No. S062180

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD VALDEZ, Defendant and Appellant.	

APPELLANT'S OPENING BRIEF

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

THE HONORABLE GEORGE W. TRAMMELL, III
AND THE HONORABLE ROBERT ARMSTRONG,
JUDGES PRESIDING

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TEXT AND OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	No. S062180
Plaintiff and Respondent,	)	(Super. Ct. No. BA108995)
v.	)	
RICHARD VALDEZ,	)	
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a final judgment of death. (Pen. Code, § 1239, subd.(b); Cal. Rules of Court, rule 13.)[1]

STATEMENT OF THE CASE

On September 20, 1995, a Los Angeles County grand jury returned a secret indictment against appellant Richard Valdez ("appellant") and three co-defendants – Daniel Logan, Jimmy Palma, and Anthony Torres – charging them with five counts of murder under Penal Code section 187, subdivision (a) (Counts II, III, IV, V, and VI).[2] (CT 1135-1140; 1149.)[3]

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

[2] Co-defendant Torres was alone charged in Count I with a separate (continued...)

The indictment further alleged the special circumstance of multiple murder, pursuant to section 190.2, subdivision (a)(3). (CT 1140.) As to each of the counts, it was further alleged that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members (§§ 186.22, subd. (b)(1) and 186.22, subd. (b)(2)); that a principal in the offense was armed with a firearm (§ 12022, subd. (a)(1)); and that the defendants personally used a handgun in the commission of the offense (§§ 1203.06, subd. (a)(1) and 12022.5, subd. (a)). (IV CT 1135-1140, 1149.)

On October 26, 1995, appellant was arraigned, entered pleas of not guilty, and denied all of the allegations. (1 RT 25; IV CT 1165.)

On December 6, 1995 and December 11, 1995, evidence was presented to the Los Angeles County Grand Jury which resulted in the

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[2] (...continued)
count of murder arising out of a separate incident which was alleged to have occurred on July 2, 1994. (IV CT 1135.)

[3] In this brief appellant abbreviates the citations to the record as follows: "RT" is the reporter's transcript on appeal; "CT" is the clerk's transcript on appeal; "SuppCT" refers to the clerk's supplemental transcripts on appeal. For all citations, appellant gives the volume number before and the page number after the transcript, e.g., "I CT 6-7" refers to the first volume of the clerk's transcript at pages 6-7. The clerk's supplemental transcript on appeal consists of five sets of materials; these are referenced by the volume of the supplemental transcript, followed by the supplemental clerk's transcript number and page citation, e.g., "1 SuppCT III 107." Appellant follows the court reporter's system of labeling the transcript volumes: roman numerals are used for the volume numbers of the clerk's transcript, and arabic numerals are used for the volume numbers of the reporter's transcript and the volume numbers of the clerk's supplemental transcripts.

indictment of two additional co-defendants, Jose Ortiz and Luis Maciel. (IV CT 921-950, 968-1085.)

On December 12, 1995, a Los Angeles County grand jury returned a secret amended indictment charging Maciel, Ortiz, and the four original co-defendants – appellant, Logan, Palma, and Torres – with five counts of murder under section 187 (Counts 2, 3, 4, 5, and 6).[4] (IV CT 1141-1146.) The indictment further alleged the special circumstance of multiple murder, pursuant to section 190.2, subdivision (a)(3). (CT 1147.) As to each of the counts, it was further alleged that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members (§§ 186.22, subds. (b)(1) and (b)(2)); that a principal in the offense was armed with a firearm (§ 12022, subd. (a)(1)); and that the defendants personally used a handgun in the commission of the offense (§§ 1203.06, subd. (a)(1) and 12022.5, subd. (a)). (IV CT 1141-1146.)

On June 13, 1996, the People announced the intention to seek the death penalty against all six defendants. (V CT 1317; 2 RT 337.)

On September 20, 1996, the trial court determined that appellant and co-defendant Palma would be tried together before a single jury. (4 RT 788.)

Jury selection began on September 30, 1996. (IV CT 1615; 5 RT 814.)

The guilt phase of the proceedings commenced on October 21, 1996. (VI CT 1646.) On October 29, 1996, the trial court denied a defense

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[4] Co-defendant Torres was alone charged in Count 1 with a separate count of murder arising out of a separate incident. (IV CT 1135.)

motion for mistrial after a prosecution witness refused to answer questions on cross-examination about his surreptitious surveillance of a meeting of the Mexican Mafia about which he testified on direct examination. (18 RT 2373-2382; VI CT 1664.)

The jury commenced deliberations on November 18, 1996, and continued to deliberate on November 19, 20, 21, 22, 25, 26, and 27, 1996. (VI CT 1685, 1688, 1691, 1693, 1695, 1698, 1701, 1702.) During the first four days of deliberations, the jury sent out seven notes to the trial court requesting readback of various witnesses' testimony or the re-playing of videotape exhibits.[5] On November 25, 1996, the sixth day of deliberations, the jury informed the trial court that it was at an "impasse." (VI CT 1696; 33 RT 3789.) The trial court denied defense motions for mistrial and instructed the jury to resume its deliberations. (VI CT 1698; 33 RT 3793-3797.) On November 27, 1996, the eighth day of deliberations, the trial court excused a juror who indicated that she was unsure whether she could be "totally objective" deciding the case. (34 RT 3819-3820.) The trial court denied a defense motion for mistrial related to the juror's excusal. (34 RT 3838-3839.)

