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No. S058019

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GEORGE LOPEZ CONTRERAS, Defendant and Appellant.	(Tulare County Superior Court No. 37619)

APPELLANT'S [illegible] OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Tulare

HONORABLE PATRICK J. O'HARA, JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff and Respondent,)
)
v.) (Tulare County Superior Court No. 37619)
)
GEORGE LOPEZ CONTRERAS,)
)
Defendant and Appellant.)

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

STATEMENT OF THE CASE

On November 3, 1995, an Information was filed in Tulare County Superior Court charging appellant George Lopez Contreras, Santos Acevedo Pasillas, Jose Gonzalez and Louis Phillip Fernandez, Jr. with murder in violation of Penal Code section 187, subdivision (a) (Count 1) and second degree robbery in violation of Penal Code section 211 (Count 2). (2 CT 300.)

The special circumstance allegation of murder in the commission of robbery in violation of Penal Code section 190.2, subdivision (a)(17) was charged against all defendants. Special allegations of personal use of a

shotgun, within the meaning of Penal Code sections 1203.06 and 12022.5, subdivision (a), were also alleged as to both counts against appellant, causing the offenses to become serious felonies pursuant to Penal Code section 1192.7, subdivision (c)(8). (2 CT 300-304.)

On August 2, 1996, a hearing was held on appellants Motion to Sever filed on July 23, 1996. (1 CT 10; 2 CT 314.) On August 6, 1996, the court granted the motion based on *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123. (1 CT 11.)

Jury selection began on August 27 (1 CT 16), and a jury and three alternates were sworn on September 17, 1996. The presentation of evidence in the guilt phase of the proceedings began on September 17. (1 CT 40, 41.) The jury was instructed on September 24, 1996, and began deliberations that same day. (1 CT 56-57.) On September 26, 1996, the jury returned its verdict, finding appellant guilty of first degree felony murder and robbery. (2 CT 514-515.) The jurors also found the robbery-murder special circumstance and personal use allegations to be true. (*Ibid.*)

The penalty phase of trial began on September 30, 1996, and the presentation of evidence was completed on October 1, 1996. (1 CT 62, 66.)

On October 2, counsel made their closing arguments and the jury was instructed. The case was submitted to the jury at 1:44 p.m. (1 CT 68.) Shortly after 2:00 p.m. on October 4th, the jury announced a verdict of death. (1 CT 70, 2 CT 568.)

On November 12, 1996, appellant filed a motion for modification (2 CT 586) that was heard and denied on December 11, 1996 (1 CT 76). The court then sentenced appellant to death. (1 CT 77.)

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a verdict of death. (Pen. Code, §1239, subd. (b)); Cal. Rules of Court, rule 13.)

STATEMENT OF FACTS

I. GUILT PHASE

A. Events of December 29, 1994

On December 29, 1994, as on many other days that month, appellant and his young son Marco[1] spent the day at the family home of appellant's girlfriend Claudia Contreras Gutierrez. (6 RT 1615, 1622, 1650, 1692, 1695.)[2] Appellant and Claudia had dated on and off for several years, and they were married at the time of appellant's trial. (6 RT 1612-1613.) On December 29, 1994, Claudia's mother and godmother took her to work. (6 RT 1622.) According to her time sheet for that day, Claudia began work at 9:02 a.m. and finished at 3:36 p.m. (6 RT 1623; Def. Exh. B), at which time appellant and Marco picked her up. They drove directly to Claudia's house. (6 RT 1623.) Shortly after they arrived home, Claudia's mother asked Claudia and appellant to pick up Claudia's sister Erika from work. (6 RT 1623, 1699.)

Appellant, Claudia and Marco then drove to Erika's work place, the

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[1]Appellant and Arcadia Hernandez had a son Mark Anthony ("Marco") who was born in December 1993. (6 RT 1613, 1732.)

[2]Arcadia Hernandez testified that in December 1994, Marco was with her not appellant. (6 RT 1763.) She insisted that appellant had Marco in 1995, on his second, not first, birthday, although, in fact, appellant was in custody in December 1995. (6 RT 1765-1766.) Appellant's family uniformly testified that appellant had Marco on his first birthday and was with him daily between Christmas and New Year's of 1994. (6 RT 1615 [Claudia Contreras Gutierrez]), 1691-1692 [Martina Gutierrez], 1704-1705 [Maria Contreras Lopez].)

accounting firm of Hocking, Denton & Palquist, in Claudia's Oldsmobile Forenza. (6 RT 1617, 1623, 1649.)[3] The Hocking firm was located in the same building as the Transamerica Company on Main Street in Visalia. (6 RT 1641, 1679-1680.) Appellant and Claudia drove there early because a man previously exposed himself at that location and they did not want Erika waiting alone. (6 RT 1635, 1648-1649.) They waited about 45 minutes for Erika who, as her time cards established, left work at 5:00 p.m. (6 RT 1641, 1643-1645; Def. Exh. G.)

While waiting for Erika, appellant and Claudia saw Claudia's sister and brother-in-law, Patricia and Raul Murillo, in the parking lot with a Transamerica agent who was photographing their Baretta car. (6 RT 1623.) The two couples waved at each other. (*Ibid.*)

Shortly before 4:00 p.m., from the office window where she typed invoices, Erika also saw Patricia and Raul in the parking lot as they were entering the building. (6 RT 1647-1648.) A short time later, Erika saw appellant and Claudia in the parking lot in Claudia's Oldsmobile Forenza. (6 RT 1648-1649.)

When Erika entered Claudia's car after work, she saw Marco in the car. (6 RT 1649.) Erika told Claudia she had seen Patricia and Raul, and Claudia explained they were there to get a loan. Claudia had also seen them and had waved at them. (6 RT 1654.) Claudia, Erika and appellant then drove straight home. (6 RT 1650.) Appellant stayed at the Gutierrez home until midnight or 1:00 a.m. (6 RT 1650, 1697.)

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[3]Appellant and Claudia used Claudia's car because, as different witnesses testified, appellant's van had not been running since before Christmas. (6 RT 1616 [Claudia Contreras], 1693 [Martina Gutierrez], 1705 [Maria Contreras].)

On December 29, 1994, Patricia and Raul Murillo were at the Transamerica office to arrange for a loan using the Gutierrez family's Baretta car as collateral. (6 RT 1662, 1668, 1694-1695.) The transaction was memorialized in a contract that was admitted into evidence as Defense Exhibit No. D. (1 CT 49, 53; 6 RT 1664, 1687, 1694-1695, 1748.) Patricia and Raul went to Transamerica at approximately 4:00 p.m. (6 RT 1663.) According to Isaac Perez, the loan officer with whom they met, the latest appointment he would schedule would be between 4:00 and 4:30 p.m. (6 RT 1678.) Patricia and Raul met inside the office building with Perez, and then they went outside where Perez photographed the car. (6 RT 1663, 1676.) While outside, Raul pointed out that appellant and Claudia were sitting in a car in the parking lot. (6 RT 1664, 1690.) They waved but did not speak to each other. (6 RT 1664.) After the photographs were taken, Patricia and Raul went back into the office to sign the loan papers. When they returned to the parking lot, appellant and Claudia were gone. (6 RT 1664.) Perez confirmed that Patricia and Raul signed the contract and that he photographed the car on December 29, 1994. (6 RT 1675.) On that same day, Patricia made a bank deposit of $3,267.67. (6 RT 1702.)

During this same time frame on December 29, 1994 – approximately 3:20 p.m. – Saleh Bin Hassan was shot in his store, the Casa Blanca Market, in Farmersville. (5 RT 1570-1572.) Hassan, who was 49 years old, bled to death within minutes from two gunshot wounds. (5 RT 1426-1427, 1431.) No usable fingerprints were found inside or outside the store. (5 RT 1556.) No murder weapon was found, and no ballistics evidence was presented.

Three people – Amanda Garcia, Joel Mohr, and Byron Northcutt –

saw the perpetrators leave the Casa Blanca Market. These eyewitnesses saw four men and four men only: two fleeing the store and two men waiting in a getaway car. All testified they saw only one man leave the store carrying a rifle or a gun; none saw a baby in the car. The eyewitnesses were not able to make any identifications.

Amanda Garcia testified that while driving home, she noticed an orange car, similar to the car pictured in People's Exhibit 13, parked in the middle of the street blocking traffic. (5 RT 1522-1523.)[4] The car had a yellowish license plate with a tree-like logo in the middle. (5 RT 1525.) The car was pointed toward the store on the corner, and Garcia was stopped five or six car lengths from it. (5 RT 1524.) She saw only two people in the car: one in the driver's seat and the other in the back seat. Both wore masks on their faces. (5 RT 1528-1531.) Garcia testified that there was no baby in the car and that she did not see anyone get out of the car. (5 RT 1530.)

Eventually Garcia saw two people rush to the car from the store. (5 RT 1526, 1530.) They were dressed in black, and their faces were covered with something like a mask, so only their eyes showed. (5 RT 1528.) One of the people carried something. She did not know what is was, but it was about a foot long and shaped like a gun. (5 RT 1526-1527, 1530.) One person got into the driver's side of the rear seat and the other got into the passenger's side of the front seat. (5 RT 1526, 1531.) The car took off, ran a stop sign and turned left, heading towards highway 198. (5 RT 1527.)

Joel Mohr, a Farmersville resident, was working on a pick-up truck

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[4]The car depicted in People's Exhibit 13 was identified by Artero Vallejo as Louis Fernandez's car. (5 RT 1379.).

about 50 yards from the Casa Blanca Market when he heard a commotion at the store. (6 RT 1598, 1605-1606.)[5] Mohr was familiar with the store and knew the owner Hassan, who was called "Shorty." (6 RT 1600, 1602.) Mohr saw one person leave the store and heard him yelling, "come on, hurry up. Let's go." (6 RT 1599-1600.) Mohr did not see anything in this person's hands. (6 RT 1600, 1603.) Another person, wearing a dark blue jacket that had a hood with red lining, came out of the store with what looked like a rifle. (6 RT 1600, 1603.) The second person stood in the driveway and held the rifle towards the direction of the cash register. (6 RT 1600.) Mohr heard more yelling and then a shot; he thought he heard two shots, but the second may have been an echo. (6 RT 1600, 1609.) Mohr then ran to the store where he called 911. (6 RT 1607.)

Mohr testified that neither of the two men he saw wore a mask. He saw them run to and get into the back seat of a copper-colored, mid-sized car parked near the telephone located outside the store. (6 RT 1601, 1603, 1610.)[6] Two other men already were in the front seat of the car. (6 RT 1603-1604.) They looked older than the two who came out of the store, and the passenger in the front seat, who was closest to Mohr, looked the oldest. (*Ibid.*)[7] There was no baby in the car, and no one was holding

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[5]Mohr originally told police he was 100 to 150 yards from the market when he heard the commotion, but before his testimony he checked the distance and estimated he was 50 yards away. (6 RT 1605-1606)

[6]Mohr was fairly certain that the car was a Chevy Celebrity. (6 RT 1610-1611.)

[7]At trial in September 1996, about 21 months after the homicide, Vallejo was 28 years old and estimated that Santos was in his mid twenties, and Louis was in his early thirties. (5 RT 1391.) He did not know Gonzalez's age, but he was younger than Vallejo. (5 RT 1392.) Appellant

anything that looked like a baby. (6 RT 1603.) The car sped off. (6 RT 1601.)

The final eyewitness, Byron Northcutt, testified that he was in his home when he heard a couple of gunshots coming from Hassan's store located about three-quarters of a block away. (6 RT 1589.)[8] Looking out his window, Northcutt saw a man come out of the store carrying a rifle. (6 RT 1590.) The man then turned around and went back into the store. Northcutt heard another shot. (6 RT 1591.) Then two men came out of the store with the man with the rifle in front. (*Ibid.*) Northcutt could not tell if the other man had anything in his hands. (*Ibid.*) Both men got into a car. (6 RT 1590.) They were wearing dark clothing and what appeared to be hoods. (6 RT 1592.) According to Northcutt, three shots were fired: the first two were close together, and the third occurred after the man with the rifle reentered the store. (6 RT 1592.) Northcutt called 911 and went to the store. (6 RT 1590, 1594.)

B. Informant Artero Vallejo

A few days after Hassan was killed, Artero Vallejo, a drug addict and dealer, was arrested. (5 RT 1391, 1462, 1467.)[9] Although he faced felony charges, Vallejo said nothing to the police about what he claimed at trial to know about the Hassan killing. (5 RT 1386.) Between January and August 1995, Vallejo spent three months in a residential treatment

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turned 20 just weeks before the homicide. (2 CT 304.)

[8] Northcutt had something alcoholic to drink before the shooting, but he did not remember how much. (6 RT 1594.)

[9] In December 1994, Vallejo was selling drugs and using a quarter gram of methamphetamine at least twice a day. (5 RT 1509-1510.)

program, apparently for drug and alcohol abuse. (5 RT 1468-1469.)

On August 10, 1995, more than seven months after the killing, Vallejo, in a state of intoxication, called the police and turned himself in on outstanding warrants for his arrest. (5 RT 1387; 5 RT 1449; 6 RT 1711, 1717.) Vallejo told James Hilger, a Tulare County Sheriff detective, that he would provide names if Hilger would take care of Vallejo's arrest warrants with the District Attorney's office. (6 RT 1716.) Two hours after providing Hilger with information about the homicide at the Casa Blanca Market, Vallejo was released from custody, and within two days, he entered a residential rehabilitation program. (5 RT 1389-1390.)

Vallejo gave various explanations for his decision to go to the police: he wanted to give up drugs and alcohol (5 RT 1469) and to turn his life around (5 RT 1387, 1479); he wanted the police to intervene with the district attorney to take care of his arrest warrants on charges involving a billy club and shotgun (5 RT 1460-1461, 1478); he had family problems (5 RT 1470); he was angry because he could not find a job and started drinking (5 RT 1471); and he was angry at some of the men he would implicate over drug debts they owed him (5 RT 1470-1472, 1478).

The defense attempted to show that the real reason Vallejo gave his statement was that he feared he was about to be implicated in the murder. The police knew he had earlier been stopped with 12-gauge shotgun shells in his jacket pocket and a shotgun outside his car. (5 RT 1448.) In addition, he had been arrested in April 1994, wearing a black Raiders jacket (5 RT 1404), which is what he told police appellant was wearing when he committed the killing (5 RT 1475). He claimed, however, that he had given it away before the Casa Blanca homicide. (5 RT 1774.) He also claimed he accompanied appellant and Santos when they picked up the

shotgun and .22 rifle from Jesus Manuel Fernandez (5 RT 1380-1381, 1532), and admitted he had handled the shotgun (5 RT 1474).[10]

Vallejo named four men involved in the killing of Saleh bin Hassan – appellant, Santos Pasillas, Jose Gonzalez and Louis Fernandez. (See 5 RT 1485-1489.) No one mentioned anything to Vallejo about the participation of self-proclaimed accomplice Jose Guadalupe Valencia. (5 RT 1486 ["I don't even know who that is"].) Vallejo testified, however, that appellant's year-old baby was with the four men during the crime. (5 RT 1486, 1496.) In Vallejo's version, appellant, carrying a shotgun, Santos Pasillas, carrying a rifle, and Jose Gonzalez went into the market, while Louis Fernandez, alone with the baby, waited in the car. (5 RT 1486-1487, 1508.) Vallejo testified to statements made by all four men. (5 RT 1372, 1483, 1491-1493, 1507.)

On December 29, 1994, Vallejo worked at Poser Business Forms from about 3:00 p.m. until about 11:30 p.m. Vallejo's work supervisor confirmed that he worked these hours. (5 RT 1576-1577; P. Exh. 21 [Vallejo's time card for December 29, 1994].) Vallejo admitted generally using methamphetamine during work hours (5 RT 1510) as well as drinking a lot and using methamphetamine during the night of December 29 (5 RT 1495). Vallejo claimed that after work that night, he went to the home of Santos Pasillas, who also was known as "Topo." (5 RT 1368,

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[10]The defense also argued that Vallejo knew that both Santos Pasillas and Jose Gonzalez were in custody on charges unrelated to the killing, and feared they might break under the strain of custody and talk about what happened at the market. Vallejo, however, denied that he was trying to shift attention from himself by saying appellant wore a Raiders jacket (5 RT 1475) or that he was worried that Santos and Jose would implicate him in the homicide (5 RT 1472-1473).

1451-1452, 1576; P. Exh. 21.)[11] Appellant was present at Santos's home as were Santos's girlfriend and children. (5 RT 1369.)[12] Vallejo did not mention the presence of appellant's son. According to Vallejo, Santos talked about a robbery they had tried to pull that did not go right. (5 RT 1371-1372.) There was a shooting, and they did not get anything. (5 RT 1372.) Excited, Santos told Vallejo, "it was an adrenaline rush." (*Ibid.*)

According to Vallejo, appellant had a shotgun, and Santos had a .22 rifle. (5 RT 1376, 1486.) Vallejo also claimed that appellant admitted to Vallejo that he shot the clerk. (5 RT 1372.) After being shot, the clerk had a smile on his face. (5 RT 1373.) Appellant told the clerk, "I told you I was going to kill you." (*Ibid.*) Appellant said he then kicked the clerk and shot him again. (*Ibid.*) Appellant's mood was "like it was no big deal." (*Ibid.*) Appellant looked excited and a little confused. (*Ibid.*) Appellant said they only got a .25 handgun. (*Ibid.*) Vallejo saw the handgun, identified as People's Exhibit 4, which he thought appellant pulled from his jacket pocket. (5 RT 1374.)

According to Vallejo, a week or two before the shooting, he went with appellant and Santos to Orosi to pick up the shotgun and .22 rifle from a man named "Shorty." (5 RT 1380-1381.)[13] Vallejo had seen appellant

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[11]Appellant uses the first names of his severed codefendants, as did most of the witnesses. He uses "Santos" instead of "Topo" for the sake of consistency. Other people are referred to by their surnames.

[12]Although Vallejo claimed to have known appellant for a couple years and to see him often, he did not know appellant's last name. (5 RT 1367, 1393-1394.)

[13]This "Shorty" is Jesus Manuel Fernandez who shares a nickname with the victim, Saleh bin Hassan. (5 RT 1531-1532.)

with a shotgun and had held the gun himself. (5 RT 1376, 1474.) Before the crime, appellant told Vallejo that he got the guns because "they wanted to pull a little job. . . ." (5 RT 1501.)

According to Vallejo, Louis Fernandez and Jose Gonzalez also visited Santos's house the night of December 29. (5 RT 1376.) Traveling in at least two vehicles, the group – appellant, Santos, Louis, Jose and Vallejo – first went to Louis's house, where appellant's van was located. (5 RT 1377-1379, 1490.) While there, Louis and Jose talked about the incident. (5 RT 1491-1494.) Louis was paranoid; appellant "was just kicking back relaxed." (5 RT 1491.) Louis, Santos, Jose and appellant wanted to celebrate the shooting. (5 RT 1381-1382.) Vallejo accompanied the four men to a bar called "The Break Room" where they drank beer. (5 RT 1383-1384.) The five men then went to a party in Farmersville where they drank more beer and did methamphetamine. (5 RT 1384-1385.) Vallejo, Jose and appellant went to a second party in Farmersville, while Santos and Louis went home. (5 RT 1385.)

According to Vallejo, Santos Pasillas, both on December 29, and at a later date when appellant was not present, and Jose Gonzalez told him what happened at the Casa Blanca Market. (5 RT 1371-1372, 1483, 1507.) Vallejo did not consistently identify the source of statements he relayed, but he testified he "was told" that appellant, Santos, Louis and Jose did the crime together (5 RT 1485-1486) and that appellant had his baby with him during the crime (5 RT 1483, 1486). According to the version that Santos or Jose told Vallejo, appellant, Santos and Jose went into the store, while Louis waited in the car. (5 RT 1486-1488, 1508.) In the store, Santos watched the back, while Jose looked for money and tried to open the register. (5 RT 1486-1487.) The clerk would not give up any money. (5

RT 1487, 1508.) Either Jose or appellant suggested that they should just take the cash register. (5 RT 1488-1489, 1508.) While appellant was looking away, Santos saw the clerk pull a gun and said, "Watch out, he's got a gun." (5 RT 1487.) Holding the shotgun with one hand, appellant shot the clerk. (*Ibid.*; 5 RT 1508.) Jose and Santos ran out of the store, but appellant stayed. After shooting the clerk the first time, appellant told him either "[Y]ou didn't think I was going to shoot you," or "[Y]ou thought I was kidding." (5 RT 1488.) Appellant saw a smile on the clerk's face, kicked him, shot him again, and left the store. (*Ibid.*, 5 RT 1508.) The others had driven off but came back. (5 RT 1487.) Louis was driving, Jose was "riding shotgun," and Santos and appellant were in the back with the baby. (5 RT 1496.)

In April 1994, Vallejo was arrested in the possession of burglary tools. He was wearing a black Raiders jacket at the time of his arrest. (5 RT 1404.) Vallejo had told police that appellant was wearing a black Raiders jacket on the night of the homicide. (5 RT 1475-1476, 6 RT 1721-1722.) Vallejo had given away his Raiders jacket before the homicide at the Casa Blanca Market, but he did not give it to appellant. (5 RT 1475.) According to appellant's wife, Claudia Contreras, appellant never owned a Raiders jacket, and she never saw him with either a Raiders or other black jacket. (6 RT 1728-1729.)

