003) 30 Cal.4th 1166, 1230, fn. 25; *People v. Wharton* (1991) 53 Cal.3d 522, 600, fn. 23; *People v. Taylor* (1990) 52 Cal.3d 719, 746; *People v. Lanphear* (1984) 36 Cal.3d 163, 167; *People v. Easley* (1983) 34 Cal.3d 858, 874-80.) A trial court "should allow evidence and argument on emotional albeit relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." (*People v. Lewis* (1990) 50 Cal.3d 262, 284.) By promoting a reliable, non-arbitrary, and individualized sentencing determination, the mercy, compassion, and sympathy instructions above protect a defendant's federal constitutional rights to be free from cruel and unusual punishment under the Eighth Amendment and to due process and equal protection under the Fourteenth Amendment. (See, e.g., *Sochor v. Florida* (1992) 504 U.S. 527; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318; *Clemons v. Mississippi* (1990) 494 U.S. 738; *McCleskey v. Kemp* (1987) 481 U.S. 279.) Accordingly, the above mercy, compassion, and sympathy instructions should have been given as requested.

Deterrence

In *People v. Thompson* (1988) 45 Cal.3d 86, this Court held that it would not be error to give an instruction "to forestall consideration of deterrence or cost. . . ." (*Id.* at p. 132.) Consideration of deterrence would violate the Eighth and Fourteenth Amendments by allowing the jury to consider non-statutory aggravation. (See *Clemons v. Mississippi* (1990) 494 U.S. 738, 745; *People v. Williams* (1988) 45 Cal.3d 1268, 1324.)

Accordingly, the above deterrence instruction should have been given as requested. (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 145-146; see also *People v. Welch* (1999) 20 Cal.4th 701 [instructing the jury not to consider the deterrent effect of the death penalty or the monetary cost of executing a prisoner versus maintaining him in prison for life without possibility of parole "may be appropriate in some cases"].)

Lingering Doubt

This Court has held that a specific instruction on lingering doubt is not required, even on request, because lingering doubt is encompassed within the catch-all factor (k) language. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1273.) Moreover, the United States Supreme Court has rejected an Eighth Amendment claim to consideration of lingering doubt because lingering doubt is a not an aspect of the defendant's character or record, or a circumstance of the case. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 174.)

Nevertheless, in *People v. Cox* (1991) 53 Cal.3d 618, 678, fn. 20, the Court stated that, under Penal Code section 1093(f) (court should charge jury on "any points of law pertinent to the issue, if requested"), the trial court may be required to give a "properly formulated" lingering doubt instruction as to the extent of the defendant's guilt. (See also *People v. Thompson* (1988) 45 Cal.3d 86, 134-135.) Here, the requested lingering doubt instructions were properly formulated and did not misstate the law. (*People v. Terry* (1964) 61 Cal.2d 137, 145-146 [a jury may "demand a greater degree of certainty of guilt for the imposition of the death penalty"]; *People v. Snow* (2003) 30 Cal.4th 43, 125 ["Lingering or residual doubt is defined as a state of mind between beyond a reasonable doubt and all

possible doubt"].) Moreover, they were required because the second penalty phase jury did not determine guilt, and therefore needed to be informed by way of a court instruction that residual doubt, if any, may be properly considered a circumstance in mitigation despite the fact that the second penalty phase jury had been instructed by the court that a previous jury had found Sergio guilty of two first degree murders. (RT 5395; CT 474.)

In addition, the holding of *Franklin v. Lynaugh* must be reconsidered in light of *Tennard v. Dretke* (2004) __ U.S. __ [124 S.Ct. 2562], which held: "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" (*Id.* at p. 2570 [quoting *McKoy v. North Carolina* (1990) 494 U.S. 433, 440].) Mitigation evidence is any evidence the trier of fact could "reasonably find warrants a sentence less than death." (*Id.* at p. 2570.) There is nothing in this statement that limits mitigation to "character," "record," or "circumstances of the case." Hence, because lingering doubt is an acknowledged factor that the jury could use to choose a sentence of life imprisonment, and because the Eighth Amendment requires that the jury be able to consider and give effect to all of a capital defendant's mitigating evidence (*Boyde v. California* (1990) 494 U.S. 370, 377-378), an instruction making it clear that lingering doubt can be considered as mitigation was required in this case.

Character and Background

Evidence of the defendant's background can only be a mitigating factor because the permissible aggravating factors are limited to those listed in Penal Code section 190.3. (*People v. Hardy* (1992) 2 Cal.4th 86, 207.)

In *Hardy*, it appears that no limiting instruction on the use of background evidence was requested. Nevertheless, this Court assumed that the failure to limit the jury's consideration of background to mitigation was error. Accordingly, the character and background instruction set forth above should have been given in this case because evidence of Sergio's background was presented.

Therefore, the trial court's errors in refusing these instructions violated Sergio's rights to a fair, non-arbitrary, and reliable sentencing determination, to have the jury consider all mitigating circumstances (see, e.g., *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604) and make an individualized determination whether he should be executed, under all the circumstances (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879); and, constituted a deprivation of a state-created right (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346). (U.S. Const., Amends. VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15, 16, 17.)

The trial court's failure to give the requested instructions was prejudicial. This Court cannot determine the specific point at which the jury decided that death was the appropriate penalty. (*People v. Robertson* (1982) 33 Cal.3d 21, 54.) Had the jury been instructed in how to consider the mitigating evidence before it, there is a reasonable possibility of a different verdict. (*Ibid.*) Accordingly, the trial court's refusal to give the requested instructions was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The judgment of death must be reversed.

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23.

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

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.)[106] 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. at p. 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].)

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[106]Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

The cumulative effect of the errors in this case so infected Sergio's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and Sergio's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at p. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of Sergio's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining

> the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 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].)

Reversal of the death judgment is mandated here because it cannot be shown 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.)

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

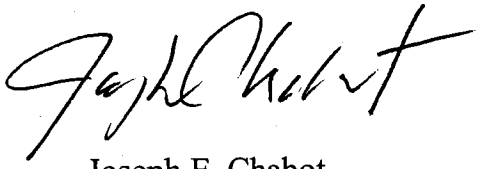
CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

Dated: May 16, 2005

Respectfully submitted,

Michael J. Hersek
State Public Defender



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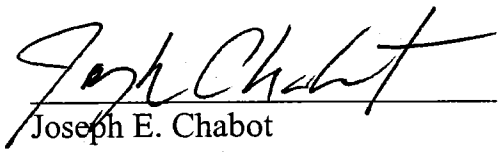
CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Joseph E. Chabot, am the Deputy State Public Defender assigned to represent appellant, Sergio D. Nelson, in this automatic appeal. I conducted 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 is 93,215 words in length excluding the tables and certificates.

Dated: May 16, 2005.



Joseph E. Chabot

DECLARATION OF SERVICE

Re: *People v. Sergio D. Nelson* No. S048763

I, Ja Keith Turk, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

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

ROGER WHITENHILL
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Each envelope was then, on May 16, 2005, sealed and deposited in the United States mail at San Francisco, 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.

Executed on May 16, 2005, at San Francisco, California.

Ja Keith Turk
JA KEITH TURK