Vallejo denied being at the scene of the homicide. (5 RT 1473.)

C. Accomplice Jose Guadalupe (Lupe) Valencia

Lupe Valencia, who was not named by Vallejo as one of the perpetrators, testified as an accomplice under a grant of immunity. (5 RT 1347-1348.) On the day Hassan was killed, Lupe was 15 years old and lived with his sister and codefendant Jose Gonzalez, who was his sister's

boyfriend. (1 CT 88; 5 RT 1281-1282, 1320, 1338.) In contrast to all the eyewitnesses and Vallejo, who testified that four men perpetrated the crime, Lupe added himself as the fifth participant. (5 RT 1347.) While the eyewitnesses reported that only one of the men carried a weapon and Vallejo said appellant and Santos had the weapons, Lupe placed the weapons in the hands of appellant and Jose. (5 RT 1298.) Lupe also testified that, contrary to Vallejo's testimony, appellant's baby did not accompany them. (5 RT 1314-1315.)[14]

Lupe testified that sometime in December 1994, appellant picked up him and Jose in appellant's van and took them from Lupe's house in Farmersville to appellant's house, then to Santos's apartment, and then to Louis's house. (5 RT 1283-1287, 1312, 1321.)[15] Lupe had not previously met Santos or Louis. (5 RT 1285-1286.) Nor had Lupe previously been to

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[14]As noted, *infra*, Lupe, throughout his testimony, had frequent lapses of memory (see, e.g., 5 RT 1284, 1287, 1288, 1302, 1307, 1309, 1317, 1323, 1334) and repeatedly had his recollection refreshed with his preliminary hearing testimony (see, e.g., 5 RT 1284-1285, 1288, 1302, 1309, 1334, 1336-1337.) He also testified to facts that he previously claimed he did not know or had not reported, such as seeing a phone outside the market. (See 5 RT 1330-1331.)

[15]Lupe's testimony was hardly clear on these events. He testified that appellant picked up him and Jose Gonzalez in appellant's van at Lupe's home in Farmersville. (5 RT 1283.) Lupe acknowledged that he previously said he went in Gonzalez's van, then corrected himself to say he went in appellant's van. (5 RT 1321.) Lupe testified that they went to Visalia, but he did not remember if they stopped at anyone's house. (5 RT 1284.) After his recollection was refreshed, he testified that after appellant picked them up, they went to appellant's house for a while, then to Santos Pasillas's home, then to Louis Fernandez's house and finally back to Santos's apartment. (5 RT 1285-1287.) Still later, Lupe testified that he did not remember where they went after appellant picked them up. (5 RT 1320.)

appellant's house. (5 RT 1316.) Appellant, Lupe, Jose and Louis went back to Santos's apartment. (5 RT 1288.) From Santos's apartment, appellant and Santos brought out two long guns which they put on the back seat of the car (5 RT 1289), although Lupe could not remember seeing them do so (5 RT 1323).[16] Appellant, Santos and Jose sat on the guns in the back seat, while Louis drove and Lupe sat in the front with Louis. (5 RT 1290.)[17] Lupe said he knew they were going to rob a store because in the car appellant, Santos and Jose had pieces of material, like masks, hanging in front of, but not tied around, their faces. (5 RT 1292-1294, 1324-1326, 1352.)[18]

They first drove to a store in Visalia, but there were a lot of people

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[16]Lupe testified that he did not remember what happened at Santos's apartment. He did not go in and could not remember if anybody came out. (5 RT 1288.) After his recollection was refreshed, Lupe testified that appellant and Santos brought out two long guns from Santos's house, which they put in the back seat of the car. (5 RT 1289.) Lupe later testified that he did not remember seeing Santos and appellant bring the guns out of the house. He did not remember seeing anybody put guns or rifles into a vehicle that day. (5 RT 1323.)

[17]Vallejo testified that appellant and Santos were in the back seat with the baby, Louis was driving and Jose was in the front passenger seat. (5 RT 1495.)

[18]At one point, Lupe testified that appellant, Jose and Santos were tying cloth around their faces while they drove from Santos's house, and that their faces were covered when they arrived at the store in Visalia. (5 RT 1294.) He did not know where the covers came from. (5 RT 1293.) He later testified that they came from Louis's house. (5 RT 1325.) Another time, he testified that the men did not tie the cloth around their faces in the car, but he was "pretty sure" they put them on when they got out of the car. They all had the covers hanging in front of them while in the car. He did not see them put the covers over their faces in the car. (5 RT 1352.)

outside, so they kept on going. (5 RT 1291, 1295.) They next drove to a store near Camp Linnell, which Lupe thought was named the Casa Grande Market. (5 RT 1295, 1311.) Santos said he would see if anyone was in the store. He got out of the car and acted like he was going to use the phone located near the doors to the store. (5 RT 1295-1296.)[19] Lupe did not actually see Santos go to the door of the store. (5 RT 1351.) Santos returned to the car and reported that nobody was in the store. (5 RT 1298.) Jose and appellant each left the car with a gun and presumably entered the store, although Lupe did not watch them go in. (5 RT 1298-1299.)[20]

About 20 seconds later, there was one, loud gunshot. (5 RT 1299, 1333.)[21] Lupe did not turn to see where the shot came from because he was scared. (5 RT 1333.) At some point, Santos ran out of the store and said appellant was shot. (5 RT 1301.) Making a U-turn, Louis moved the car around the back of the store. (5 RT 1299-1300.) When Louis stopped the car, appellant got in. Lupe did not know when Jose got into the car. (5

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[19]At trial, Lupe was able to mark the diagram depicting the relationship of the telephone to the doorway of the market. (5 RT 1331.) At the preliminary hearing in October 1995, he testified he did not know where the telephone was located. (*Ibid.*)

[20]Lupe testified that he first saw appellant on December 29, 1994, at about 3:00 p.m. in the afternoon, and they traveled from place to place several times. Lupe thought the killing occurred at about 5:00 or 6:00 p.m. (5 RT 1319.) He recalled that the sun was starting to go down when they arrived at the market. (5 RT 1309.) In fact, the parties stipulated that the first 911 call was received at 3:27 p.m. (5 RT 1745) and that the local newspaper reported sunset at 4:51 p.m. on December 29, 1994. (5 RT 1768.) Vallejo testified that the killing happened at 3:00 or 3:30 p.m. (5 RT 1454.)

[21]Lupe never heard a second shot (5 RT 1333), although the victim suffered two shotgun wounds (5 RT 1426-1427).

RT 1300-1301.) All five men then drove to Santos's apartment in Visalia. En route, appellant said "he would never forget the smile on his face." (5 RT 1302, 1317.) Appellant was in a "smiling, happyish mood." (5 RT 1303.)[22]

From Santos's apartment, Lupe, Jose and appellant went to appellant's house in appellant's van. (*Ibid.*; 5 RT 1322.) At some point, Lupe was taken back to his house. (5 RT 1335.) While there, appellant tried to give Lupe a little handgun, identified as People's Exhibit 4, but Lupe did not take it. (5 RT 1305-1306, 1335, 1350.) Lupe had not previously seen appellant with the handgun. (5 RT 1306.)[23]

Jose told Lupe that the man at the store pulled out a gun and tried to shoot him, but his gun jammed. (5 RT 1306.) Jose said he tried to, but could not, open the register. (*Ibid.*) Jose also told Lupe that he took the clerk's wallet, which Lupe saw and identified as People's Exhibit 16 and which Jose used as his own. (5 RT 1307.)[24]

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[22]Lupe initially could not remember if anybody said anything in the car while driving back to Santos's apartment. (5 RT 1302.) After his recollection was refreshed, he recall that appellant said that he would "never forget the smile on his face," but did not say about whom he was referring. (5 RT 1302.)

[23]Lupe testified that appellant tried to give him a little handgun when they returned to Lupe's house, but Lupe could not remember if appellant told him where he got it. (5 RT 1304-1305.) Lupe later testified that appellant told him he got it from the clerk. (5 RT 1350.)

[24]Lupe testified that Jose told him not all, but parts of what happened in the store. (5 RT 1317.) Lupe testified that he did not know why he testified at the preliminary hearing that Jose did *not* tell him what happened. (5 RT 1317-1318.) Lupe then said that Jose never told him what happened. Neither Jose nor Santos ever really told him what happened inside the store. (5 RT 1318.)

The day of the crime, appellant told Lupe that he went inside the store and the clerk pulled out a gun, so appellant shot him. (5 RT 1309, 1316.)[25] Appellant also told Lupe that if anybody said anything, he would get them too. (5 RT 1310.) Lupe felt threatened by appellant's statement, which he interpreted to mean that if Lupe said anything, appellant would shoot him. (5 RT 1356-1357.)

D. Physical Evidence: Wallet, Handgun, Shotgun and Rifle

1. Hassan's wallet

Yesenia Valencia, Jose Gonzalez's girlfriend, identified People's Exhibit 16 as the wallet Jose showed her when he told her about the robbery at the Casa Blanca Market. Jose said that he went to the store to rob, but not to kill, and that he got the wallet from the clerk. (5 RT 1362-1366.)

2. Hassan's handgun

On January 5, 1995, Visalia police officer Jeff McIntosh found a .25 caliber handgun, identified as People's Exhibit No. 4, along with ammunition, identified as People's Exhibit Nos. 1 and 2, and a magazine

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[25]Once again, Lupe's testimony was not consistent. Lupe testified that he never talked to appellant about what happened inside the store. (5 RT 1304, 1308.) After his recollection was refreshed, he testified that appellant told Lupe that the clerk pulled out a gun so he shot him. (5 RT 1309.) He also testified that no one ever "sat down and told [him]" what happened in the store. (5 RT 1319.) Lupe told Detective Gutierrez in August 1995, that appellant told him he shot the clerk. (5 RT 1349.) He testified at trial that he never talked to appellant about what happened inside the store (5 RT 1308), and that he did not remember appellant telling him what happened in the store (5 RT 1309). After his memory was refreshed, he recalled that appellant *did* tell him what happened. (5 RT 1309, 1316, 1354.) He could not remember why, when asked the question at the preliminary, he had answered "no." (5 RT 1317.)

clip, identified as People's Exhibit No. 3, in the possession of Fernando Contreras Lopez during a search related to the report of a stolen vehicle. (5 RT 1515-1518.) Fernando Contreras Lopez is appellant's older brother. (5 RT 1582-1583, 1520; 6 RT 1708.) The handgun was registered to Saleh Bin Hassan. (5 RT 1584-1585.)

3. Shotgun and rifle

Jesus Manuel Fernandez, nicknamed "Shorty," testified that he occasionally loaned appellant his guns for hunting, and appellant usually returned them within about two days. (5 RT 1534-1535, 1539, 1540.) He recalled that sometime, "it might have been" right around Christmas 1994, he arranged to loan appellant a .12 gauge shotgun and a .22 full-length hunting rifle. (5 RT 1532, 1535-1537.) It was his wife Mariela Fernandez who was home and actually handed the guns over to appellant. (5 RT 1535, 1544.) Mariela recalled that she gave the guns to appellant, who was accompanied by Santos and another person, in November 1994. That time frame is consistent with what she earlier told the officer who interviewed her. (5 RT 1543-1545.) The guns were never returned. (5 RT 1541.) When Shorty asked appellant about the guns, appellant said Santos had them and they had been lost or stolen from his car. (5 RT 1540.)

II. PENALTY PHASE

A. Prosecution Case in Aggravation

The prosecution presented victim impact evidence and evidence of an uncharged assault with a firearm. (Pen. Code, § 245, subd. (a).)

1. Victim impact evidence

Alya Saed Hassan, Saleh Bin Hassan's widow, testified she had been married for 30 years to Hassan, with whom she had three sons who, at the time of trial, were ages 10, 18 and 22. (7 RT 1908-1909.) She

identified photographs of her husband and sons. (7 RT 1909-1910.) Her husband had worked on farms for 16 years, and she for 3 years, in order to save money to buy the Casa Blanca Market. (7 RT 1909.) They had owned the store for 8 years and lived in a trailer parked next to it. (*Ibid.*) Her husband worked in the store every day from 7:00 a.m. to 10:00 p.m. (*Ibid.*)

Mrs. Hassan testified that she would never remarry. (7 RT 1910.) She was trying to survive by supporting her children and sending them to school. She, however, had a lot of bills. She was receiving social security and welfare benefits, which was almost as much as their income when her husband was alive. (7 RT 1911.)

2. Assault with a firearm

Three relatives of Arcadia Hernandez, the mother of appellant's children, testified that on August 29, 1994, appellant shot a gun at a car occupied by his son Marco, Arcadia's sister Elisabeth Hernandez, Elisabeth's husband Ramon Torres, and Ramon's brother Angel Torres. The shooting followed an argument between appellant and Arcadia over Marco.

B. Defense Case in Mitigation

The case in mitigation was presented by five witnesses: Tulare County Sheriff Bill Wittman (7 RT 1940-1954); appellant's sister Angelica Torres (7 RT 1965-1993); his neighbor, Louisa Duarte (7 RT 2001-2003); his wife, Claudia Gutierrez Contreras (7 RT 2004-2006); and, on sur-rebuttal, his former teacher, Victor De Vaca (7 RT 2021-2023). They gave a brief sketch of appellant's character and family background.

1. Sheriff Bill Wittman

Bill Wittman, the elected Sheriff of Tulare County, knew appellant through a community center run through the police activities league and later named after Wittman. (7 RT 1940-1941.) The center provided activities and mentors for children in North Visalia, an area with a lot of drugs and poverty and little hope. (7 RT 1942.) They worked with at-risk kids to keep them out of gangs. (7 RT 1944.)

Appellant came to the center with his brother, Jimmy, to play baseball or work out in the gym. (7 RT 1946.) Wittman saw appellant about two or three times a week. (7 RT 1952.) Appellant appeared to be a good kid, who was very likeable and had an outgoing personality. (*Ibid.*) He never gave Wittman any trouble. (7 RT 1946, 1949.) While appellant's brother, Fernando, was a bully, appellant was not. (7 RT 1948.) Wittman took appellant and other children to his walnut ranch, where the children helped pick up debris. Wittman tried to pay them, but although they had very little, the children refused. (7 RT 1949.) Appellant said to Wittman, "You do a lot for us and we don't want to take your money." (*Ibid.*)

Wittman last saw appellant in 1993. (7 RT 1952.) He did not know if appellant had been arrested or was on probation. (*Ibid.*) Wittman was shocked to learn that appellant was in serious trouble. (7 RT 1950.)

2. Appellant's sister Angelica Torres

Appellant's sister Angelica Torres, who at the time of trial was an architect and electrical engineer in training for the Federal Aviation Administration, presented an abbreviated family history. (7 RT 1988.) She explained that the Contreras family came from Mexico. (7 RT 1966.) Their mother was 13 and their father 18 when they married. (7 RT 1969,

1983.) Their father "put [their mother] over the shoulders" and "just took her." (7 RT 1983.) In Mexico, their father worked and their mother stayed home with the children. (*Ibid.*) They were not rich, but they were not the poorest. They always had something to eat. (7 RT 1967.) They built a house with their own hands. (7 RT 1968.) At trial, their parents were still together. (*Ibid.*)

Angelica, born in 1965, was ten years older than appellant. (7 RT 1966, 1969.) There were ten children in the family, but appellant was always closest to Angelica. (7 RT 1973, 1978.) When Angelica was 14, she moved to Los Angeles without her family. Two year later, her parents came with appellant and her brother Jaime, who was 4 years younger than appellant, and settled in Visalia. (7 RT 1973-1974.) When Angelica was 16, she moved to Visalia for a year and lived with her family. She was like a second mother to appellant. (7 RT 1975.) When she moved back to Los Angeles, she visited her family, including appellant, every two weeks. (7 RT 1978.) At trial, Angelica lived next door to her parents. (*Ibid.*)

Their father was a hard worker. (7 RT 1982.) He was the provider but could not support the whole family on his own. (7 RT 1980, 1982.) It was not easy for him when their mother worked outside the home. (7 RT 1981.) He did not like his wife working in a factory, but he knew the family needed the money. (*Ibid.*)

Their parents argued a lot and fought because their father was always jealous. (7 RT 1981-1982.) Her father would hit her mother in front of the children who would try to intervene. (7 RT 1976, 1982, 1998.) Her father beat her mother very badly when she was pregnant with appellant. (7 RT 1971.) Appellant found out about this incident sometime between the ages of 10 and 14. (7 RT 1984.) He became angry at his

father, and their relationship changed. (7 RT 1972, 1984.) Appellant believed the beating showed that his father did not love him. (7 RT 1998.)

Consistent with his upbringing, their father did not know how to say "I love you." (7 RT 1981.) He was never close to or affectionate with any of the children. (7 RT 1983.) But their mother always has been there for her children; she was gentle and affectionate. (*Ibid.*)

Before his arrest, appellant, who was a loving father, spent a lot of time with his children. (7 RT 1990.) When the children cried, they cried for their father, not their mother. Angelica and her mother have concerns about Arcadia who did not seem to care much about the baby. She was young and wanted to have her own life. (7 RT 1991.) When she received a welfare check, she would call for them to pick up the baby, but she would not supply milk, diapers or clothing for him. (7 RT 1992.) Her mother offered to adopt the child or take him, but Arcadia refused. (*Ibid.*)

Angelica identified pictures of appellant and his children. (7 RT 1985, 1989, 1992, 1993.)

Finally, Angelica told the jury she knew they had a difficult decision to make. She told them that "we really do believe in our hearts that he didn't do it. Other than that, I don't know what else to say. [¶] There's so many things. But I just guess not all the words come out the way we would want to say it, and heartbreak. I'm sorry." (7 RT 1993.)

3. Appellant's neighbor Louisa Duarte

Louisa Duarte had been a neighbor of the Contreras family since appellant was five or six years old. (7 RT 2001.) She described appellant as a very eager little boy who wanted to learn English. (7 RT 2002.) He had a special smile for Duarte and, like his whole family, was very respectful. (*Ibid.*) While other people tormented her pit bull dog,

appellant and his family did not. (7 RT 2003.)

4. Appellant's wife Claudia Contreras

Appellant's wife, Claudia Contreras, had known appellant since she was in eighth grade. (7 RT 2004.) She expressed her love for appellant. In spite of everything, she was proud to be his wife. (7 RT 2005.) She told the jury she would be there for appellant through anything that happened. (7 RT 2006.) If he were imprisoned for the rest of his life, she would visit him, maintain her relationship with his children and try to help him maintain his relationship with them. (*Ibid.*) If appellant were put to death, the jury could put her to death too. (*Ibid.*)

C. Prosecution Rebuttal Evidence

In rebuttal, the prosecution presented two witnesses: Arcadia Hernandez and Jerry Speck, appellant's juvenile probation officer. Arcadia testified that although appellant was at their daughter Jasmine's birth in February 1995, he visited her only twice. (7 RT 2015-2016.) Appellant did not support either child, but his mother helped with the children. (*Ibid.*)

In October 1991, Speck was a probation officer in juvenile hall. (7 RT 2017.) Appellant was on probation for having a pellet gun on school grounds. (7 RT 2019.) As part of his probation, appellant had to complete community service hours. (7 RT 2018.) When Speck asked appellant to leave class and work in the kitchen to complete his work hours, appellant became upset, refused to comply, became verbally loud and took a defiant stance. (7 RT 2018-2019.) Appellant did not calm down, so Speck took him into custody. (7 RT 2019.) For the most part, appellant could be a very pleasant young man who was well liked at school and got along well with teachers and other students. He did well unless he was angry or upset.

(*Ibid.*)

D. Surrebuttal from Appellant's Former Teacher Victor De Vaca

In sur-rebuttal, Victor De Vaca, appellant's former teacher at Green Acres Middle School in Visalia, described appellant as a typical student who was respectful of him. (7 RT 2021-2022.) He took appellant home after a couple of fights that did not go beyond what De Vaca considered typical or normal. (7 RT 2023.)

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ARGUMENT

I.

THE TRIAL COURT CONDUCTED INADEQUATE VOIR DIRE TO ENSURE APPELLANT A FAIR TRIAL, DUE PROCESS, AN IMPARTIAL JURY, AND A RELIABLE DEATH VERDICT.

A. Introduction

A criminal defendant is entitled to a trial by jurors who are impartial and unbiased. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.) Although neither the state nor federal Constitution expressly mentions it, courts have long interpreted both charters to encompass the right to impartial jurors. (*Turner v. Louisiana* (1965) 379 U.S. 466, 471-472; *People v. Wheeler* (1978) 22 Cal.3d 258, 265.) "'[T]he right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the [C]onstitution.'" (*People v. Earp* (1999) 20 Cal.4th 826, 852.) And "in carrying out its duty to select a fair and impartial jury . . . , the trial court is not only permitted but required by inquiry sufficient for the purpose to ascertain whether prospective jurors are, through the absence of bias or prejudice, capable of participating in their assigned function in such fashion as will provide the defendant the fair trial to which he is constitutionally entitled." (*People v. Fimbres* (1980) 104 Cal.App.3d 780, 788.)

In this case, appellant was denied his constitutional rights to a fair, impartial, and unbiased jury because the voir dire conducted by the court was inadequate to remove jurors who harbored particular prejudices or biases. The court did not conduct "a suitable inquiry . . . to ascertain whether [each] juror has any bias, opinion, or prejudice that would affect or control the fair determination by him [or her] of the issues to be tried."

(*Connors v. United States* (1895) 158 U.S. 408, 413.) The lack of general, collective voir dire regarding general legal principles also violated appellant's Eighth Amendment right to reliable verdicts in a capital case. (U.S. Const., 5th, 6th, 8th & 14th Amends; Cal. Const., art. I, § 17.) The guilt verdict and penalty judgment must be reversed.

B. Voir Dire Procedure Employed by the Court.

After initially conducting voir dire to ascertain hardship excusals (1 RT 103 *et seq.* [panel 1]; 1 RT 150 *et seq.* [panel 2]), the court explained to the remaining prospective jurors the two-part nature of a capital trial and the need to voir dire them individually regarding their views on the death penalty. (1 RT 141-147 [panel 1]; 1 RT 186-191 [panel 2].) The court also stated: "I have also decided in this case that myself and the attorneys will also question you during the individual meeting about additional areas concerning your ability to be fair and impartial jurors in this case. By using this method, we just need to have you appear once more in the court before you returned to the court for final selection of the jurors and alternate jurors." (1 RT 146 [panel 1]; 1 RT 191 [panel 2].) The court advised that voir dire would be limited to approximately ten minutes per individual. (1 RT 146 [court would schedule five prospective jurors an hour]; 1 RT 191 [same].)

The court then had the prospective jurors complete a 14-page juror questionnaire that asked 86 questions. (1 RT 147 [panel 1]; 1 RT 192 [panel 2].) The questionnaire was divided into categories: general background; education; personal circumstances; employment; marital status; children; child rearing practices; family background; administration of justice experience; affiliations and interests; drugs; and publicity. It then asked a series of questions regarding the death penalty and, finally, listed

witnesses and court personnel and asked the prospective juror to check any names he or she might know. (See e.g., 1 CT 1-14 [juror questionnaire of seated Juror Number 1].) The questionnaire failed to ask a single question about the burden of proof, presumption of innocence, reasonable doubt or the difference between the burden of proof in civil and criminal cases.[26]

Sequestered voir dire began on September 5, 1996 (1 RT 196) and continued through September 11, 1996 (1 RT 13). The court prefaced voir dire of each prospective juror with its explanation that individual voir dire was necessary to ascertain each person's views on the death penalty. (2 RT 408 ["[Juror Number 1], the reason I've asked the perspective [sic] jurors to come individually, of course, is because I need to talk about your views of the death penalty"]; 4 RT 1068 [Juror Number 2]; RT 206 [Juror Number 3]; 4 RT 1036 [Juror Number 4]; RT 309 [Juror Number 5]; RT 1975 [Juror Number 6]; 3 RT 749-750 [Juror Number 7]; 3 RT 622 [Juror Number 8]; 2 RT 462 [Juror Number 9]; 4 RT 946-947 [Juror Number 10]; 4 RT 893 [Juror Number 11]; and 4 RT 1114 [Juror Number 12].)

Following sequestered voir dire and before exercising peremptory challenges, defense counsel asked about a general group voir dire – of the

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[26]Compare, *People v. Robinson* (2005) 37 Cal.4th 592, 615-616 ("The questionnaire further explored whether each prospective juror would have difficulty following the law as given by the trial court, even if he or she disagreed with the law. Each was asked whether he or she had 'any feelings against the defendant solely because the defendant is charged this particular offense. . .' and whether the 'mere fact that criminal charges had been filed against the defendant' caused the prospective juror to conclude that the defendant is 'more likely to be guilty than not guilty.'" The questionnaire also "probed, in open-ended questions, each prospective juror's willingness to 'stay as long as is necessary to reach a verdict' and to keep an open mind until all the evidence was presented and arguments were heard").

sort required by Code of Civil Procedure section 223 and set forth in the Judicial Administration Standards:

Counsel: I have question [sic] the way we did it the last time, that I recall in your case, we didn't really do anything – have any so-called general type voir dire in the sense of jurors that have any problems with reasonable doubt or the burden of proof. We got into things like that impartiality (sic). I think the last time you allowed us a few minutes to do like we've always done, where we have the jurors in the box and just a general voir dire just as a last precaution.

Court: We did a voir dire. I don't know why I need to do any more. What do you intend to do?

Counsel: We never had a question that really has to do with just jurors understanding and acceptance of the burden of proof, the presumption of innocence. Some of the general stuff that we always do.

Court: Why don't I read them CALJIC 0.50 which is the - -?

Counsel: Fine with me if you do it. I don't have any problem with that and I don't want to tie up a lot of time.

Court: I'll go ahead and do it and make sure to ask if anybody has any problems of following those laws.

(4 RT 1224-1225.)

When court resumed on September 17, 1996, the court did not read CALJIC No. 0.50,[27] nor did it inquire whether any of the prospective jurors

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[27]CALJIC No. 0.50 was designed to fulfill the requirements of Penal Code section 1122(a), which requires that the court, after the jury has been sworn, instruct the jury concerning its basic functions, duties and conduct, specifically identifying certain admonitions. (Use Note, CALJIC No. 0.50.) It does not mention the burden of proof or the presumption of innocence.

would be unable to follow the law. But it did offer the following regarding burden of proof and presumption of innocence:

> [I]n a criminal trial, the burden of proof is on the prosecuting agency. It is on the district attorney's office, representing the People. The People have to prove this case beyond a reasonable doubt. The defendant has no burden to prove anything.
>
> I want you to, as we go through this, remember that the People have the burden of proving this case beyond a reasonable doubt. And the purpose for this trial, as in any criminal trial, is to prove the People have proved their case beyond a reasonable doubt. And if you have found, at the end of the case, you think the People have proved their case beyond a reasonable doubt, you vote guilty. And if you have not been proved or don't feel that the proof has been satisfactorily shown, then you vote not guilty. This is the case. I just want to make sure we are all clear on that.

(5 RT 1229.)

The court failed to ask if the jurors understood the law, would abide by the law regardless of whether he or she approved of it, felt he or she could not be a fair and impartial juror for any reason, or had any questions. (5 RT 1228-1229.) The court then recited the names of four potential witnesses that had not been included on the questionnaire and asked the jurors to raise their hands if they recognized the names. The record does not indicate if any one raised a hand, and the attorneys immediately began exercising peremptory challenges. (5 RT 1231.)

C. The Trial Court Deprived Appellant of His State and Federal Constitutional Rights to Due Process, a Fair and Impartial Jury and a Reliable Guilt Verdict and Capital Sentencing Determination by Failing to Conduct an Adequate Voir Dire Regarding Essential Legal Concepts Designed to Probe Potential Bias.

The constitutional standard of fairness requires that a defendant

have "a panel of impartial, 'indifferent' jurors.' The failure to accord an accused a fair hearing violates even the minimal standards of due process." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722.) "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citation.] Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188. See also *In re Hitchings* (1993) 6 Cal.4th 97, 110 ["The ability of a defendant, either personally, through counsel, or by the court, to examine the prospective jurors during voir dire is thus significant in protecting the defendant's right to an impartial jury"]; accord *People v. Roldan* (2005) 35 Cal.4th 646, 689.)

In *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1312-1313, the court observed that,

> bias is seldom overt and admitted. More often, it lies hidden and beneath the surface. An individual juror "may have an interest in concealing his own bias [or] may be unaware of it." (*Smith v. Phillips* (1982) 455 U.S. 209, 221, 222 (conc. opn. of O'Connor, J.) . . . . [T]rial judges [must, where appropriate, be willing to ask] prospective jurors relevant questions which are substantially likely to reveal such juror bias or prejudice, whether consciously or unconsciously held." (*People v. Wells* (1983) 149 Cal.App.3d 721, 727.)

The court continued that, "[s]ometimes a broad question or statement will elicit responses that call for follow-up questions which eventually disclose a bias. Or the prospective juror's response may be

innocuous in words, yet uttered with such hesitation or expression as to signal a basis for further questioning." (*People v. Taylor, supra,* 5 Cal.App.4th at pp. 1312-1313.)

Voir dire in a criminal case is governed by Code of Civil Procedure section 223 (*People v. Box* (2000) 23 Cal.4th 1153, 1178), which provides that the trial court shall conduct the initial examination of prospective jurors. The exercise of discretion by trial judges under the new system of court-conducted voir dire is accorded deference by appellate courts. (*People v. Taylor*, *supra*, 5 Cal.App.4th at p.1313.) A trial court has significant discretion with respect to the particular questions asked and areas covered in voir dire. (See *Rosales-Lopez v. United States*, *supra*, 451 U.S. at p. 189 [discussing deference accorded to federal judges under court-conducted voir dire, rule 24(a) of the Federal Rules of Criminal Procedure].) The failure to ask specific questions is reversed for abuse of discretion, which is found when the questioning is not reasonably sufficient to test the jury for bias or partiality. (*People v. Chaney* (1991) 234 Cal.App.3d 853, 861, citing *United States v. Jones* (9th Cir. 1983) 722 F.2d 528, 529; *United States v. Baldwin* (9th Cir. 1979) 607 F.2d 1295, 1297.) "[W]here . . . the trial judge so limits the scope of voir dire that the procedure used for testing does not create any reasonable assurances that prejudice would be discovered if present, he commits reversible error." (*United States v. Baldwin, supra,* 607 F.2d at p. 1298.)

The California Standards of Judicial Administration require the examination of prospective jurors to include all questions necessary to insure the selection of a fair and impartial jury. (Cal. Stds. Jud. Admin., § 8.5(a)(2).) The standards suggest specific questions to be asked by the judge. (Cal. Stds. Jud. Admin., § 8.5(b).) This Court has cautioned that

trial court judges should "closely follow the language and formulae" recommended in this standard to ensure that all appropriate areas of inquiry are properly covered. "Failure to use the recommended language may be a factor to be considered in determining whether a voir dire was adequate, but the entire voir dire must be considered in making that judgment." (*People v. Holt* (1997) 15 C.4th 619, 661.)[28]

The trial court in this case failed to ask essential questions required under the Standards. Then Section 8.5(b) of the Standards, in effect at the time of appellant's trial, assumes a group voir dire and advises trial courts to instruct prospective jurors:

> (1) (*To the entire jury panel after it has been sworn and seated*): I am now going to question the prospective jurors who are seated in the jury box concerning their qualifications to serve as jurors in this case. All members of this jury panel, however, should pay close attention to my questions, making note of the answers you would give if these questions were put to you personally. If and when any other member of this panel is called to the jury box, he or she will be asked to answer these questions.

(Cal. Stds. Jud. Admin., § 8.5(b) (1).)

It further states that the following inquiries should be made of potential jurors, who have been sworn and must respond under oath:

- whether, after hearing the charges against the defendant, "any member of the jury panel ... feels that he or she cannot give this

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[28]Former Standards of Judicial Administration, Section 8.5(a)(2) has been renumbered Standards of Judicial Administration, Section 4.30(a)(2) in 2006. Former Standards of Judicial Administration, Section 8.5(b) was amended in 2003, 2005, and 2006 to revise the questions to be asked by the judge and was renumbered Standards of Judicial Administration, Section 4.30(b) in 2006.

defendant a fair trial because of the nature of the charge(s) against him;"[29]

- whether there is any fact or any reason why any of them might be biased or prejudiced in any way;[30]
- whether those who had previously served as jurors in criminal cases could put aside whatever they heard in that case and could decide this case on the evidence to be presented and law the court states;[31]
- whether those who had previously served as jurors in civil cases understood the different rules in criminal cases, especially those

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[29]Cal. Stds. Jud. Admin., § 8.5(b) (6).

[30] (*To the prospective jurors seated in the jury box*): In the trial of this case each side is entitled to have a fair, unbiased, and unprejudiced jury. If there is any fact or any reason why any of you might be biased or prejudiced in any way, you must disclose such reasons when you are asked to do so. It is your duty to make this disclosure.

(*Id.*, at subd. (2).)

[31] How many of you have served previously as jurors in a criminal case?
(*To each person whose hand is raised)*:
(a) (Mr.)(Ms.) __________ , you indicated you have been a juror in a criminal case. What was the nature of the charge in that case?
(Response.)
(b) Do you feel you can put aside whatever you heard in that case and decide this case on the evidence to be presented and the law as I shall state it to you? (Response.)

(*Id.*, at subd. (10).)

respecting burden of proof;[32]

- that the prospective jurors be informed that the charges against the defendant are not evidence of his guilt;[33]

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[32] May I see the hands of those jurors who have served on civil cases, but who have never served on a criminal case? (Response.) You must understand that there are substantial differences in the rules applicable to the trial of criminal cases from those applicable to the trial of civil cases. This is particularly true respecting the burden of proof which is placed upon the People. In a civil case we say that the plaintiff must prove his case by a preponderance of the evidence. In a criminal case, the defendant is presumed to be innocent, and before he may be found guilty, the People must prove his guilt beyond a reasonable doubt. If the jury has a reasonable doubt, the defendant must be acquitted. Will each of you be able to set aside the instructions which you received in your previous cases and try this case on the instructions given by me in this case?

(*Id.,* at subd. (12).)

[33] The fact that the defendant is in court for trial, or that charges have been made against (him)(her), is no evidence whatever of (his)(her) guilt. The jurors are to consider only evidence properly received in the courtroom in determining the guilt or innocence of the defendant. The defendant has been arraigned and has entered a plea of "not guilty," which is a complete denial, making it necessary for the People, acting through the district attorney, to prove beyond a reasonable doubt the case against the defendant. Until and unless this is done, the presumption of innocence prevails.

- that they are to consider only the evidence properly received in the courtroom.[34]
- that the district attorney must prove the case against defendant beyond a reasonable doubt. Until that is done, the presumption of innocence prevails;[35]
- whether they could assure the court that they will, without reservation, follow the court's instructions and rulings on the law, whether or not they approve or disapprove of the law or instructions;[36]

and, finally,

- whether there was any reason that might make them doubt they could be a completely fair and impartial jury.[37]

(*Id.*, at subd.(12).)

[34](*Ibid.*)

[35](*Ibid.*)

[36] It is important that I have your assurance that you will, without reservation, follow my instructions and rulings on the law and will apply that law to this case. To put it somewhat differently, whether you approve or disapprove of the law or instructions rulings or instructions, it is your solemn duty to accept as correct these statements of the law. You may not substitute your own idea of what you think the law ought to be. Will all of you follow the law as given to you by me in this case?

(*Id.*, at subd. (19).)

[37] Do you know of any other reason, or has anything occurred during this question period,

Viewing the voir dire record as a whole, it is clear that the voir dire conducted in this case was inadequate and that the resulting trial was fundamentally unfair. (*People v. Holt*, *supra*, 15 Cal.4th at p. 661.) For example, all but one of the seated jurors had previously served on a jury. (1 CT 5 [Juror Number 1, two civil trials]; 1 CT 19 [Juror Number 2, three criminal trials]; 1 CT 33 [juror Number 3, one civil trial]; 1 CT 47 [juror Number 4, one civil trial]; 1 CT 61 [juror Number 5, one criminal trial]; 1 CT 75 [juror Number 6, one criminal trial]; 1 CT 89 [juror Number 7, one civil trial]; 1 CT 117 [juror Number 9, one trial involving spousal abuse]; 1 CT 131 [juror Number 10, one criminal trial]; 1 CT 145 [juror Number 11, one civil trial]; and 1 CT 159 [juror Number 12, one criminal trial and one federal grand jury].) The questionnaire did not mention the different standards of proof involved in civil and criminal cases, and five of the eleven jurors were not asked a single question about their prior jury service during the sequestered voir dire. (See 2 RT 406-418 [voir dire of juror number 1]; 4 RT 1067-1074 [voir dire of juror number 2];1 RT 309-318 [voir dire of juror number 5]; 4 RT 1075-1082 [voir dire of juror number 6]; and 2 RT 462-469 [voir dire of juror number 9].) Of the remaining six jurors, only Juror Number 4 and Juror Number 12 were questioned about the legal principles involved. Juror Number 10 was asked only if she still had "any feelings about" what she saw on the earlier

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> that might make you doubtful you would be a completely fair and impartial juror in this case or why you should not be on this jury? If there is, it is your duty to disclose the reason at this time.

(*Id.*, at subd. (21).)

case. (4 RT 949.) Juror Number 7 was asked even less, even though the trial had been a civil one:

Q. Your prior jury service was maybe one case?
A. Yes.
Q. That's quite awhile. Although I think it is . . . working pretty much the same.
Any problems still linger?
A. No.

(3 RT 752.)

Juror Number 11 was asked to explain his comment that the earlier trial was quick and to the point, and assured counsel he would not require that to serve. (4 RT 896.) Juror Number 3 assured counsel that nothing in her experience serving on a prior civil trial made her uncomfortable to sit again. (RT 210.) Juror Number 4 was the *only juror* asked about reasonable doubt, the burden of proof and whether she had a problem applying those concepts. (4 RT 1039-1040,[38] 1041-1042.[39]) Since this questioning was during sequestered voir dire, the other jurors received no indirect education regarding reasonable doubt, the burden of proof and their obligation to accept these concepts. Not one juror was asked about the presumption of innocence.

It is true that the court did not restrict counsel voir dire, but it is

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[38]"Q. You understand the prosecutor has to prove the case beyond a reasonable doubt? [¶] A. Yes. [¶] Q. Okay. The defendant doesn't have to prove anything? [¶] A. No. [¶] Q. Okay. You don't have a problem with that? [¶] I don't believe so."

[39]"Q. If the Court made it clear to you that the law is, as I said a moment ago, that before you could find the defendant guilty, that the prosecution has to prove its case beyond a reasonable doubt, with the defendant not being required to produced anything, you don't have a problem with that? [¶] A. No. [¶] You could follow that? [¶] A. Yes."

equally true that, as the court explained to each juror, the primary focus of the brief voir dire was death qualification. Beyond that, as counsel explained to Juror Number 7, "We just have a few minutes, very short time to try to get to know you as well as we can." (3 RT 752. See also, 4 RT 1116 [voir dire of Juror Number 12, "We just have a few minutes to try to get to know you a little better"].) In getting to know the jurors, both defense counsel and the prosecutor asked a very few questions seeking clarification of questionnaire responses. But nothing in the record suggests that counsel was advised that he should examine the jurors regarding all aspects of bias because the court was not intending to conduct any general voir dire for such purpose as required by Code of Civil Procedure section 223 and as set forth in the Judicial Standards. To the contrary, counsel's request for general voir dire at the conclusion of the sequestered questioning belies such a notion and instead suggests that counsel presumed that the court would conduct a group voir dire when the prospective jurors returned to court for final selection of jurors. (1 RT 146, 191.)

In addition, it would have been impossible for counsel, in the short time allotted (five prospective jurors an hour [1 RT 146, 191]), to fully voir dire each prospective juror regarding his or her attitudes about the death penalty and then adequately question each prospective juror individually regarding biases he or she may consciously or unconsciously harbor toward specific legal doctrines.

Moreover, the decision in *Hovey v. Superior Court* (1980) 28 Cal.3d 1, did not require that death-qualifying voir dire and general voir dire be combined – or that *Hovey* voir dire could be an adequate substitute for collective general voir dire. Indeed, general voir dire is best done before

the full panel. As Justice Richardson explained in his dissenting opinion in *Hovey*: "Frequently, collective voir dire performs a valuable educational function whereby the assembled panel learns the correct disqualification standards and other juror responsibilities by observing the interrogation of the prospective jurors examined in their presence, and the interplay between juror, court and counsel. A prospective juror witnessing the oral voir dire process as applied to other jurors may find greatly clarified through concrete application the trial judge's necessarily abstract explanation of legal principles." (*Id.* at p. 82.) In this case, appellant was denied the valuable benefit of the educational function of collective voir dire to the extent that it helps guarantee a fair and impartial jury.

D. The Guilt Verdict and Penalty Judgment Must be Reversed.

The United States Supreme Court has observed that most constitutional errors can be harmless. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." (*Neder v. United States* (1999) 527 U.S. 1, 8-9, internal quotations and citations omitted.)

Relying on *Neder*, this Court has ruled that structural error as defined in *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310, is error that deprives a defendant of "'basic protections' [such as an unbiased judge, *an impartial jury*, or the assistance of counsel] without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence [or punishment] ... and no criminal punishment may be regarded as fundamentally fair." (*People v. Carter* (2003) 30 Cal.4th 1166, 1221, italics added, internal quotations and

citations omitted.)

In this case, there was no general voir dire on basic legal tenets. The consequences of such a limited voir dire are necessarily unquantifiable and indeterminate. The incomplete voir dire deprived appellant of the basic protection of an impartial jury without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." (*Neder v. United States*, *supra*, 527 U.S. at p. 9.) Prejudice must necessarily be presumed.

In *State v. Williams* (1988) 550 A.2d 1172, 1179, the New Jersey Supreme Court observed, "[i]f counsel is unable to screen out prejudice and bias, that inevitably leads to unfair juries. This result, or the possibility of this result, cannot be tolerated." The Court in *Williams* refused to apply a harmless error analysis where the scant record made assessment of prejudice virtually impossible and the competing interests involved fundamental constitutional rights. As the Court stated: "Even in a case such as this, where the evidence of guilt is compelling, the right to a fair trial must be diligently protected to insure that all defendants, regardless of the crime charged or the weight of the evidence produced, are tried by a fair and impartial jury." (*Id.* at p. 1179. See also *People v. Wheeler, supra*, 22 Cal.3d at p. 283 [the right to have a fair and impartial jury determine guilt or innocence is "'one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.' [Citations.]"].)

Moreover, as the court explained in *People v. Chapman* (1993) 15 Cal.App.4th 136, where the trial court failed to voir dire regarding the

defendant's prior conviction which was to come before the jury for purposes of impeachment, the prejudice from failure to voir dire in this area cannot be cured by instruction on the law. "This argument misses the point. We are not dealing here with a question of the admissibility of a felony to attack the credibility of a witness. We are concerned with the right of a defendant to ferret out the possible biases or prejudices of individual jurors and thereby ensure a defendant's Sixth Amendment right to an impartial jury." (*Id.* at p.142.) In this case, prejudice resulting from the court's failure to voir regarding general principles such as the presumption of innocence and burden of proof was not cured by the court's instruction on those concepts. The question was not the state of the law, but the juror's ability to abide by that law. The jurors in this case were correctly instructed on the basic principles of law, but only one juror was asked whether she could accept and properly apply reasonable doubt and the burden of proof. Not one was asked about the presumption of innocence and his or her ability to accept this presumption, regardless of his or her personal opinion.

Appellant was deprived of an impartial jury by the trial court's failure to fully voir dire the jurors. This error contains a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante*, *supra*, 499 U.S. at p.310.) The error was structural and requires a reversal of the guilt verdicts and penalty judgment.

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II.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187.

After the trial court instructed the jury that appellant could be convicted of first degree murder if he killed during commission of robbery (CALJIC No. 8.21; 2 CT 453; 6 RT 1784-1785), the jury found appellant guilty of murder in the first degree. (2 CT 514.) 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 appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[40]

Count 1 of the information filed on November 3, 1995, alleged:

> On or about December 29, 1994, in the County of Tulare, State of California, the crime of MURDER, in violation of PENAL CODE SECTION 187 (a), a Felony, was committed by GEORGE LOPEZ CONTRERAS, SANTOS ACEVEDO PASILLAS, JOSE GONZALEZ and LOUIS PHILLIP JR. FERNANDEZ, who did willfully, unlawfully, and with malice aforethought murder SALEH BIN HASSAN, a human being.

(2 CT 301.)

Both the statutory reference ("Penal Code section 187 (a)") and the

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[40]Appellant is not contending that the information was defective. On the contrary, as explained hereafter, Count One of the information was an entirely correct charge 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 felony murder in violation of Penal Code section 189.

description of the crime ("did willfully, unlawfully, and with malice aforethought murder") establish that appellant 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.

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.)[41] 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.)

Because the information charged only second degree malice murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try appellant 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].)

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[41]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."

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. Kelly* (2007) 42 Cal.4th 763, 791-792; *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 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.[[42]] It has

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[42]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.

> 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."

This rationale, however, was completely undermined by the decision in *People v. Dillon* (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*. In fact, it cannot.

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, emphasis 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, supra*, 23 Cal.4th at p. 1212.) 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, subd. (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* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice murder clearly *are* distinct crimes. (*See People v. Hart* (1999) 20 Cal.4th 546, 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].)[43]

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[43]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*, 60 Cal.2d at pp. 502-503 (dis. opn. of Schauer, J.), original italics.)

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. 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.)[44]

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[44]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.]"

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 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, subd. (a).) Therefore, those facts should have been charged in the information. (See *United States v. Allen* (8th Cir. 2005) 406 F.3d 940 [the Fifth Amendment requires at least one statutory aggravating factor and the mens rea requirement to be found by the grand jury and charged in the indictment, but failure to do so was harmless error]; See also *United States v. Robinson* (5th Cir.) 367 F.3d 278, 284, cert. denied (2004) 543 U.S. 1005; *United States v. Higgs* (4th Cir.2003) 353 F.3d 281, 299, cert. denied (2004) 543 U.S. 999; *United States v. Quinones* (2d Cir.2002) 313 F.3d 49, 53, fn. 1, cert. denied (2003) 540 U.S. 1051; *State v. Fortin* (N.J. 2004) 178 N.J. 540, 632-650, 843 A.2d 974, 1027-1038 [holding prospectively that in capital cases aggravating factors must be submitted to grand jury and returned in the indictment].)

Permitting the jury to convict appellant of an uncharged crime 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.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the

crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423.) The error also violated appellant'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 appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 178 N.J. 540, 632 *et seq.*, 843 A.2d 974, 1027 *et seq.*) Therefore, appellant's conviction for first degree murder, the special circumstance finding and the death judgment must be reversed.

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III.

THE RESTRICTION OF IMPEACHMENT OF A KEY PROSECUTION WITNESS'S CREDIBILITY VIOLATED APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

A. Introduction

Appellant's immunized alleged accomplice Jose Guadalupe ("Lupe") Valencia testified that Hassan's killing bothered him a lot, and he had problems concentrating and doing his work when he returned to high school in January 1995. (5 RT 1340-1341.) According to Lupe, as the months went by the pressure lessened, and he began to do better in school. (5 RT 1341-1342.) After information about the crime came out in August, he talked to the police and returned to school the next day. He felt better after meeting with the police and did better at school. (5 RT 1343.)

In fact, Lupe's school report cards showed the exact opposite, which defense counsel tried to demonstrate to the jurors. When counsel attempted to impeach Lupe with his report cards, however, the prosecutor requested a sidebar conference, during which defense counsel made an offer of proof that the report cards showed that prior to the offense, Lupe had a grade point average of 1.0. After the homicide, and for the remainder of that school year, his grades went up, and he earned almost all C's. The next semester, after he gave a statement to the police, Lupe's grades declined. From January 1995, until the end of the school year, Lupe's report cards reflect he performed worse than he ever had. (5 RT 1344.)

The court sustained the prosecutor's objection to impeachment with Lupe's school records, holding that there was no rationale basis to tell whether Lupe was feeling good or bad about this incident. The court found that the proffered evidence was "pop psychology," and it was impeachment

on a collateral matter. The court ruled that Evidence Code section 352 was not even a consideration because of the lack of relevance. (5 RT 1344, 1358-1359.)

B. Lupe's School Records were Relevant to Impeach His Testimony, And The Trial Court Abused its Discretion in Excluding the Evidence as "Collateral."

Lupe's school records had a tendency in reason to disprove a disputed material fact: Lupe's claim that the murder upset him and negatively affected his school performance. The school records that contradict Lupe's testimony suggest that his testimony was unreliable, not credible and manipulated to bolster the prosecutor's theory of the case. The court abused its discretion in refusing to allow impeachment with the records.

All relevant evidence is admissible at trial unless excluded by statute. (Cal. Const. Art. I, § 28, subd. (d); Evid. Code, § 351.) Relevant evidence means evidence, *including evidence relevant to the credibility of a witness*, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, §210 [italics added].) Lupe's testimony was the only direct evidence of appellant's participation in the murder. Whether Lupe had some bias, motive or interest in the case, or whether a fact he testified to was nonexistent, were factors that would impact his credibility generally, and therefore necessarily impact the reliability and credibility of his testimony that appellant was present when the murder occurred in this case.

The Evidence Code contemplates impeachment with precisely the type of evidence defense counsel offered in this case:

> Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter

> that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to the following: . . .
> (f) The existence or nonexistence of a bias, interest, or other motive . . .
> (i) The existence of nonexistence of any fact testified to by him.

(Evid. Code, §§ 780(f) and (i).)

As with all relevant evidence, the trial court retains discretion to admit or exclude evidence offered for impeachment. (Evid. Code, §352; *People v. Douglas* (1990) 50 Cal.3d 468, 509.) Under section 352, the court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. The objection must be overruled unless these dangers substantially outweigh probative value of the evidence. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse (*People v. Alvarez* (1996) 14 Cal.4th 155, 201) and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Jones* (1998) 17 Cal.4th 279, 304.)

Here, the trial court expressly refused even to apply section 352, concluding that the evidence was both irrelevant and collateral. The court erred in its ruling. The court appeared to be considering the relevance of Lupe's grades only to show whether Lupe was, in fact, "feeling good or bad." (5 RT 1345.) Beyond that, however, the school records directly contradicted Lupe's testimony about his grades, and "[e]vidence tending to contradict any part of a witness's testimony is relevant for purposes of impeachment." (*People v. Lang* (1989) 49 Cal.3d 991, 1017; Evid. Code,

§ 780, subd. (i)). Lupe also was untruthful in a way that suggested a bias or motive to help the prosecution's case, which makes the evidence relevant under Evidence Code section 780 subdivision (f).

The trial court also erred in characterizing the report cards as "impeachment on collateral issues." (5 RT 1345, 1359 ["you asked him [Lupe] questions about his grades which were, in fact, incorrect, but that would be impeachment on collateral issue"].) In fact, "[t]here is no specific limitation in the Evidence Code on the use of impeaching evidence on the ground that it is 'collateral.'" (Evid. Code, § 780, Law Review Commission Comment.) Collateral matters are generally admissible for impeachment purposes subject to balancing under Evidence Code section 352. Thus, while a trial court has discretion to exclude impeachment evidence if it is collateral, cumulative, confusing or misleading (*People v. Price* (1991) 1 Cal.4th 324, 412; *People v. Mayfield* (1997) 14 Cal.4th 668, 748), a matter collateral to an issue in the action may nevertheless be relevant to the credibility of a witness who presents evidence on an issue. (Evid. Code, § 780(f); *People v. Lang*, *supra*, 49 Cal.3d at p.1017). Here, the trial court failed to perform *any* balancing functions under Evidence Code section 352, and its decision to exclude the evidence was an abuse of discretion.

In *People v. Price* (1991) 1 Cal.4th 324, this Court found impeachment was not on a collateral matter where the questions on cross examination related directly to relevant matters raised on direct examination. On direct examination, Stinson testified for the defense that prison officials had used his alleged Aryan Brotherhood membership several times to justify restrictions imposed upon him, including segregation from the general prison population. He also made the broader

claim that the Aryan Brotherhood did not exist as an organization and was merely a label invented by prison authorities to justify restrictions imposed on certain prisoners. (*Id.* at pp. 436-437.) This Court found that the prosecutor properly cross examined Stinson regarding whether he had engaged in acts of misconduct while in prison because these acts were not collateral but relevant to his testimony on direct. The acts of misconduct were relevant to explain Stinson's segregated prison housing and undermined his claim that the Aryan Brotherhood did not exist as an organization in prison but was merely a tool to justify imposition of restrictions. (*Id.* at p. 436.)

In this case, the trial court's conclusion that Lupe's report cards were "collateral" to Lupe's testimony about his grades was not supported by the record. As counsel questioned Lupe at length regarding his school performance, the prosecutor remained silent, failing to object to any of the testimony on the grounds that it was not relevant. (See 5 RT 1340-1344.) It was only when counsel began to impeach the witness with the *true* facts of his school performance, as reflected in his report cards, that the prosecutor decided to object.

When the court sustained her belated objection, the prosecutor received the best of both worlds: she allowed the witness to testify in a manner that was beneficial to her case, and then when counsel was poised to prove that Lupe's testimony was false, she objected to the impeachment. Had she made the relevancy objection at the beginning of such testimony, the court may very well have been correct in sustaining it. Once the testimony was permitted, however, and there was documentary evidence to prove it false, it was error to prevent impeachment with that evidence.

Impeachment with Lupe's grades was particularly relevant because

he not merely misrepresented his grades, but did so in a manner apparently designed to support his testimony that he was involved in the crime, while his grades, in fact, were more supportive of the defense theory that he was not. Lupe testified that after the killing, he was upset and his grades dropped. After he spoke to the police, he was relieved and his grades improved. In fact, the event apparently had no effect on his grades, and, after he gave his statement implicating appellant, which, under the defense theory was a lie, his grades plummeted. This had nothing to do with "pop psychology" but had much to do with Lupe's attempt to manipulate the facts to show his involvement and help the prosecution's case.

In addition, as defense counsel pointed out, little time would be spent showing Lupe his school records and asking about the inconsistency between his testimony and his grades. (5 RT 1358.)

Finally, the prosecutor made no argument under Evidence Code section 352 that there was any danger of prejudice, confusion, or undue time consumption. The prosecutor's objection came only *after* defense counsel's examination about Lupe's grades. Under these circumstances, this Court should not entertain any arguments belatedly made on appeal regarding prejudice confusion, or undue time consumption.

C. The Exclusion of Lupe's School Records Violated Appellant's Federal Constitutional Rights to Confront and Cross Examine Witnesses, Compulsory Process, Due Process and Reliable Guilt and Penalty Verdicts under the Fifth, Sixth, Eighth and Fourteenth Amendments.

The Confrontation Clause of the Sixth Amendment secures a defendant's right to cross-examine government witnesses. (See *Davis v. Alaska* (1974) 415 U.S. 308, 316; *Evans v. Lewis* (9th Cir. 1988) 855 F.2d 631, 633-634.) Although the Confrontation Clause "does not guarantee

unbounded scope in cross-examination" (*United States v. Lo* (9th Cir. 2000) 231 F.3d 471, 482), it does guarantee "an *opportunity* for effective cross-examination." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679, quoting *Delaware v. Fensterer* (1985) 474 U.S. 15, 20 (per curiam) italics in original).)

Central to the Confrontation Clause is the right of a defendant to examine a witness's credibility. (See *Davis v. Alaska*, *supra*, 415 U.S. at p. 316; see also *Boggs v. Collins* (6th Cir. 2000) 226 F.3d 728, 736 ["At the core of the Confrontation Clause is the right of every defendant to test the credibility of witnesses through cross-examination"].)

A Confrontation Clause violation exists where the trial court's ruling "limit[ed] relevant testimony, prejudice[d] the defendant, and denie[d] the jury sufficient information to appraise the biases and motivations of the witness." (*United States v. Lo*, *supra*, 231 F.3d at p. 482; see also, *United States v. Harris* (9th Cir. 1999) 185 F.3d 999, 1008 [stating that although "the district court can exercise discretion to avoid undue consumption of time and confusion of issues in the cross examination, these legitimate concerns cannot justify so severe a limitation as to prevent the jury from finding out what it needs in order to judge rationally whether the witnesses might be lying or shading the truth"].)

As the United States Supreme Court recently observed:

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " [Citation.] This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to

serve.'" [Citation].

(*Holmes v. South Carolina* (2006) 547 U.S. 319, 324-325.)

In *Holmes,* the Court reviewed a long line of cases invalidating state evidentiary rules that abridged these federal constitutional rights. (See e.g., *Washington v. Texas* (1967) 388 U.S. 14 [right to present a defense violated by state statute prohibiting a person charged as a participant in a crime from testifying in defense of another alleged participant unless the witness had been acquitted]; *Chambers v. Mississippi* (1973) 410 U.S. 284 [violation of due process and confrontation to exclude third party culpability evidence and curtail cross examination on subject]; *Crane v. Kentucky* (1986) 476 U.S. 683 [exclusion of testimony at trial concerning circumstances of defendant's confession, on ground that the testimony pertained solely to issue of voluntariness resolved against defendant in pretrial ruling, deprived him of a fair trial]; *Rock v. Arkansas* (1987) 483 U.S. 44 [per se rule excluding all hypnotically refreshed testimony impermissibly infringed on criminal defendant's right to testify on her own behalf].)

In this case, appellant's right to cross examine and impeach Lupe was severely limited with no countervailing state interest justifying the limitation. The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." (*Chambers*, *supra*, 410 U.S. at p. 295.) Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. (*Davis v. Alaska*, *supra*, 415 U.S. at p. 316.) "A criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination

designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" (*Delaware v. Van Ardsall* (1986) 475 U.S. 673, 680, citing *Davis v. Alaska, supra.*) In this case, the trial court did not permit the jury to properly evaluate the reliability of Lupe's testimony.

Several federal courts have found federal constitutional violations on similar facts. (See e.g., *Lindh v. Murphy* (7th Cir. 1997) 124 F.3d 899 [trial court's refusal to permit the impeachment of the prosecution's expert with evidence that the psychiatrist had sexually abused some of his patients, was about to lose his license and faculty positions, and might be sent to prison violated defendant's Sixth Amendment right of confrontation]; *Olden v. Kentucky* (1988) 488 U.S. 277 [trial court's refusal to permit cross-examination of the victim regarding her motive to lie, and its exclusion of evidence proffered by the defendant on the same issue, violated the Sixth Amendment right of confrontation]; *United States v. Adamson* (9th Cir. 2002) 291 F.3d 606 [trial court violated defendant's Sixth Amendment right of confrontation by precluding impeachment of a prosecution witness with her silence during the portions of defendant's interrogation when he denied criminal activity, which was inconsistent with her trial testimony]; *Howard v. Walker*, 406 F.3d 114 (2nd Cir. 2005) [trial court's ruling that testimony by a defense expert to rebut state medical examiner's opinion about cause of death would open the door to the admission of the codefendant's inadmissible "*Bruton* infected" hearsay statement of the codefendant, violated defendant's right to present a defense under the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment]; *Chia v. Cambra*,

360 F.3d 997 (9th Cir. 2004) [trial court's exclusion of reliable evidence of defendant's innocence – the codefendant's hearsay statements to police that Chia was not involved in the offense – violated due process]; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862 [exclusion of expert testimony regarding whether the key prosecution witness had been hypnotically influenced in various interviews with police investigators violated petitioner's due process right to a fundamentally fair trial and to present witnesses in his defense]; *Justice v. Hoke* (2nd Cir. 1996) 90 F.3d 43, 49 [exclusion of competent evidence that prosecution's only witness had a motive to fabricate violated petitioner's right to present a defense].) The trial court's actions in this case similarly rise to the level of federal constitutional error.

D. The Exclusion of Lupe's School Report Cards Prejudiced the Verdict.

To avoid reversal, the state must prove that the federal constitutional violation was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24). Evidentiary errors are subject to the same standard of prejudice as state law errors under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) Under *Watson*, an error is harmless if it does not appear reasonably probable that the verdict was affected. (*Watson*, *supra*, 46 Cal.2d at p. 836.) In this case, the error was prejudicial under either standard.

Lupe was a key prosecution witness whose ability to accurately recall and recollect specific events was paramount to the jury's determination of his credibility and, ultimately, appellant's guilt. The numerous conflicts, inconsistencies and admitted failures of memory in his testimony, however, are glaring. (See statement of facts, I.-C., *supra*.) It

thus was imperative that counsel be permitted to impeach Lupe's testimony at every opportunity and to probe the motivation for his varied accounts of what occurred. Valencia's testimony about his school performance (5 RT 1340-1343) was directly contradicted by his report cards, and appellant had a constitutional right to bring that fact to the jurors' attention.

It is reasonably probable that the trial court's error in not allowing the defense impeachment evidence affected the jury's verdict. Had the jury learned that Lupe lied about his grades, it is reasonably probable that they would not have credited his testimony. That is especially true since Lupe appeared to be lying for no reason other than to assist the prosecutor's theory of the case.

In this case, the trial court correctly instructed the jury that in determining the believability of a witness they could consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including the existence or non-existence of a bias, interest or other motive, and evidence of the existence or non-existence of any fact testified to by the witness. (CALJIC No. 2.20; 2 CT 431.) Lupe's school records tended to disprove his truthfulness in general, and, specifically, his bias and motive to help the prosecution.

Lupe was a crucial witness, and this was a close case, as demonstrated by the lack of any physical evidence linking appellant to the crime, the jury's questions,[45] their request for a read-back of Lupe's

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[45]During the course of the trial, the jurors sent the court a note suggesting concern about Lupe's testimony. They asked: "How tall was Guadalupe Valencia in December of 1994 when George and Topo were alleged to have been in the store? Where was Guadalupe sitting in the car? Where was he sitting in the car when they left the store?" (5 RT 1410.)

testimony[46] and the length of their deliberations.[47]

This case presented a credibility contest between appellant's alibi witnesses and the prosecutor's immunized accomplice, Lupe, and informant Vallejo, an admitted drug addict and dealer who received benefits for his testimony. Counsel's ability to impeach Lupe's credibility was crucial to the outcome of the case – especially given Vallejo's credibility problems. Appellant's inability to attack Lupe's credibility at every juncture of the trial prevented the jury from properly assessing and

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[46]During deliberations, the jurors asked for a read back of "Lupe's testimony regarding what happened at Casa Grande [sic]." (2 CT 513.) As the foreperson explained, "[w]e want a description, how they described what took place when they went there." (7 1893.) A jury's request for a read-back of testimony is indicative of a close case. (See *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["juror 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].)

[47]The jurors began deliberations at 4:00 p.m. on September 24, 1996 (1 CT 57), and returned with a verdict at 2:57 p.m. on September 26, 1996 (1 CT 60-61) – nearly eight hours of deliberations, in addition to read-backs. The length of the jury deliberations suggests some deficiencies in the prosecution's case. (See *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [six hours of jury deliberations is evidence of a close case]; *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612 [nine hours of deliberations "deemed protracted"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391, recognized as overruled on other grounds by *People v. Hall* (1988) 199 Cal.App.3d 914 [nine hours of deliberations]; *People v. Woodard* (1979) 23 Cal.3d 329, 341, superseded by statute on another ground as recognized by *People v. Castro* (1985) 38 Cal.3d 301, 307-310 [six hours of deliberation and request for reading of trial testimony demonstrates defendant's guilt "was far from open and shut" and evidentiary errors were therefore prejudicial].) When the jury is troubled by the case, the appellate court is required to take heed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [harmless error analysis requires the court to look at the impact of an error on the jury].)

determining whether appellant's alibi witnesses or Lupe were the more credible. Because of the trial court's ruling, appellant was precluded from making the case that Lupe was lying or his ability to recall and recollect specific events was fatally flawed.

Based on the foregoing, the state cannot show that the trial court's error was harmless beyond a reasonable doubt. The guilt convictions, special circumstance finding and death judgment should be reversed.

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IV.

APPELLANT'S DEATH SENTENCE, IMPOSED FOR FELONY MURDER *SIMPLICITER*, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW.

The sole fact rendering appellant death-eligible was the robbery-murder special circumstance. Under California law, a defendant convicted of a murder during the commission or attempted commission of a felony may be executed even if the killing was unintentional or accidental. The lack of any requirement that the prosecution prove that an actual killer had a culpable state of mind with regard to the murder before a death sentence may be imposed violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing use of the death penalty.[48]

A. California Improperly Authorizes The Imposition Of The Death Penalty Upon A Person Who Kills During A Felony Without Regard To His Or Her State Of Mind At The Time Of The Killing.

Appellant was death-eligible because he was convicted of committing a robbery and killing during commission of that robbery. (See Pen.Code §§ 189, 190.2, subd. (a)(17)(i).) To obtain a murder conviction, the prosecution ordinarily must prove that the defendant had the subjective mental state of malice – either express or implied. In the case of a killing committed during a robbery, however, or, indeed, during any felony listed in section 189, the prosecution can convict a defendant of first degree

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[48]This argument draws heavily from Steven F. Shatz, *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study* (2007) 59 Fla. L. Rev. 719, 761.

felony murder without proof of any mens rea with regard to the murder.

> [F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

(*People v. Dillon*, *supra*, 34 Cal.3d at p. 477.)

This rule is reflected in the standard jury instruction for felony murder:

> The unlawful killing of a human being, *whether intentional, unintentional or accidental*, which occurs [during the commission or attempted commission of the crime] [as a direct causal result of __________] is murder of the first degree when the perpetrator had the specific intent to commit that crime.

(CALJIC No. 8.21, italics added. See 6 RT 1784 [as read to appellant's jury].)

Except in one rarely-occurring situation,[49] under this Court's interpretation of section 190.2, subdivision (a)(17), if the defendant is the actual killer in a robbery felony murder, the defendant also is death-eligible under the robbery-murder special circumstance.[50] (See *People v. Hayes*

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[49]See *People v. Green* (1980) 27 Cal.3d 1, 61-62 (robbery-murder special circumstance does not apply if the robbery was only *incidental* to the murder).

[50]In *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 154, later reversed in *People v. Anderson* (1987) 43 Cal.3d 1104, this Court held that

(1990) 52 Cal.3d 577, 631-632 [the reach of the felony murder special circumstances is as broad as the reach of felony murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction.'"].)[51]

In *People v. Anderson* (1987) 43 Cal.3d 1104, this Court held that under section 190.2, "intent to kill is not an element of the felony murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved." (*Id.* at p. 1147.) The *Anderson* majority did not disagree with dissenting Justice Broussard's summary of the holding: "Now the majority . . . declare that in California a person can be executed for an accidental or negligent killing." (*Id.* at p. 1152 (dis. opn. of Broussard, J.).)

Since *Anderson*, this Court has repeatedly held that to seek the death penalty for a felony murder, the prosecution need not prove that the defendant had any mens rea as to the killing. For example, in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264, this Court rejected the defendant's argument that the prosecution was required to prove malice to prove a felony murder special circumstance. In *People v. Earp*, *supra*, 20 Cal.4th 826, the defendant argued that the felony murder special

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intent to kill was an element of the felony murder special circumstance. *Carlos* now applies only to felony murders committed during the period December 12, 1983, to October 13, 1987. *Carlos* has no application to prosecutions for murders occurring either before or after the *Carlos* window period. (*People v. Johnson* (1993) 6 Cal.4th 1, 44-45.)

[51]In fact, the robbery-murder special circumstance is even broader than the robbery felony murder rule because it covers a species of implied malice murders, so-called "provocative act" murders. (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1080-1081.)

circumstance required proof that the defendant acted with "reckless disregard" and could not be applied to one who killed accidentally. This Court held that the defendant's argument was foreclosed by *Anderson*. (*Id.* at p. 905, fn.15.) Similarly, in *People v. Smithey* (1999) 20 Cal.4th 936, 1016, this Court rejected the defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life.[52]

In this case, there was evidence that the shooter initially shot the victim in self-defense or the heat of passion. (5 RT 1487, 1508.) And defense counsel requested, unsuccessfully, that the jury be instructed regarding both such defenses. (2 CT 418 [request]; 2 CT 499 [denial] 6 RT 1750.) In urging the jury to convict appellant of first degree felony murder, the prosecutor argued:

> If Mr. Hassan was killed in the course of a robbery, it doesn't matter whether they intended to kill him, whether the gun went off as an accident, or whether they intended to shoot him and not kill him. None of that matters.

(6 RT 1802.)

The jury was instructed pursuant to the standard felony murder instruction CALJIC No. 8.21, set forth above. (2 CT 453; 6 RT 1784-1785.)

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[52]Alternatively, this Court found that there was sufficient evidence that the defendant did act with reckless indifference to justify the death penalty. (*People v. Smithey, supra,* 20 Cal.4th at pp. 1016-1017.)

B. The Robbery-Murder Special Circumstance Violates The Eighth Amendment's Proportionality Requirement And International Law Because It Permits Imposition Of The Death Penalty Without Proof That The Defendant Had A Culpable Mens Rea As To The Killing.

In a series of cases beginning with *Gregg v. Georgia* (1976) 428 U.S. 153, the United States Supreme Court has recognized that the Eighth Amendment embodies a proportionality principle, and it has applied that principle to hold the death penalty unconstitutional in a variety of circumstances. (See *Coker v. Georgia* (1977) 433 U.S. 584 [death penalty for rape of an adult woman]; *Enmund v. Florida* (1982) 458 U.S. 782 [death penalty for getaway driver to a robbery felony murder]; *Thompson v. Oklahoma* (1988) 487 U.S. 815 [death penalty for murder committed by defendant under 16-years old]; *Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty for mentally retarded defendant]; *Roper v. Simmons* (2005) 543 U.S. 551 [death penalty for juvenile].) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Supreme Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 183.)

The Supreme Court addressed the proportionality of the death penalty for unintended felony murders in *Enmund v. Florida*, *supra*, 458 U.S. 782, and in *Tison v. Arizona* (1987) 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred the imposition of the death penalty on the "getaway driver" to an armed robbery murder because he did not take life, attempt to take life, or intend to take life. (*Enmund*, *supra*,

458 U.S. at pp. 789-793.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty. Justice O'Connor, writing for the majority, held that it was not, and that the Eighth Amendment would be satisfied by proof that the defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (*Tison, supra*, 481 U.S. at pp. 158.) Justice O'Connor explained the rationale of the holding as follows:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane or all – the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional. . . . *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence – the taking of human life – the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

(*Id.* at pp. 157-158.)

In choosing actual killers as examples of "reckless indifference" murderers whose culpability would satisfy the Eighth Amendment standard, Justice O'Connor eschewed any distinction between actual killers

and accomplices.[184]

That *Tison* established a minimum mens rea for actual killers as well as accomplices was confirmed clearly in *Hopkins v. Reeves* (1998) 524 U.S. 88. In *Reeves,* a case involving an actual killer, the Court reversed the Eighth Circuit's ruling that the jury should have been instructed to determine whether the defendant satisfied the minimum mens rea required under *Enmund* and *Tison,* but held that such a finding had to be made at some point in the case:

> The Court of Appeals also erroneously relied upon our decisions in *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982) to support its holding. It reasoned that because *those cases require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder*, Nebraska could not refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. In so doing, the Court of Appeals read *Tison* and *Enmund* as essentially requiring the States to alter their definitions of felony murder to include a *mens rea* requirement with respect to the killing. In *Cabana v. Bullock*, 474 U.S. 376 (1986), however, we rejected precisely such a reading and stated that "our ruling in *Enmund* does not concern the guilt or innocence of the defendant – it establishes no new elements of the crime of murder that must be found by the jury" and "does not affect the state's definition of any substantive offense." For this reason, we held that a State could comply with *Enmund*'s requirement at sentencing or even on appeal. Accordingly *Tison* and *Enmund* do not affect the showing

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[184]In his dissent, Justice Brennan argued that there should be a distinction for Eighth Amendment purposes between actual killers and accomplices and that the state should have to prove intent to kill in the case of accomplices. (*Id.* at pp. 168-179 (dis. opn. of Brennan, J.).) That argument was rejected by the majority.

> that a State must make at a defendant's trial for felony murder, *so long as their requirement is satisfied at some point thereafter.*

(*Reeves*, *supra*, 524 U.S. at p. 99, citations and fns. omitted; italics added.)[103]

Every lower federal court to consider the issue – both before and after *Reeves* – has read *Tison* to establish a minimum mens rea applicable to all defendants. (See *Lear v. Cowan* (7th Cir. 2000) 220 F.3d 825, 828; *Pruett v. Norris* (8th Cir. 1998) 153 F.3d 579, 591; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-985, revd. on other grounds (1998) 524 U.S. 88; *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329, 335; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1443, fn.9.[104] The *Loving* court explained its thinking as follows:

> As highlighted by Justice Scalia in the *Loving* oral argument, the phrase "actually killed" could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to situations where the accused intended to kill or acted with reckless indifference to human life. We note that Justice White, who wrote the majority opinion in *Enmund* and joined the majority opinion in *Tison*, had earlier written separately in *Lockett v. Ohio*, 438 U.S. 586 (1978), expressing his view that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624. Without speculating on the views of the current membership of the Supreme Court, we

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[103]See also *Graham v. Collins* (1993) 506 U.S. 461, 501 (conc. opn. of Stevens, J.) (stating that an accidental homicide, like the one in *Furman*, may no longer support a death sentence).

[104]See also *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345.

> conclude that when *Enmund* and *Tison* were decided, a majority of the Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, "actually killed," as used in *Enmund* and *Tison*, must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life.

(*Loving*, *supra*, 220 F.3d at p. 443.)

Even were it not abundantly clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty, the Court's two-part test for proportionality would dictate such a conclusion. In *Atkins v. Virginia,* the Court's most recent proportionality decision, the Court emphasized that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Atkins*, *supra*, 536 U.S. at p. 312.) Of the 38 death penalty jurisdictions (thirty-six states,[105] the United States Government and the United States military), there are at most five states other than California – Florida, Georgia, Idaho, Maryland and Mississippi – in which a defendant may be death-eligible for felony murder

[105]Fourteen states – Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, New Jersey, New York, Rhode Island, Vermont, West Virginia, and Wisconsin – and the District of Columbia do not have the death penalty. (Death Penalty Information Center, www.deathpenaltyinfo.org.)

simpliciter.[106]

Another seven jurisdictions – Arkansas, Delaware, Illinois, Kentucky, Louisiana, Tennessee, and the United States military – appear to make death-eligible a felony murderer who acts with a mens rea less than intent to kill, e.g., "reckless indifference."[107] The remaining death penalty jurisdictions either (1) do not make robbery-burglary murder (or, in almost all cases, any felony murder) a capital crime,[108] do not make felony murder an aggravating circumstance,[109] or do not permit the prosecutor to "double count" the felony to prove both the capital crime and the aggravating

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[106]Fla. Stat. Ann. §§ 782.04, 921.141(5)(d) (West 2007); Ga. Code Ann. §§ 16-5-1, 17-10-30(b)(2) (2007); Idaho Code Ann. §§ 18-4003(d), 19-2515(9)(g) (2007); Md. Code Ann., Crim. Law §§ 2-201, 303 (West 2007); Miss. Code Ann. §§ 97-3-19(2)(e) & (f), 99-19-101(5)(d) (2007). The position of Florida is not altogether clear because the Florida Supreme Court has applied the *Enmund-Tison* principle to actual killers, see *Stephens v. State* (Fla. 2001) 787 So. 2d 747, 759-61, and has apparently never upheld a death sentence on the basis of a felony-murder aggravator alone.

[107]See (2006) Ark. Code Ann. § 5-10-101(a)(1); (2007) Del. Code Ann. tit. 11, § 4209(e); (West 2007) 720 Ill. Comp. Stat. Ann. 5/9-1(6)(b); (West 2007) Ky. Rev. Stat. Ann. §§ 532.025, 507.020; (2007) La. Rev. Stat. Ann. § 14:30(A)(1); (2007) Tenn. Code Ann. §§ 39-13-202, 39-13-204(i)(7); (2005) Manual for Courts-Martial, United States, R.C.M. 1004©.

[108]See, e.g., (2007) Mo. Rev. Stat. § 565.020.

[109]See, e.g., (2006) Ariz. Rev. Stat. Ann. § 13-703(F); (2006) S.D. Codified Laws § 23A-27A-1.

circumstance;[110] or (2) require proof of an intent to kill.[111]

That at least thirty-nine jurisdictions (thirty-eight states and the federal government) – three quarters of the jurisdictions – do not, without more, make death-eligible a defendant who unintentionally kills during a robbery or burglary reflects a substantially stronger "national consensus against the death penalty" than the United States Supreme Court found sufficient in its most recent proportionality cases, *Atkins*, *supra*, 536 U.S. 304 (30 states and the federal government) and *Roper v. Simmons, supra*, 543 U.S. 551 (30 states and the federal government).

Although such legislative judgments constitute "the clearest and most reliable objective evidence of contemporary values" (*Atkins*, *supra*, 536 U.S. at p. 312), professional opinion as reflected in the Report of the Governor's Commission on Capital Punishment (Illinois)[112] and international opinion[113] also weigh against finding felony murder *simpliciter* a sufficient basis for death-eligibility. The most comprehensive recent study of a state's death penalty was conducted by the Governor's

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[110]See, e.g., *McConnell v. State* (Nev. 2004) 102 P.3d 606, 620-624; *State v. Gregory* (N.C. 1995) 459 S.E.2d 638, 665.

[111]See, e.g., (West 2007) Ohio Rev. Code Ann. § 2903.01(D); (Vernon 2007) Tex. Penal Code Ann. § 19.03(a)(2).

[112]The Court has recognized that professional opinion should be considered in determining contemporary values. (*Atkins*, *supra*, 536 U.S. at p. 316, fn. 21.)

[113]The Court has regularly looked to the views of the world community to assist in determining contemporary values. (See *Atkins*, *supra,* 536 U.S. at p. 316 n.21; *Enmund*, *supra*, 458 U.S. at pp. 796-797, fn. 22; *Coker v. Georgia, supra*, 433 U.S. at p. 596.)

Commission on Capital Punishment in Illinois, and its conclusions reflect the current professional opinion about the administration of the death penalty. Even though Illinois's "course of a felony" eligibility factor is far narrower than California's special circumstance, requiring actual participation in the killing and intent to kill on the part of the defendant or knowledge that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1(b)(6)(b)), the Commission recommended eliminating this factor. (*Report of the Former Governor Ryan's Commission on Capital Punishment*, April 15, 2002, at pp. 72-73, <http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_04 .pdf>.) The Commission stated, in words which certainly apply to the California statute:

> Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view of Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve.
>
> A second reason for excluding the "course of a felony" eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murders, this eligibility factor does not advance that goal.

(*Id.* at p. 72.)

In Massachusetts, the Report of the Governor's Council on Capital Punishment, which proposed a "model" death penalty law, recommended

that death-eligibility be limited to defendants who "committed the murder with deliberately premeditated malice aforethought, with respect to the victim's death."[114]

With regard to international opinion, the Court observed in *Enmund*:

> "[T]he climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant." *Coker v. Georgia*, 433 U.S. 584, 596, n. 10, 97 S.Ct. 2861, 2868, n. 10, 53 L.Ed.2d 982 (1977). It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.

(*Enmund, supra*, 458 U.S. at p. 796, fn. 22.) International opinion has become even clearer since *Enmund.* Article 6 (2) of the International Covenant on Civil and Political Rights ("ICCPR"), to which the United States is a party, provides that the death penalty may only be imposed for the "most serious crimes." (ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at p. 52, U.N. Doc, A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976 and ratified by the United States on June 8, 1992.) The Human Rights Committee, the expert body created to interpret and apply the ICCPR, has observed that this phrase must be "read restrictively" because death is a "quite exceptional measure." (Human Rights Committee, General Comment 6(16), ¶ 7; see also American Convention on Human Rights, art. 4(2), Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996) ["In countries that have

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[114]Symposium, Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report, (2005) 80 Ind. L.J. 1, 5.

not abolished the death penalty, it may be imposed only for the most serious crimes . . . ."].) In 1984, the Economic and Social Council of the United Nations further defined the "most serious crime" restriction in its Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. (E.S.C. res. 1984/50; GA Res. 39/118.) The Safeguards, which were endorsed by the General Assembly, instruct that the death penalty may only be imposed for intentional crimes. (*Ibid.*)[115] The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considers that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." (*Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, U.N. Doc. CCPR/C/79/Add.85, November 19, 1997, ¶ 13.)

The imposition of the death penalty on a person who has killed negligently or accidentally is not only contrary to evolving standards of decency, but it fails to serve either of the penological purposes identified by the United States Supreme Court – retribution and deterrence of capital crimes by prospective offenders. With regard to these purposes, "[u]nless the death penalty ... measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund*,

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[115]The Safeguards are a set of norms meant to guide the behavior of nations that continue to impose the death penalty. While the safeguards are not binding treaty obligations, they provide strong evidence of an international consensus on this point. "[D]eclaratory pronouncements [by international organizations] provide some evidence of what the states voting for it regard the law to be . . . and if adopted by consensus or virtual unanimity, are given substantial weight." (*Restatement (Third) of the Foreign Relations Law of the United States*, § 103 cmt. c.)

supra, 458 U.S. at pp. 798-799, quoting *Coker*, *supra*, 433 U.S. at p. 592). With respect to retribution, the Supreme Court has made clear that retribution must be calibrated to the defendant's culpability which, in turn, depends on his mental state with regard to the crime. In *Enmund*, the Court said: "It is fundamental 'that causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Enmund*, *supra*, 458 U.S. at p. 798, quoting Hart, *Punishment and Responsibility* (1968) p. 162.) In *Tison*, the Court further explained:

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of . . . Clergy" would be spared.

(*Tison*, *supra*, 481 U.S. at p. 156.) Plainly, treating negligent and accidental killers on a par with intentional killers ignores the wide difference in their level of culpability.

Nor does the death penalty for negligent and accidental killings serve any deterrent purpose. As the Court said in *Enmund*:

> [I]t seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act." *Gregg v. Georgia*, *supra*, 428 U.S., at 186, 96 S.Ct., at 2931

(fn. omitted).

(*Enmund, supra*, 458 U.S. at pp. 798-99; accord, *Atkins, supra*, 536 U.S. at p. 319.) The law simply cannot deter a person from causing a result he never intended.

Since imposition of the death penalty for robbery-murder *simpliciter* clearly is contrary to the judgment of the overwhelming majority of the states, recent professional opinion and international norms, it does not comport with contemporary values. Moreover, because imposition of the death penalty for robbery-murder *simpliciter* serves no penological purpose, it "is nothing more than the purposeless and needless imposition of pain and suffering." As interpreted and applied by this Court, the robbery-murder special circumstance is unconstitutional under the Eighth Amendment, and appellant's death sentence must be set aside.

Finally, California law making a defendant death-eligible for felony murder *simpliciter* violates international law. As noted above, Article 6(2) of the ICCPR restricts the death penalty to only the "most serious crimes," and the Safeguards, adopted by the United Nations General Assembly, restrict the death penalty to intentional crimes. This international law limitation applies domestically under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.) In light of the international law principles discussed previously, appellant's death sentence, predicated on his act of shooting Saleh Bin Hassan without any proof that the murder was intentional, violates both the ICCPR and customary international law and, therefore, must be reversed.

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V.

THE COURT COMMITTED INSTRUCTIONAL ERRORS THAT UNFAIRLY AND PREJUDICIALLY BOLSTERED THE CREDIBILITY OF PROSECUTION WITNESSES IN VIOLATION OF APPELLANT'S DUE PROCESS AND OTHER FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The prosecution's case rested on the testimony of Lupe Valencia and Artero Vallejo, both of whom had serious credibility problems and gave inconsistent accounts of what allegedly occurred. These two witnesses were pitted against appellant's alibi witnesses, who placed appellant with his family when the murder was committed. The jurors' verdict turned on whom they believed was telling the truth. The jurors obviously struggled with this determination, for they needed read-back of testimony and deliberated from late afternoon on September 24 through the afternoon of September 26, 1996. (1 CT 57, 60-61.) The court, in delivering incomplete and insufficient jury instructions, tipped the scales in favor of the prosecution witnesses, and prejudicially denied appellant his right to a fair jury trial (U.S. Const., 6th & 14th Amends.) as well as his right to due process and a reliable penalty determination (U.S. Const., 8th & 14th Amends.).

A. The Court Committed Prejudicial Error in Deleting Applicable Paragraphs of CALJIC No. 2.20.

CALJIC No. 2.20 instructs the jurors on what they may consider in assessing the believability of a witness. The instruction should be given sua sponte in every criminal case, omitting paragraphs inapplicable under the evidence. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884;

accord, Use Note, CALJIC No. 2.20 (6th ed. 1996) p. 62.]

At the time of appellant's trial, CALJIC No. 2.20 read:

> Every person who testifies under oath [or affirmation] is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. [¶] In determining the believability of a witness you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified; [¶] The ability of the witness to remember or to communicate any matter about which the witness testified; [¶] The character and quality of that testimony; [¶] The demeanor and manner of the witness while testifying; [¶] The existence or nonexistence of a bias, interest, or other motive; [¶] The existence or nonexistence of any fact testified to by the witness; [¶] The attitude of the witness toward this action or toward the giving of testimony[.][;] [¶] [A statement [previously] made by the witness that is [consistent] [or] [inconsistent] with [his] [her] testimony][.][;] [¶] [The character of the witness for honesty or truthfulness or their opposites][;] [¶] [An admission by the witness of untruthfulness][;] [¶] [The witness's prior conviction of a felony][;] [¶] [Past criminal conduct of a witness amounting to a misdemeanor].

(CALJIC No. 2.20 (6th ed. 1996).)

The court, however, used the 1993 Revision of the instruction (without, apparently, checking the pocket parts[116]) that did not include the last bracketed paragraph – past criminal conduct amounting to a misdemeanor. (2 CT 431.)

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[116]As early as 1994, the instruction included the consideration: "Past criminal conduct of a witness amounting to a misdemeanor." (CALJIC No. 2.20 (5th ed.1993 Revision) (Jan. 1994 Pocket Part).)

Prosecution witness Artero Vallejo admitted he had engaged in past criminal conduct amounting to a misdemeanor and to using and selling drugs. (5 RT 1472, 1495.) He testified he had been arrested for possession of a billy club and shotgun shells, an offense that was initially charged as a felony but was resolved as a misdemeanor. He also testified he failed to appear on the case and was sentenced to twenty days in jail. (5 RT 1462-1465.) However, because the trial court failed to instruct the jurors with the then-current jury instruction, it failed to instruct them that, in considering Vallejo's credibility, they should consider his past criminal conduct amounting to a misdemeanor. (2 CT 431; 6 RT 1776.)

The trial court's failure to focus the jury's attention on Vallejo's untrustworthiness and unreliability because of his past criminal conduct was error.

B. The Court Committed Reversible Error When it Failed Sua Sponte to Instruct the Jury with CALJIC No. 2.27.

CALJIC No. 2.27 (6th ed. 1996) provides:

> You should give the [uncorroborated] testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact [whose testimony about that fact does not require corroboration] is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends.[117]

This instruction or its equivalent should be given in every criminal

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[117]The first bracketed phrase should be used if corroboration is required, such as in Penal Code section 1111 (testimony of an accomplice). (Use Note to CALJIC No. 2.27; see also *People v. Stewart* (1983) 145 Cal.App.3d 967, 975; *People v. Chavez* (1985) 39 Cal.3d 823, 831.)

case in which no corroborating evidence is required. (*People v. Rincon-Pineda, supra*, 14 Cal.3d at p. 844; *People v. Pringle* (1986) 177 Cal.App.3d 785, 788-790.)

In *People v. Pringle*, the court observed that in *People v. Haslouer* (1978) 79 Cal.App.3d 818, 832-833, the appellate court decided that the trial court did not err in failing to give CALJIC No. 2.27 where there was evidence which, if believed, was corroborative of the statements of each prosecuting witness. The court in *Pringle* continued:

> We could reach the same conclusion here because the victim's testimony is corroborated by both the testimony of Wells and the blood test results. However, the jury could disbelieve the corroborating evidence, confronting itself with whether the testimony of the victim alone is sufficient for a conviction. That is precisely Pringle's argument: the jury could disbelieve Wells' testimony, given his long history of dealings and disagreements with Pringle, and disregard the equivocal statistical studies and blood test results, leaving the People's case to turn solely on the victim's testimony and thus within the ambit of CALJIC No. 2.27. This dilemma is neither addressed in the Use Note to CALJIC No. 2.27, nor in *Haslouer, supra*, and *Alvarado, supra* [*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1023]. However, inferentially this matter was resolved in defendant's favor in *Rincon-Pineda, supra*, 14 Cal.3d 864, where the Supreme Court flatly requires giving CALJIC No. 2.27 in every criminal case in which no corroborating evidence is required to sustain a conviction. Accordingly, the trial court erred in not giving CALJIC No. 2.27 sua sponte.

(*People v. Pringle, supra*, 177 Cal.App.3d at p. 789.)

Here, too, the trial court erred in failing to instruct, sua sponte, with CALJIC No. 2.27. No physical evidence implicated appellant in the charged murder – no fingerprints or murder weapon was found (5 RT

1556), and no ballistics evidence or eyewitness identification of appellant as the shooter was presented. The prosecution's case centered on two highly suspect witnesses – either of whose testimony the jurors may have rejected in whole or part. Lupe was an accomplice who testified against appellant pursuant to an immunity agreement with the prosecution and whose testimony was riddled with inconsistencies. The jurors may have rejected all or aspects of accomplice Lupe's testimony, leaving the case to stand or fall on the hearsay testimony of informant Vallejo, an admitted drug user and dealer, who first gave information about this case eight months after it occurred, at a time that was opportune for him. This case is thus "within the ambit of CALJIC No. 2.27." (*People v. Pringle*, *supra*, 177 Cal.App.3d at p. 789.)

Penal Code section 1127 subd. (a) requires that, upon request, the court should give a cautionary instruction regarding an in-custody informant. (See CALJIC No. 3.20.) Although Vallejo was not an "in-custody informant," the essence of CALJIC No. 3.20 – that the testimony of the informant should be viewed with caution and close scrutiny and that the jurors should consider the effect of any benefits the witness may have received – applies with equal strength to informers who are not in custody. (See *United States v. Patterson* (9th Cir. 1981) 648 F.2d 625, 630-631; *United States v. Gonzalez* (5th Cir. 1974) 491 F.2d 1202, 1207-1208.) While the court may not have been required to give CALJIC No. 3.20 sua sponte (*People v. Mickey* (1991) 54 Cal.3d 612, 674-675, the *absence* of such an instruction in this case reinforced the need for instruction with CALJIC No. 2.27. Vallejo gave various motives for his decision to give information about this offense, including his desire to have the police intervene with the district attorney to take care of outstanding arrest

warrants (5 RT 1460-1461, 1478) and his anger at some of the men he would implicate over drug debts they owed him (5 RT 1470-1472, 1478). Vallejo's testimony was contradicted by other evidence and testimony, *and* much of his testimony was hearsay statements of others. Moreover, the defense contended that it was Vallejo, not Contreras, who participated in the robbery and killing, and that he implicated Contreras to deflect investigation of his own involvement in the offense, which he believed might be discovered given the arrests of Santos Pasillas and Jose Gonzalez. (See generally 5 RT 1411-1413.) At the *very least*, then, the court should have informed the jurors that they "should carefully review" all the evidence upon which the proof of a fact is supplied by one witness.

C. The Instructional Errors Were Prejudicial.

In a case as close as this one, where the credibility of the alibi witnesses versus the credibility of an informant and accomplice dictated the jurors' verdict, every instruction regarding the believability of a witness was crucial to ensure that appellant received a fair trial. The failure to fully instruct with CALJIC No. 2.27 and a complete version of CALJIC No. 2.20 was highly prejudicial. The errors skewed "the balance of forces between the accused and the accuser" (*Wardius v. Oregon* (1973) 412 U.S. 470, 474) in favor of the accuser – the prosecution – and against the accused – appellant. Vallejo claimed not to be present at the scene of the crime, yet provided details of it. He had several motives – both to implicate appellant and to exculpate himself. He had serious credibility problems in various respects. The court's failure to give CALJIC No. 2.27 and all pertinent sections of CALJIC No. 2.20 improperly assisted the prosecution in establishing the credibility of Vallejo, damaged appellant's

efforts to undermine Vallejo's credibility in the jurors' eyes, and prejudicially denied appellant his right to a fair jury trial (U.S. Const., 6th & 14th Amends.) as well as his right to due process and a reliable penalty determination (U.S. Const., 8th & 14th Amends.).

Since the prosecution cannot establish that these federal constitutional errors in unfairly buttressing the credibility of Vallejo were harmless beyond a reasonable doubt (see *Chapman v. California, supra,* 386 U.S. at p. 24), the entire judgment must be reversed. (See also *Wardius v. Oregon, supra,* 412 U.S. at p. 479 [conviction reversed because of "a substantial possibility" that the error "may have infected the verdict"]; *People v. Moore* (1954) 43 Cal.2d 517, 530-531; *People v. Mata* (1955) 133 Cal.App.2d 18, 21-24.)

The error was prejudicial even if this Court concludes it was not of constitutional dimension. *In People v. Rincon-Pineda, supra,* 14 Cal.3d at p. 872, this Court stated that error in failing to give CALJIC No. 2.27 is not prejudicial per se.

> "The circumstances of each case" must be reviewed on appeal to "determine whether failure to give the instruction was prejudicial." [Citation.] Such failure "does not constitute prejudicial error if 'the evidence clearly points to the defendant's guilt, or . . . the testimony of the prosecuting witness is amply corroborated, or there are other factors in the case which show that the defendant has been given a fair trial.'" [Citation.]

Under the circumstances of this case, it is reasonably probable a result more favorable to appellant would have been reached in the absence of the errors. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) There was no physical evidence, and appellant presented a corroborated alibi that might

have been accepted by the jurors had they been instructed to view carefully all the evidence upon which the proof of a fact is supplied by one witness.

The instructional errors were not harmless, and the convictions, special circumstance finding and death judgment must be reversed.

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VI.

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* (1979) 443 U.S. 307, 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*, 397 U.S. 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 appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that never can 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, 8.83, And 8.83.1).

At the guilt trial, the court instructed that appellant 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." (2 CT 440; 6 RT 1780.) 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 is open to some possible or imaginary doubt. It is that 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 of the truth of the charge.

(2 CT 440; 6 RT 1780 [oral version].)

In combination with the other instructions given, it was reasonably likely that CALJIC No. 2.90 led the jury to convict appellant on proof less than beyond a reasonable doubt in violation of his Fourteenth Amendment right to due process.

The jury was given three interrelated instructions that discussed the relationship between the reasonable doubt requirement and circumstantial evidence – CALJIC No. 2.01 ([sufficiency of circumstantial evidence] 2 CT 426; 6 RT 1774); CALJIC No. 8.83 ([special circumstances – sufficiency of circumstantial evidence] 2 CT 457; 6 RT 1786-1787); and CALJIC No. 8.83.1 ([special circumstances – sufficiency of circumstantial evidence to prove required mental state] 2 CT 459; 6 RT 1787-1788.) These instructions, addressing different evidentiary issues in nearly

identical terms, advised appellant'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 reject the unreasonable.*

(2 CT 427, emphasis added. See also 2 CT 458, 459-460, regarding the special circumstance allegation.)

These instructions informed the jurors that if appellant *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. This thrice repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant'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). (See *Sullivan v. Louisiana, supra*, 508 U.S. at p. 278; *Carella 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 appellant 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 appellant 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 "appear[ed]" to them to be "reasonable." (2 CT 427, 458, 459-60; 6 RT 1774, 1787, 1788.) 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," emphasis 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 appellant 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, emphasis added, fn. omitted.) Mandatory presumptions, even those that are explicitly rebuttable, 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, all three instructions plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." 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. *A fortiori*, 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 circumstantial evidence instructions permitted and indeed encouraged the jury to convict appellant of first degree murder and to find the robbery-murder special circumstance true upon a finding that the prosecution's theory was reasonable, rather than upon proof beyond a reasonable doubt.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant in another way – 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 appellant's guilt on a standard that is less than constitutionally required.

B. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.21.1 and 2.22).

The trial court gave other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt

standard: CALJIC No. 1.00, regarding respective duties of judge and jury (2 CT 420; 6 RT 1770-1771); CALJIC No. 2.21.2 , regarding willfully false witnesses (2 CT 433; 6 RT 1777); and CALJIC No. 2.22, regarding weighing conflicting testimony (2 CT 434; 6 RT 1777-1778). 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 upon 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, two instructions violated appellant's constitutional rights (as enumerated in section A of this argument) by misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. CALJIC No. 1.00 told the jury that pity for or prejudice 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." (2 CT 421; 6 RT 1771.) CALJIC No. 2.01, discussed previously in subsection A of this argument, also refers to the jury's choice between "guilt" and "innocence." (2 CT 426; 6 RT 1774.) 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 appellant guilty because it had not been proven

that he was "innocent."[118]

Similarly, CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (2 CT 433; 6 RT 1777, italics added.) The instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[119] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable

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[118]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 emphasis.) *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.)

[119]The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana, supra,* 508 U.S. at p. 278; *In re Winship, supra,* 397 U.S. at p. 364.)

Furthermore, the jurors were instructed:

> 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 caprice, 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.

(CALJIC No. 2.22; 2 CT 434; 6 RT 1777-1778 [oral version].)

This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence 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, was 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." As with CALJIC No. 2.21, discussed above, 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.)

"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 other instructions permitting conviction upon a lesser showing – that he or she must find appellant 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 section A of this argument.

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

Although each one of the challenged instructions violated appellant'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 No. 2.01, 2.02, 2.21, 2.27)]; *People v.*

Jennings (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].) 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 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.[120] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

It cannot seriously be maintained that a single instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary 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 which is reversible *per se.*

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[120]A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

(*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. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Here, that showing cannot be made. Appellant contested the evidence against him and the truth of the single special circumstance. This was a close case, and the jury deliberations were protracted. Accordingly, the dilution of the reasonable-doubt requirement by the guilt-phase instructions, particularly when considered cumulatively with the other instructional errors set forth above, 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.)

The guilt phase convictions, the special circumstance finding and the death judgment must be reversed.

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PENALTY PHASE ISSUES

VII.

THE COURT ERRED IN REFUSING TO GIVE JURY INSTRUCTIONS THAT WERE VITAL TO A PROPER CONSIDERATION OF THE EVIDENCE OF AN ALLEGED PRIOR ACT OF VIOLENCE, THEREBY VIOLATING APPELLANT'S RIGHTS UNDER FEDERAL AND CALIFORNIA CONSTITUTIONS TO A FAIR PENALTY PHASE HEARING AND RELIABLE DEATH VERDICT.

A. Introduction

During the penalty phase of this case, the prosecution introduced in aggravation under the authority of Penal Code Section 190.3(b), evidence of a previously unadjudicated assault with a firearm in violation of Penal Code section 245, subd. (a). The evidence consisted of the testimony of relatives of Arcadia Hernandez, the mother of appellant's two children, who described an incident where appellant allegedly fired gun shots following an argument he had with Arcadia. Their testimony conflicted regarding several key elements of assault, and all the witnesses had bias against appellant and a motive to assist Arcadia. Under these circumstances, it was essential that the jurors be informed as to how to evaluate the witnesses and their credibility. Surprisingly, the court, after initially considering it, decided *against* instructing the jurors with CALJIC No. 2.20 regarding credibility of a witness, CALJIC No. 2.22 regarding weighing conflicting testimony, and CALJIC Nos. 2.00 and 2.01 regarding direct and circumstantial evidence and the sufficiency of circumstantial evidence. The court erred in its ruling.

B. The Court Erred in Failing to Instruct the Jurors at the Penalty Phase with Applicable Guilt Phase Instructions.

During discussion of penalty phase instructions, the court noted a number of instructions requested, but then withdrawn, by the prosecution. Among them was CALJIC No. 2.22, which addresses the weighing of conflicting testimony. The court explained, "that would only be applicable, I think the reason the district attorney gave that is for the underlying 245 that you are attempting to prove up, but *I think it would be a little bit confusing, because, it being the penalty phase, I don't think it is necessary. I think it could be confusing.*" (7 RT 2026, italics added.)

Later in the discussion the court stated:

> Before we go, I still am having a problem with these general instructions.
>
> For example, 2.01, "However a finding of guilt as to any crime may not be based upon circumstantial evidence." I don't know why we need this – these things. If you can – I don't want to roll over a request, but I don't know – I mean, I've given 2.00, I've given 2.01, I've given 2.20, and I don't know why I need to specifically give those three instructions again, to the exclusion of other instructions defining crimes.

(7 RT 2035.)

The prosecutor suggested that the court remind the jury that they were to consider instructions previously given in determining the reasonable doubt factor. She did not want to see the jurors confused as to their duties as to the criminal activity as opposed to the penalty. (7 RT 2036.) Defense counsel agreed. "I want them to realize that this is aggravated or has an independent status here, and it does have to be viewed independently. [¶] In other words, they have to make a determination of whether that really exists." (*Ibid.*)

The court then suggested:

> Would it be appropriate for me, when I get to the aggravator, to indicate that this – this particular factor, of whether or not the defendant committed an assault with a firearm, must be proved beyond a reasonable doubt, like any other crime, in order to determine whether the defendant committed this offense, all the previous instructions having to do with proof of a crime would be applicable.

(7 RT 2036.)

Both defense counsel and the prosecutor agreed that this was the proper way to proceed. (7 RT 2036-2037.) The court then explained that it did *not* want "to instruct them on the whole bunch of instructions we gave before, because I think they can be misleading because their focus here is different." (7 RT 2037.) It explained that in lieu of CALJIC Nos. 2.00, 2.01 and 2.20, it would inform the jurors that the previous instructions having to do with proof of a crime would be applicable to the factor (b) evidence. (*Ibid.*)

Shortly after that, the court reversed its decision. The court explained that as it was "writing up this little blurb that we talked about," it decided "we're better off not instructing other than what I'm doing, is instructing with general intent, proof beyond a reasonable doubt, and the elements." (7 RT 2038.) The court concluded:

> if I say that those instructions – the previous instructions apply to the 245, my concern is that the jurors will think that they do not apply to the penalty phase, and that's not necessarily true. [¶] We've already instructed them on the law, and I don't think we need to instruct it again, and I think it may be confusing if I do anything other than what I've done. [¶] So I'm not going to make that little blurb. I just want you to know.

(7 RT 2038.)

The court then instructed the jurors in the most inaccurate, incomplete and misleading manner possible. The court's stated reason for not needing to give the instructions – the fact that it had already instructed the jurors on the law – was negated by the very instructions it delivered. The court informed the jurors, "[y]ou will now be instructed as to all of the law that applies to the penalty phase of this trial" (7 RT 2039); at the same time it told them to "[d]isregard all other instructions given to you in other phases of this trial." (7 RT 2040.)[121] These instructions told the jurors that the guilt phase instructions regarding credibility, conflicting testimony and circumstantial evidence had no application at the penalty phase. The court's instructions were in direct conflict with the law.

Prior to appellant's trial, this Court stated, "To avoid any possible confusion in future cases, trial courts should expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." (*People v. Babbitt* (1988) 45 Cal.3d 660, 718 fn. 26.) In *People v. Weaver* (2001) 26 Cal.4th 876, 982, this Court stated, "Defendant is correct that the trial court's failure to specify which of the previously delivered instructions continued to apply at the penalty phase was potentially misleading. . . ."

It is true that this Court has uniformly held that when the jury has

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[121]The jury was instructed on the elements of assault with a firearm in the language of former CALJIC 9.00 and 9.02. (7 RT 2043-2044; 2 CT 533-535.) They were also instructed with CALJIC No. 3.30 regarding concurrence of act and general intent (7 RT 2044; 2 CT 536) and a modified version of CALJIC No. 2.90 regarding reasonable doubt (7 RT 2044; 2 CT 537).

been advised to follow the guilt phase instructions and there are no contradictory penalty phase instructions, there is no duty to repeat the guilt instructions because it may be presumed the jury applied to the penalty determination any applicable guilt phase instructions. (See e.g., *People v. Danielson* (1992) 3 Cal.4th 691, 722; *People v. Wharton* (1991) 53 Cal.3d 522, 600; *People v. Brown* (1988) 46 Cal.3d 432, 460; *People v. Williams* (1988) 45 Cal.3d 1268, 1321; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1079.) In this case, however, the trial court specifically admonished the jurors to *disregard* all instructions previously given (7 RT 2040), which included instructions on the believability of witnesses, weighing of evidence and evaluating circumstantial evidence. As this Court observed in *Weaver*, 26 Cal.4th at p. 982:

> The current applicable pattern instruction, CALJIC No. 8.84.1 (6th ed. 1996), provides that the jury at the penalty phase should "[d]isregard all other instructions given to you in other phases of this trial." In the Use Note to CALJIC No. 8.84.1, the authors explain that the instruction "should be followed by all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88. Our recommended procedure may be more cumbersome than the suggestion advanced in footnote number 26 [of *Babbitt, supra*, at p. 718], but the Committee believes it is less likely to result in confusion to the jury."

The jurors are presumed to have followed this instruction and disregarded all instructions given during the guilt phase. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; *People v. Scott* (1988) 200 Cal.App.3d 1090, 1095, and cases cited; *Opper v. United States* (1954) 348 U.S. 84, 95; *Erikson v. Rowland* (1993) 991 F.2d 803). The jurors, thus, were not simply left without guidance as to how to evaluate the witnesses and evidence. They were affirmatively instructed *not* to apply the pertinent

and applicable instructions that should have been given as they related to the factor (b) evidence. Prejudice was assured.

C. The Court's Error Was Highly Prejudicial and Requires Reversal of the Penalty Phase Verdict.

This Court has recognized that introduction of other crime evidence "'may have a particularly damaging impact on the jury's determination whether the defendant should be executed.' (*People v. Polk* [(1975)] 63 Cal.2d [443] at p. 450." (*People v. Robertson* (1982) 33 Cal.3d 21, 54; accord, *People v. Davenport* (1985) 41 Cal.3d 247, 280-281.) Such evidence can be devastating when jurors are not instructed on important rules of law bearing on the other crime alleged. Jurors who are instructed to disregard all of the instructions in the guilt phase of the trial and then are given only a few instructions on how to reach a decision on the uncharged offense, are not bound to follow important laws relating to this trial within a trial. In this case, the jurors were free to accept the witnesses' testimony at face value without considering their bias, motivation, expertise, reasonableness, or conflicting statements, all of which were, as a review of the testimony demonstrates, factors in this case.

The three prosecution witnesses all testified that in August 1994, Arcadia Hernandez, her sister Maria Elena Torres and her husband Ramon, and Arcadia's other sister Elisabeth, her husband Angel and their young son, went in Angel's car to appellant's mother's house to pick up Marco. (7 RT 1912-1915 [testimony of Maria Elena Torres]; 7 RT 1922-1924 [testimony of Elisabeth Hernandez]; 7 RT 1926-1927 [testimony of Ramon Torres].) Appellant did not want to return his son, and he and Arcadia got into an argument in front of the house. (7 RT 1916.) While they argued

Elisabeth took Marco into the car. (7 RT 1916-1917.) From here, the accounts differ.

Maria Elena testified that after Elisabeth took Marco, appellant came and got him, but that Elisabeth took him back a second time and brought him to the car. (7 RT 1916-1917.) After that, "all of a sudden we just heard gunshots and then we turned around and it was [appellant]." (7 RT 1918.) Maria Elena was "pretty sure he shot up." (*Ibid.*) "But then I seen the shotgun and it was pointing to us. It was pointing to the car." (7 RT 1918-1919.) They drove off and stopped at a store to call police. They looked at the car, "[a]nd we didn't see nothing on the car," although it was dark. (7 RT 1919.) She further testified that the next morning her husband found a "bullet hole" in the spoiler of the car. (7 RT 1920.) She did not know whether anyone reported finding the bullet hole to the police. (7 RT 1922.)

Elisabeth testified that appellant "gave" her the baby and never took him back from her. (7 RT 1924.) She testified that Arcadia and appellant were sitting on a bench arguing. When Arcadia started to get in the car, appellant "started shooting at the car." (*Ibid.*) When asked how she knew that appellant was the one shooting, Elisabeth responded, "[b]ecause it was only him and my sister." (7 RT 1924-1925.) She clarified that appellant pulled something out of his pants and "all I heard was just bullets." She could not see where the object in his hand was pointed. (7 RT 1925.) They left and called police. (*Ibid.*)

Ramon Torres never mentioned appellant taking Marco away from Elisabeth. He testified he was seated in the back seat of the car looking out the window at appellant. (7 RT 1931.) He claimed to have see appellant

get up from the bench, take out a handgun point it at the car. (7 RT 1928.) Appellant fired three or four shots from seven to eight feet away. (7 RT 1929.) Ramon testified that the next day, he saw a "bullet hole" on the spoiler of the car. (7 RT 1930.)

Ramon testified that he spoke to a police officer that night, but denied that he failed to tell the officer that he saw a gun pointed at the car. (7 1931-1932.) He did not talk to the police about the hole that was found in the car the next day, and did not tell anyone to call the police about it. (7 RT 1932.)

James Rapozo, a police officer with the City of Visalia, testified he responded to the call regarding this incident. (7 RT 1955-1956.) He stated there several people claimed their vehicle had been fired upon, and he believed he examined the car and looked for evidence after taking statements from the witnesses. (7 RT 1957-1958.) He found two expended shell casing from a .380 caliber handgun in the roadway in front of 1012 North Court which is where the offices of Real Alternatives for Youth Organization is located. (7 RT 1958.) He also found two holes in the front of that building that he believed were made by the two bullets. (7 RT 1963.)[122] Officer Rapozo noted in his report that the victims told him that neither the vehicle nor its occupants were struck by gunfire. (7 RT 1960.) He testified that he would think that he personally checked the vehicle and confirmed their report. (7 RT 1961.)

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[122]Nearly two years later, on April 29, 1996, Eric Grant, an investigator with the District Attorney's Office, photographed what he described as bullet holes in the Real Alternatives For Youth Organization building. (7 RT 1935-1938.)

Officer Rapoza took a statement from Ramon Torres, who told him that "he turned around, looked, and saw subject Contreras, Arcadia Hernandez fighting in the middle of Court Street." (7 RT 1961-1964.) Nothing more.

If appellant's jurors had been properly instructed, it is reasonably likely that they would not have found the assault proved beyond a reasonable doubt. And without a finding of the assault, it is likely that the jurors would have arrived at a penalty of life without possibility of parole. The key prosecution witnesses had serious credibility problems, and the jurors clearly struggled to reach a guilt verdict. Appellant was young – he had just turned 20 years old when the crime was committed – and had no prior criminal background. He allegedly shot the clerk only after the clerk drew a gun on him. Under these circumstances, it is reasonably probable that had the jurors been properly instructed with applicable guilt phase instructions, they would have sentenced appellant to life without possibility of parole.

1. Refusal to give CALJIC No. 2.20 on the believability of witnesses was prejudicial.

Maria Elena is the sister of Arcadia, with whom appellant was arguing at the time of the shooting. Had the jurors been properly instructed, indeed had they not been improperly instructed not to apply the guilt phase instructions, they would have considered whether Maria Elena's testimony was based on a bias, motive or interest. They would have been required to consider whether she had the opportunity or ability to see and hear the events about which she testified. In fact, no evidence was presented as to where Maria Elena was at the time of the alleged shooting,

what direction she was facing, or from what distance she was making her observations. She testified she was "pretty sure" appellant fired upwards but when she turned, the shotgun was pointed to the car. (7 RT 1918-1919.) Her husband Ramon described the weapon not as a shotgun, but as a "handgun" or "pistol." (7 RT 1929.)

Maria Elena testified that her husband found a bullet hole in the spoiler of the vehicle the next day, and she identified a "white spot" depicted in a photograph of the car as a bullet hole. (7 RT 1920.) If the jury had been required to consider the character and quality of Maria Elena's testimony, they would have considered whether she could distinguish a hole made by a bullet from that by a rock, pellet, BB, or other object; whether she examined the car's spoiler before the incident; and when the photograph was taken.

Elisabeth is also Arcadia's sister and was also subject to bias. She also gave a very vague account of what she actually saw. She initially testified that she concluded appellant shot "[b]ecause it was only him and my sister." (7 RT 1925.) Then she stated, "I didn't see the gun, but – well, I didn't get a look to see what kind of gun it was." (*Ibid.*) Finally she testified that she was led to believe appellant had a gun, [b]ecause he pulled something out of his pants and all I heard were just bullets." She did not see whether the object in appellant's hand was pointed. (*Ibid.*) There was no evidence of where Elisabeth was located when she made her observations, her past experience in identifying gunfire, or what bias she may have harbored against appellant because of his relationship with her sister. The jurors should have been required to consider all these factors in evaluating her testimony. Their presumed failure to do so, in light of the

penalty phase instructions, enhanced Elisabeth's otherwise suspect testimony and lessened the prosecutor's burden of proving beyond a reasonable doubt that appellant committed an assault with a firearm.

The third critical witness was Arcadia' brother-in-law, Ramon. He claimed to have seen appellant take out a handgun, point it towards the car and fire three or four shots. He also claimed to have seen a bullet hole in the spoiler the next day. Ramon denied that he told the police officer only that he turned around and saw Arcadia and appellant fighting in the middle of the street. 97 RT 1931.) Despite the officer's testimony to the contrary (7 RT 1963) Ramon insisted he told the officer that he saw a gun being pointed at the car.

The jury should have been instructed to evaluate Ramon's testimony in accordance with the factors set forth in CALJIC 2.20 in light of prior inconsistent statements; ability to recollect, the quality and character of his testimony inasmuch as his brother allegedly found the damage to the spoiler the next day with apparently none of the other witnesses present, the lack of testimony that the hole was not present on the spoiler before the incident, the fact that Maria Elena testified that they examined the car that night and found no evidence of a bullet hole (7 RT 1919), and Officer Rapozo's testimony that he looked at the vehicle and would have confirmed the reports that neither the vehicle or the passengers were struck (7 RT 1957, 1961).

Proof beyond a reasonable doubt of the alleged assault with a firearm depended solely on the credibility of these three witnesses. No gun was found, there were no admissions by appellant, and there was no expert testimony that the damage to the vehicle was caused by a bullet or any

other projectile. One witness testified she thought appellant was firing upwards and there was conflicting testimony as to whether it was a shotgun or pistol that was used. Inexplicably, the witnesses called the police, but apparently never identified appellant as the perpetrator – even after allegedly finding a bullet hole.

The lack of an instruction on the factors to consider in assessing the believability of witnesses severely prejudiced appellant.

2. Refusal to give the CALJIC No. 2.22 regarding weighing conflicting testimony was prejudicial.

Arcadia's relatives gave conflicting accounts regarding whether appellant resisted Elisabeth taking Marco, whether he took Marco back from Elisabeth, in which direction appellant allegedly fired, and what type of gun he allegedly fired with. They expressed no expertise in recognizing a "bullet" hole from any other type hole, and they testified in greater detail at trial than they reported to the police officer immediately after the alleged event.

CALJIC No. 2.22, regarding weighing conflicting testimony, reads, in relevant part, "You must not decide an issue by the simple process of counting the number of witnesses. The final test is not in the number of witnesses, but in the convincing force of the evidence." (Bracketed language omitted.) "We acknowledge that this instruction should be given sua sponte in every criminal case in which conflicting testimony has been presented." (*People v. Rincon-Pineda*, *supra*, 14 Cal.3d at pp. 883-884.)

Failure to give this instructions is grounds for reversal of the verdict when there is a reasonable likelihood the failure caused juror misunderstanding. (*People v. Snead* (1993) 20 Cal.App.4th 1088, 1097

[error in failing to give CALJIC No. 2.22, but "considering all the instructions that were given, 85 pages worth, there was no 'reasonable likelihood' . . . of juror misunderstanding caused by the omission"].) To assess the possibility of juror misunderstanding the entire record and the totality of the jury instructions must be considered. In this case, there was more than a likelihood of misunderstanding, since the court instructed them to disregard the guilt phase instructions. Had the jurors been accurately and fully instructed it is reasonably likely that the jurors would have reached a different verdict.

3. Refusal to give the CALJIC 2.00 regarding direct and circumstantial evidence and caljic no. 2.01 regarding sufficiency of circumstantial evidence was prejudicial.

CALJIC No. 2.00 instructs regarding direct and circumstantial evidence and inferences that may be drawn from a fact or set of facts. CALJIC No. 2.01 outlines the sufficiency of circumstantial evidence and instructs that if circumstantial evidence permits two reasonable interpretations:

> one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt.

CALJIC No. 2.01 should be given when the prosecution's case is based substantially on circumstantial evidence. (*People v. Marquez* (1992) 1 Cal.4th 553, 577.) In this case, evidence of where appellant allegedly shot and any mental state he may have entertained was purely circumstantial. Given the equivocal testimony about what actually occurred, the failure to give CALJIC No. 2.01, alone and especially with the failure to give CALJIC Nos. 2.20 and 2.22, was highly prejudicial.

Had the jurors been instructed that they "must" accept a reasonable interpretation pointing to appellant's innocence, it is reasonably likely they would have reached a different verdict.

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VIII.

THE TRIAL COURT ERRED IN REJECTING PROPOSED PENALTY PHASE INSTRUCTIONS THAT WOULD HAVE GUIDED THE JURY'S DELIBERATIONS IN ACCORDANCE WITH THE LAW.

A. Introduction

A criminal defendant is entitled upon request to specially-drafted instructions that either relate the particular facts of his case to any legal issue, or which pinpoint the crux of his defense. (*People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Rincon-Pineda, supra,* 14 Cal.3d at p. 865; see *Penry v. Lynaugh* (1989) 492 U.S. 302.) In recognition of this right, at the time of appellant's trial, Judicial Administration Standards provided that "[a] trial judge in considering instructions to the jury shall give no less consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of . . . CALJIC . . . ." (Cal. Stds. Jud. Admin., § 5.)[123] It is well-settled that this right to request specially-tailored instructions applies to the penalty phase of a capital trial. (*People v. Davenport, supra,* 41 Cal.3d at pp. 281-283.)

Defense counsel requested ten special instructions that would have provided guidance to the jury during the penalty phase: a modified version CALJIC No. 8.88 (2 CT 547), an instruction that a defendant had a constitutional right not to testify at the penalty phase (special instruction # 7), an instruction that death is the most severe penalty (special instruction #

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[123]Since appellant's trial, the California Judicial Council has adopted the CALCRIM instructions, effective January 1, 2006. The Judicial Council has repealed Judicial Administration Standard 5.

8), an instruction that jurors must not consider deterrence or monetary cost (special instruction # 9), and six special instructions that pinpointed aspects of mitigation under factor (k): special instruction # 1 (effect of execution on appellant's family and friends), special instruction # 2 (potential for rehabilitation), special instruction # 3 (mercy), special instruction # 4 (lingering doubt), and special instruction # 5 (absence of prior felony conviction).[124] (2 CT 524, 528, 542-546, 548-549.) The trial judge refused to give all but one of the instructions – special instruction # 7 – proffered by the defense. (7 RT 2027-2035, 2 CT 528.) The remaining nine rejected defense instructions were correct statements of the law and vital to the jury's understanding of what mitigating evidence could be considered in determining the appropriate penalty. The trial court's refusal to give these instructions deprived appellant of the rights recognized in *Sears* and *Rincon-Pineda*, *supra*, and his rights to due process, a fair trial by jury and fair and reliable guilt and penalty determinations as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and by the applicable sections of the California Constitution. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15.)

B. The Court Committed Prejudicial Error When it Refused to Instruct with the Modified Version of CALJIC No. 8.88.

At the time of appellants trial, the last sentence of paragraph four of CALJIC No. 8.88 read:

> 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

[124]Special instruction # 6 is not the in the record.

death instead of life without parole.

Defense counsel asked that that sentence be replaced with the following language:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances outweigh the mitigating circumstances and that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that death is the appropriate penalty instead of life without the possibility of parole.

(2 CT 547.)

The proposed instruction is not only an accurate statement of the law, but also CALJIC No. 8.88 is an *inaccurate* statement of Penal Code section 190.3, which states that death shall be imposed only if the trier of fact concludes that "the aggravating circumstances outweigh the mitigating circumstances." In implicit recognition of this, the current CALCRIM instructions have modified 8.88 consistent with the language defense counsel requested. The pertinent paragraph of CALCRIM No. 776 provides:

> To return a judgment of death, each of you must be persuaded that the *aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.*

(Italics added.)

During jury instruction discussions, defense counsel explained his concern that the CALJIC instruction failed to include the requirement that the aggravating circumstances outweigh the mitigating circumstances or specify that the issue is whether death is the *appropriate* penalty rather than

merely a warranted penalty. (7 RT 2032.) The prosecutor responded merely that CALJIC is appropriate and any alteration would be confusing. (7 RT 2033.) The court ruled: "8.88 has withstood a number of appeals, and I'm going to give 8.88 as it is given." (*Ibid.*) The court erred in its ruling.

CALJIC instructions may be recommended, but reviewing courts have consistently admonished against giving them undue deference. As this Court explained:

> Though we cite CALJIC No. 12.00 for reference purposes, we caution that jury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent. They should not be cited as authority for legal principles in appellate opinions. At most, when they are accurate, as the quoted portion was here, they restate the law.

(*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7; see also *People v. Alvarez*, *supra*, 14 Cal.4th at p. 217 ["CALJIC 1.00 is not itself the law. Like other pattern instructions, it is merely an attempt at a statement thereof"]; *People v. Mata*, *supra*, 133 Cal.App.2d at p. 21 [CALJIC instructions not "sacrosanct"].)

The Ninth Circuit has expressed similar sentiments:

> Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words in terms comprehensible to the lay person. The texts of standard jury instructions are not debated and hammered out by legislators, but by ad hoc committees of lawyers and judges. Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they belong.

(*McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 841 (en banc).)

When a party seeks an instruction revising or replacing a CALJIC cautionary, limiting or explanatory instruction, the inquiry should focus on whether the requested instruction *better* accomplishes the instructional objective, not simply whether the CALJIC instruction accurately states the law. (See e.g., *People v. Danks* (2004) 32 Cal.4th 269, 306, fn. 11 [even though telling jury not to speak with anyone accurately stated the law, the California Supreme Court recommends more specific instructions on the matter]; *People v. Bolton* (1979) 23 Cal.3d 208, 215-16 [California Supreme Court recommends instruction to fully "counteract" prosecutorial misconduct]; *People v. Duran* (1976) 16 Cal.3d 282, 292 [shackling instruction must not imply defendant is a security risk].) Here, the requested modification better accomplished the instructional objective precisely *because* it more accurately stated the law.

Under CALJIC No. 8.88, the question of whether to impose a death sentence on appellant 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." (7 RT 2045; 2 CT 539.) 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, 391, 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.]" (See *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.

(*Arnold v. State*, *supra*, 224 S.E.2d at p. 392, fn. omitted.)[125]

Appellant acknowledges that this Court has opined, in discussing the 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.)

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[125]The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 202.)

However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. While *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 instant instruction, 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 which 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.)

Similarly, the instructions given, unlike the one proposed, failed to inform the jurors that the central determination was whether the death penalty was the *appropriate* – not simply an authorized – penalty for appellant. 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, upon 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.) The standard CALJIC 8.88 did not make clear this standard of appropriateness.

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" as, *inter alia*, "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, upon 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.

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. A warranted or authorized sentence is not necessary an appropriate one. Use of 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.

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. (7 RT 2045 ["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 appellant to death if they found it "warrant[ed]."

The court's failure to give CALJIC No. 8.88 as modified 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.) denies due process (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346) and must be reversed.

C. The Court Committed Prejudicial Error When it Failed to Instruct That Death Was the Most Severe of the Two Available Penalties and That, in Deciding Penalty, the Jurors Could Not Consider the Deterrent Effect or Monetary Cost of the Two Options.

Death is qualitatively different from all other punishments and is the "ultimate penalty" in the sense of the most severe penalty the law can impose. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *People v. Hernandez* (1988) 47 Cal.3d 315, 362.) Not all of appellant's jurors shared this sentiment. Juror number 2, when asked about his thoughts about life without the possibility of parole as an alternative punishment, stated in his questionnaire that he would not want to spend the rest of his life in prison with no hope of getting out. (1 CT 24.) Juror number 9 stated his belief that "it may be the more cruel punishment." (1 CT 122.) Given these voir dire responses, it was critical that all the jurors were instructed that, regardless of their personal feelings, death is the most severe punishment, and they could not choose it as the lesser of two punishments. And defense counsel submitted such an instruction:

> Some of you expressed the view during jury selection that the punishment of life in prison without the possibility of parole was actually worse than the death penalty.

> You are instructed that death is qualitatively different from all other punishment and is the ultimate penalty in the sense of the most severe penalty the law can impose. Society's next most serious punishment is life in prison without possibility of parole.
>
> It would be a violation of your duty, as jurors, if you were to fix the penalty at death with a view that you were thereby imposing the less severe of the two available penalties.

(Special instruction # 8 (2 CT 548).)

The prosecutor objected to the instruction, arguing that death is "obviously" the worst penalty and the lack of legal authority to elaborate upon that. (7 RT 2034.) The court concluded that CALJIC No. 8.88 adequately covered the issue and refused to give the instruction.

When the state seeks death, courts must ensure that every safeguard designed to guarantee "fairness and accuracy" in the "process requisite to the taking of a human life" is painstakingly observed. (*Ford v. Wainright* (1986) 477 U.S. 399, 414; see also *Gardner v. Florida* (1977) 430 U.S. 349, 357-358.) As a result, the Eighth Amendment requires a "greater degree of accuracy" and reliability. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342; see also *Gore v. State* (Fla.1998) 719 So.2d 1197, 1202 [in death case "both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects"].) "[T]he severity of the death sentence mandates heightened scrutiny in the review of any colorable claim or error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585.)

The court's refusal to give the requested instruction in this case, despite the comments made during jury selection, denied appellant a reliable sentencing determination in violation of the Eighth and Fourteenth

Amendments.

Voir dire responses also demonstrate the need for the requested instruction on deterrence. Special instruction # 9 stated:

> In deciding whether death or life imprisonment without the possibility of parole is the appropriate sentence, you may not consider for any reason whatsoever the deterrent or non-deterrent effect of the death penalty or the monetary cost to the State of execution or of maintaining a prisoner for life.

(2 CT 549.)

In arguing for the instruction, defense counsel pointed out that it, like special instruction # 8, was proposed in response to concerns expressed during jury selection. (7 RT 2034-2035.) A number of the jurors stated their belief that the death penalty is a deterrent to crime. When asked what value the death penalty had, Juror number 5 said "I believe it is a deter[r]ent to crime." (1 CT 66.) Similar responses were given by juror number 7 (1 CT 94 ["would like to think it was a crime deterrent"]), juror number 8 (1 CT 108 ["I believe it could improve society if it makes people realize before they commit the crime they could lose their life"]), juror number 9 (1 CT 122) and juror number 12 (1 CT 164).

The prosecutor argued that the jury would be instructed as to what they could consider, "and I believe that's a sufficient instruction." (7 CT 2035.) The court agreed and refused to give the instruction. (*Ibid.*)

In numerous cases, this Court has recognized that such an instruction may be appropriate if a showing of necessity is made. (*People v. Welch* (1999) 20 Cal.4th 701, 765-766 [noting that a jury was similarly instructed in *People v. Ray* (1996) 13 Cal.4th 313, 355, and footnote 22, and observing that "instructing the jury on this point may be appropriate in

some cases, defense may be entitled to instruction precluding consideration of "deterrent effect" of penalty verdict if showing of necessity is made (e.g., juror comments during voir dire)]; see also *People v. Brown* (2003) 31 Cal.4th 518, 566 [no right to such instruction if no mention of "deterrent effect" during trial]; *People v. Ochoa* (2001) 26 Cal.4th 398, 455-456 [court may refuse this instruction where neither deterrence nor cost has been raised]. In *People v. Thompson* (1988) 45 Cal.3d 86, 132 this Court held that it would not be error to give an instruction "to forestall consideration of deterrence or cost . . . ." But, because no emphasis had been placed on those considerations, this Court concluded that the trial court's refusal to give the instruction "was not prejudicial." (*Ibid.*; see also *People v. Bacigalupo* (1991) 1 Cal.4th 103, 146.) Here, nearly one-half of the jurors believed that the death penalty acted as a deterrent to crime, and no one informed them that this was not a valid consideration in their sentencing deliberations. Consideration of such factors as cost and deterrence amounts to consideration of non-statutory aggravation prohibited by this Court in *People v. Boyd* (1985) 38 Cal.3d 762, 774 [aggravating evidence limited to matters coming within one of the aggravating factors listed in section 190.3], and violated appellant's right to due process of law under the Fourteenth Amendment to the federal Constitution (see *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346) and rendered the penalty verdict unreliable in violation of the Eighth Amendment to the federal Constitution (see *Zant v. Stephens, supra,* 462 U.S. at p. 885.) The requested instruction was designed to protect against jury consideration of matters which are constitutionally irrelevant. and arbitrary. The court's refusal to give special instruction # 9 allowed the jurors to consider extraneous evidence not properly admitted at trial.

D. The Court Improperly Restricted Consideration of Mitigating Evidence When it Refused to Give the Pinpoint Instructions Requested by the Defense.

The Eighth and Fourteenth Amendments require a jury to consider "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plur. opn.).) Relevant mitigating evidence encompasses the "compassionate or mitigating factors stemming from the diverse frailties of humankind." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 304, quoting *Woodson v. North Carolina supra*, 428 U.S. at p. 304.) It includes both "mitigating aspects of the crime" (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 245; see also *Roberts v. Louisiana* (1977) 431 U.S. 633, 637 (per curiam)), and "mitigation that is unrelated to the crime." (See *Lockett*, *supra*, 438 U.S. at p. 605.)

The constitutional requirement that a jury consider mitigating evidence is not satisfied by mere introduction of evidence; jury consideration of mitigating evidence must be ensured through proper instructions. "In the absence of jury instructions . . . that would clearly direct the jury to consider fully [defendant's] mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence. . . ." (*Penry v. Lynaugh*, *supra*, 492 U.S. 302, 323; see also *Mills v. Maryland* (1988) 486 U.S. 367, 374-375; *Hitchcock v. Dugger* (1987) 481 U.S. 393.)

As this Court observed in *People v. Gordon* (1990) 50 Cal.3d 1223, 1277: "[U]nder *Lockett v. Ohio* [*supra*] and its progeny . . . [defendant] . . . had a right to 'clear instructions which not only do not preclude consideration of mitigating factors . . . but which also 'guid[e] and focu[s]

the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . . .'"

A panel of the Ninth Circuit observed, "[i]t follows as night the day that although the jury determines the appropriate weight to be given to the mitigating evidence, the jury 'may not give it no weight by excluding such evidence from their considerations.'" (*McDowell v. Calderon*, *supra*, 130 F.3d at p. 837, citing *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115.) Where the jurors misunderstands their obligation to consider relevant mitigating evidence, "[t]he risk created by this legal derailment [is] that [the jury] would impose the death penalty 'in spite of factors which . . . [might] call for a less severe penalty.'" (*McDowell, supra*, 130 F.3d at p. 838, citing *Lockett v. Ohio supra*, 438 U.S. at p. 605.) "The Supreme Court has identified this risk as one 'unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.' [Citation.]" (*Ibid.*)

In this case, defense counsel requested six special instructions, all of which were accurate statements of law, and which pinpointed aspects of mitigation under factor (k). Special instruction # 1 read:

> Such factors as the effect of defendant's execution on his family and friends is properly considered under the 'character and background' category of this instruction.

(2 CT 542. See *People v. Cooper* (1991) 53 Cal.3d 771, 844 ("defendant may have a constitutional right to present evidence of the effect of a death verdict on his family. . ."); *People v. Pride*, *supra*, 3 Cal.4th at p. 261 (no impropriety in a comment by the prosecutor, who, in arguing for death, referred to the sympathy defendant's family deserved, in contrast to defendant himself.)

Special instruction # 2 read:

> You are instructed that in determining the appropriate penalty for defendant, you may consider as a circumstance in mitigation the defendant's potential for rehabilitation and leading a useful and meaningful life while incarcerated.

(2 CT 543. See *People v. Schmeck* (2005) 37 Cal.4th 240, 302 ["At defendant's request, the jury was instructed that it could consider as a circumstance in mitigation, or in determining the appropriate sentence, evidence that defendant 'has potential for rehabilitation and for leading a useful life while incarcerated in prison for life without the possibility of parole'"].)

Special instruction # 3 read:

> In determining whether to sentence the defendant to life imprisonment without the possibility of parole, or death, you may decide to exercise mercy on behalf of the defendant.

(2 CT 544. See *Nelson v. Nagle* (11th Cir. 1993) 995 F.2d 1549, 1557 [the United States Supreme Court "has shown that mercy has its proper place in capital sentencing requiring 'individual consideration by capital juries' and 'full play for mitigating circumstances' [Citation.]"].[126])

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[126]See also *People v. Lanphear* (1984) 36 Cal.3d 163, 167-168 ("The instructions in this case did not make clear to the jury its option to reject death if the evidence aroused sympathy or compassion. The instructions were inconsistent and ambiguous in advising both that the jury must not be swayed by pity or influenced by sympathy for the defendant, and that it should consider circumstances which 'in fairness and mercy, must be considered in extenuating or reducing the degree of moral culpability.' Because they also failed to tell the jury that any aspect of the defendant's character or background could be considered mitigating and could be a basis for rejecting death even though it did not necessarily lessen culpability, the instructions were constitutionally inadequate.")

Special instruction # 4 read:

> The adjudication of guilt is not infallible and any lingering doubts you may entertain on the question of guilt may be considered by you in determining the appropriate penalty.

(2 CT 545. See *People v. Kaurish* (1990) 52 Cal.3d 648, 705 [court instructed the jury that it could consider lingering doubt of defendant's guilt to be a factor in mitigation]; *People v. Terry* (1964) 61 Cal.2d 137, 147 [jurors may consider their doubts concerning defendant's guilt at the penalty phase of the trial]. But see *Franklin v. Lynaugh* (1988) 487 U.S. 164, 188 [the sentencer in a capital case may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense; however, that edict does not mandate reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt].)

And special instruction # 5 read:

> There has been no evidence presented that defendant has been convicted of any prior felony. This circumstance should therefore be viewed as a circumstance in mitigation.

(2 CT 546. See *People v. Waidla* (2000) 22 Cal.4th 690, 712 [defendant relied on guilt phase evidence for mitigation, which included no prior felony convictions].)

Failure to give these requested instruction violated appellant's constitutional rights to due process and a reliable verdict. (U.S. Const., 8th and 14th Amends; Cal. Const., art. 1, §§ 7, 15.)

Counsel explained that he believed that without the requested instructions, the jurors would not know that the circumstances listed fell under factor (k). "[U]nless the jury knows that that at least is what that

Factor K is talking about . . . they can simply put it aside and ignore it if they want to, as though there's no legal force binding." (7 RT 2027.) As to rehabilitative possibility, counsel stated, "I can't see how the jury would feel that they really are authorized or warranted by law to consider that." (7 RT 2028.) Counsel had the same position regarding special instructions 3, 4 and 5: "I feel that it would be appropriate because of the evidence that we have to simply tell the jury that these things that you have seen are recognized by the law." (7 RT 2031.) The court stated it believed that the pinpoint instructions highlighted different factors and gave them weight, "which I think is inappropriate." (7 RT 2030.) The court ruled, "I have rejected those instructions." (7 RT 2032.) The court erred.

Defense counsel's concerns about the jurors' ability to glean the scope of factor (k) have been confirmed in a study of California jurors who had actually served in capital cases. The study found that many of the jurors who were interviewed simply dismissed mitigating evidence that had been presented during the penalty phase because they did not believe it "fit in" with the sentencing formula that they had been given by the judge, or because they did not understand that it was supposed to be considered mitigating. (Haney, et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) 50 (no. 2) J. of Social Issues 149, 167-168.)

Appellant acknowledges that there are cases holding that some version of the factor (k) instruction is sufficient to satisfy *Lockett, supra*, and its progeny, and that no additional instruction identifying other mitigating factors is necessary even if the evidence suggests them. (See, *Boyde v. California, supra*, 494 U.S. at pp. 381-382; *People v. Kaurish*,

supra, 52 Cal.3d at p. 705.) These cases assume that a jury will understand that the universe of potential mitigating factors is entirely open-ended, and is not limited either by negative implication from, or by analogy to, the listed factors. Empirical evidence suggests that assumption is wrong. In another study he conducted, Professor Haney found the "expanded" factor (k) instruction to be the least accurately understood of California's eleven sentencing factors, with 36 percent of his respondents concluding that it is an aggravating, not a mitigating factor. (Haney & Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law & Human Behavior 411, 424.) The fact that 36 percent of the respondents erroneously concluded that factor (k) is an aggravating factor is merely the tip of the iceberg.

> Other jurors recognized mitigating evidence as such but then rejected or limited its significance by imposing additional conditions on the concept that would make it difficult to ever influence a capital verdict. Thus fully 8 out of the 10 California juries included persons who dismissed mitigating evidence . . . .

(Haney, et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death, supra*, at pp. 167-168.)

Insofar as these studies indicate that the lack of understanding of factor (k) is attributable to a profound lack of understanding of what "mitigation" means, (Haney & Lynch, *ibid.*), the constitutional harm is even more pronounced.

When state law gives the jury a role in sentencing, the defendant has a liberty interest, protected under the due process clauses of the Fifth and Fourteenth Amendments, in having the sentence imposed by a jury accurately informed concerning the scope of their sentencing function

under state law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343; see also *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301; *Fetterly v. Paskett* (9th Cir. 1994) 15 F.3d 1472, 1479-1481 (conc. opn. of Trott, J.).) The requested instructions were proffered as a means of "guid[ing] and focus[ing] the jury's objective consideration of the particularized circumstances of the . . . individual offender. . . ." (See *People v. Gordon*, *supra*, 50 Cal.3d at p. 1277, quoting *Spivey v. Zant* (5th Cir. 1981) 661 F.2d 464, 471.) The court erred in refusing to give them.

E. The Trial Court's Instructional Errors Created an Unfair Balance of Penalty Phase Instructions Favoring Death.

Allowing the decision of life or death to turn on a misunderstood concept is inconsistent with the degree of reliability required by the Eighth Amendment:

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.

(*Mills v. Maryland*, *supra*, at pp. 383-384.)

The due process clause does not generally compel any specific instruction in criminal cases. It does, however, "speak to the balance of forces between the accused and his accuser." (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.) Failing to give the requested instructions was prejudicial. The Haney studies demonstrate a reasonable probability that, in the absence of the requested pinpoint instructions, the jurors did not give full mitigating weight to the evidence. Had the jury been instructed in how to consider the mitigating evidence before it, there is a reasonable

possibility of a different verdict. Accordingly, the trial court's refusal to give requested instructions was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The judgement of death must be reversed.

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IX.

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

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

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

A. Penal Code Section 190.2 Is Impermissibly Broad.

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher, supra*, 47 Cal.3d at p. 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires

a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens*, *supra*, 462 U.S. at p. 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 19 special circumstances.

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

B. The Broad Application of Section 190.3(a) Violated Appellant's Constitutional Rights.

Penal Code section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 2 CT 529; 7 RT 2040.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the

defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

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

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

C. The Use of Unadjudicated Criminal Activity as Aggravation, Factor (b), Violated Appellant's Constitutional Rights to Due Process, Equal Protection, Trial by Jury and a Reliable Penalty Determination.

The court instructed appellant's jury that they could consider in

aggravation, "the presence or absence of criminal activity by the defendant, other than the crime 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." (7 RT 2041; 2 CT 529.

The admission of evidence of previously unadjudicated criminal conduct as an aggravating factor justifying a capital sentence violated appellant's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment and a reliable determination of penalty under the Eighth Amendment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance under state constitution including rights to due process and impartial jury]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments].) Admission of the unadjudicated prior criminal activity denied appellant the right to a fair and speedy trial (indeed, there was no meaningful "trial" of the prior "offense") by an impartial and unanimous jury, effective confrontation of witnesses, and equal protection of the law. An instruction expressly permitting the jury to consider such evidence in aggravation violates these same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital proceeding violated appellant's equal protection rights under the state and federal Constitutions. (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) And because the state applies its law in an irrational manner, using this

evidence in a capital sentencing proceeding also violated appellant's state and federal rights to due process of law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; U.S. Const., 6th Amend.; Cal. Const., art. I, §§ 7 and 15.)

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

1. Appellant's death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt.

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (See 2 CT 538-539.)

Apprendi v. New Jersey, *supra*, 530 U.S. at p. 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 530 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 871 [California's determinate sentencing law, which authorized judge, not jury, to find facts exposing defendant to elevated upper term sentence violated defendant's right to trial by jury], now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to

impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 2 CT 538-539.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely,* and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14) and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi, Blakely,* and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi, Ring, Blakely,* and *Cunningham.*

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are

true, but that death is the appropriate sentence. This court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some burden of proof is required, or the jury should have been instructed that there was no burden of proof.

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

CALJIC Nos. 8.85 and 8.88, the instructions given here (2 CT 529, 538), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of

proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

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

3. Appellant's death verdict was not premised on unanimous jury findings.

a. Aggravating factors

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

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst, 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 its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth

Amendment's guarantee of a trial by jury.

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

b. Unadjudicated criminal activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was specifically instructed that unanimity was *not* required. (CALJIC No. 8.87; 2 CT 532.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra*, 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585. In this case, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant Pamela Johnson and Cynthia Johnson.

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

reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard.

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (2 CT 539.) Defense counsel recognized that the phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing, and requested that the court modify CALJIC No. 8.88 to conform with the language Penal Code section 190.3 [death shall be imposed only if "the aggravating circumstances outweigh the mitigating circumstances"]. (2 CT 547. See Argument VII.-B., *supra*.) The court refused. (7 CT 2033.) The instruction, are read to appellant's jurors, violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

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

5. The instructions failed to inform the jury that the central determination is whether death is the appropriate punishment.

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same. (2 CT 539.) Again, defense counsel asked the court to modify CALJIC No. 8.88 to conform with constitutional standard. (2 CT 547.) Again, the court refused. (7 RT 2033.)

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania supra*, 494 U.S. at p. 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The instructions failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole.

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore*, *supra*, 43 Cal.2d at pp. 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See

Wardius v. Oregon, supra, 412 U.S. at pp. 473-474.)

7. The instructions violated the Sixth, Eighth and Fourteenth Amendments by failing to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances.

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) ___ U.S. ___ [127 S.Ct. 1706, 1712-1724]; *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Lockett v. Ohio, supra*, 438 U.S. at p. 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

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

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question

that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra,* 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The penalty jury should be instructed on the presumption of life.

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

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

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an

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

E. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review.

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

F. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights.

1. The use of restrictive adjectives in the list of potential mitigating factors.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen.

Code, § 190.3, factors (d) and (g); 2 CT 529-530) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The failure to delete inapplicable sentencing factors.

CALJIC No. 8.85, factors (c)[127], (d), (e), (f), (g), (h) and (j) were inapplicable to appellant's case. The trial court failed to omit those factors from the jury instructions likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 36 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (2 CT 529.) The Court has upheld this practice. (*People v.*

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[127]Appellant had no prior felony convictions, and defense counsel asked that the court give an instruction that the absence of a prior felony conviction should be viewed as a circumstance in mitigation. (2 CT 546 [defense special instruction # 5].) The court refused. (7 RT 2032.)

Hillhouse (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport, supra*, 41 Cal.3d at pp. 288-289). Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black, supra*, 503 U.S. at pp. 230-236.)

The very real risk that the jurors might consider some of the mitigating factors in aggravation was demonstrated by the trial court's actions in this case. During the hearing on appellant's motion for modification of the sentence, the court went through each of the factors and expressly stated that it considered factors (g) and (j) in aggravation. (7 RT 2105 ["As far as that factor [subsection g], the Court finds this to be a factor in aggravation. * * * This court finds that this defendant was the major participant, and he intentionally shot and killed the victim. This [subsection j] is a circumstance in aggravation"].)[128]

Given the court's actions in this case, appellant asks the court to reconsider its holding that the court need not instruct the jury that certain

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[128]While the court did not specifically state that it considered other mitigating factors in aggravation, its words suggest it did. Regarding factor (h), mental disease, defect, or intoxication, the court stated, "[t]here is no evidence of that. On the contrary, the evidence show that the defendant knew exactly what he was doing." (7 RT 2105.)

sentencing factors are only relevant as mitigators.

G. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty.

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

H. The California Capital Sentencing Scheme Violates the Equal Protection Clause.

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

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules

of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the court to reconsider.

I. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms.

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

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X.

CUMULATIVE GUILT AND PENALTY PHASE ERRORS REQUIRE REVERSAL OF THE GUILT JUDGMENT AND PENALTY DETERMINATION.

In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. (See *In re Avena* (1996) 12 Cal. 4th 694, 772, fn.32 (dis. opn. of Mosk, J.) ["Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc), *cert. denied* (1979) 440 U.S. 974 ["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.) 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.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

Appellant has argued that a number of serious constitutional errors occurred during the guilt phase of trial and that each of these errors, alone, was sufficiently prejudicial to warrant reversal of appellant's guilt judgment. It is in consideration of the cumulative effect of the errors, however, that the true measure of harm to appellant can be found. The

combination of these errors was greater than the sum of its parts and resulted in egregious error mandating reversal.

The death judgment rendered in this case must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of trial. (See *People v. Hayes*, *supra*, 52 Cal.3d at p. 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) This Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact during penalty trial. (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [state law 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].) Error of a federal constitutional nature requires an even stricter standard of review. (*Yates v. Evatt* (1991) 500 U.S. 391, 402-405; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Moreover, when errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

In this case, appellant has shown several errors in the guilt and penalty phases. Even if this Court were to determine that no single penalty error, by itself, was prejudicial, the cumulative effect of these errors sufficiently undermines the confidence in the integrity of the penalty phase proceedings so that reversal is required. There can be no doubt that George

Lopez Contreras was denied the fair trial and due process of law to which he is entitled before the State can claim the right to take his life. Reversal is mandated because respondent cannot demonstrate that the errors individually or collectively had no effect on the penalty verdict. (*Skipper v. South Carolina*, *supra*, 476 U.S. at p. 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341; *Hitchcock v. Dugger*, *supra*, 481 U.S. at p. 399.)

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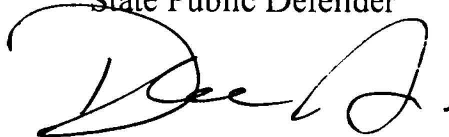
CONCLUSION.

For the reasons set forth above, the judgment of conviction entered against appellant George Lopez Contreras for the crimes of felony murder and robbery, the true finding of the robbery-felony murder special circumstance, and the judgment of death entered in this case, should be reversed.

DATED: June 9, 2008

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2)

I, Denise Anton, am the Supervising Deputy State Public Defender assigned to represent appellant GEORGE LOPEZ CONTRERAS in this Appellant's Opening Brief. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 43, 561 words in length.

DENISE ANTON
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. George Lopez Contreras* S058019

I, GLENICE FULLER, 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; that I served a true copy of the attached:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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

Office of the Attorney General
Attn: Brian Smiley, D.A.G.
P. O. Box 94255
Sacramento, CA 94244-2550

George Lopez Contreras
(Appellant)

Habeas Corpus Resource Center
Attn: Shelly Sandusky, Adrienne Toomey and Barbara Saavedra
303 Second Street, Suite 400 South
San Francisco, CA 94107

Each said envelope was then, on June 9, 2008, 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 June 9, 2008, at San Francisco, California.

DECLARANT