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[5] See VI CT 1683 (jury note dated November 18, 1996 requesting readback of testimony of Witness No. 9 and testimony related to telephone records for April 22 and 23, 1995); 1686 (jury note dated November 19, 1996 requesting readback of testimony of Elizabeth Torres); 1687 (jury note dated November 19, 1996 requesting that a videotape exhibit be re-played twice); 1689 (jury note dated November 20, 1996 requesting readback of witness Dale Higashi's testimony regarding People's Exhibit Numbers 59 and 70); 1690 (jury note dated November 20, 1996 requesting readback of testimony of Witness No. 14 and of Daniel Hooker); 1692 (jury note dated November 21, 1996 requesting readback of testimony of Witness No. 16 and Stephen Davis); 1694 (jury note dated November 22, 1996 requesting readback of testimony of Witness No. 16 and Stephen Davis).

On December 4, 1996, the jury returned verdicts finding appellant and co-defendant Palma guilty on all counts, and finding all the other allegations and special circumstances true. (VI CT 1795-1799, 1800-1804, 1825-1834.)

On December 9, 1996, the penalty phase commenced. (VII CT 1842.) The prosecution and both defendants waived opening statements. (VII CT 1842.) The prosecution rested its case-in-chief at the penalty phase without presenting any additional evidence in aggravation against appellant Valdez. (38 RT 3938.) Appellant Valdez's case in mitigation began on December 10, 1996, and concluded on December 11, 1996. (VII CT 1843, 1844.) The jury conducted deliberations on December 12 and 13, 1996. (VII CT 1845, 1883.) On December 13, 1996, the jury returned verdicts of death against both appellant and co-defendant Palma. (VII CT 1883-1884.)

On January 10, 1997, the case was transferred to the Honorable Robert W. Armstrong for proceedings related to motions for new trial and sentencing. (VII CT 1891.) On June 11, 1997, Judge Armstrong denied appellant's automatic application for modification of the verdict pursuant to section 190.4, subdivision (e), and sentenced appellant to death. (VII CT 1945-1946; 43 RT 4398-4431.)

This appeal is automatic under section 1239.

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STATEMENT OF FACTS

GUILT PHASE

I. The Prosecution's Case

A. The Murders of Anthony "Dido" Moreno, Gustavo "Tito" Aguirre, Maria Moreno, Laura Moreno, and Ambrose Padilla on April 22, 1995

1. The Events at 3843 Maxson Road on the Afternoon of April 22, 1995

In April 1995, Anthony "Dido" Moreno – a heroin addict, ex-convict, and former member of the Mexican Mafia prison gang – lived with his sister Maria Moreno and her two children, five-year-old Laura Moreno and six-month-old Ambrose Padilla, in a one-bedroom residence at 3843 Maxson Road in El Monte. (15 RT 1990-1991.)

On the afternoon of April 22, 1995, Dido and his brother, "Witness No. 15," made three trips to Arcadia to sell stolen property to a "fence" to get money to buy drugs.[6] (15 RT 1992.) They used the proceeds to buy tar heroin. (15 RT 1992, 1997.) Witness No. 15 was a member of a street gang called El Monte Flores and he bought the heroin from another El Monte Flores gang member. (15 RT 1992.) After each trip, Witness No. 15

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[6] As set forth *infra* in Argument 1 [filed under seal], during pretrial proceedings the trial court granted the People's motion to redact the names of sixteen potential prosecution witnesses from the reporter's transcripts, to assign each witness a designation such as "Witness No. 1," "Witness No. 2," etc., and to replace each reference to these witnesses' names in the record with their assigned numerical designation. Nine of these 16 witnesses – Witness Nos. 1, 2, 3, 8, 9, 13, 14, 15, and 16 – testified against appellant at trial. In this brief, appellant refers to these witnesses by the numerical designations by which they are identified in the redacted reporter's transcripts.

and Dido returned to the residence on Maxson Road and injected the heroin in the bathroom. (15 RT 1995-97.)

At about 2:30 p.m. that day, a man named Luis Maciel and two younger men came to the house. (15 RT 1997, 2008.) Witness No. 15 had known Maciel since 1990. (15 RT 1998.) Maciel had also been a member of the El Monte Flores street gang and was known by the gang moniker "Pelon." (15 RT 1998; 19 RT 2475.) Witness No. 15 assumed the two men with Maciel were also members of the El Monte Flores gang because one of them had the letters "EMF" tattooed on his arm. (15 RT 2027-2028.) One of the men had "short dirty blonde hair," while the other had "short, short hair."[7] (15 RT 2054.)

According to Witness No. 15, Gustavo "Tito" Aguirre – a friend of the Moreno brothers who was also heavily involved in drug dealing – ran into the bathroom when Maciel arrived at the house.[8] (15 RT 2011-2012, 2041.) While Maciel and the two younger men spoke to Witness No. 15,

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[7] During his closing argument at the guilt phase, the prosecutor acknowledged that the People did not claim that appellant or his co-defendant, Jimmy Palma, accompanied Maciel to the victims' residence that afternoon. (27 RT 3414.) In fact, the description of the first of the two men who were with Maciel was not consistent with either appellant or Palma. Neither Palma nor appellant had "short dirty blonde hair" or an "EMF" tattoo on his arm. (See 1 SuppCT IV 109 [photo of Palma].)

[8] Witness No. 15 testified that approximately a month or two before the charged murders, Tito and a man named Tony Cruz – both of whom were heroin addicts – had robbed Hispanic drug dealers, including some who were receiving "protection" from the Mexican Mafia. (15 RT 2019, 2042, 2044.) Witness No. 15, who witnessed one of those robberies (15 RT 2019), said that it "would be a real slap in the Mexican Mafia's face" for anyone to steal from someone who was paying for the Mexican Mafia's protection. (15 RT 2062.)

Dido walked away. (15 RT 2011.) Witness No. 15 and Maciel asked each other about how their families were doing; then Maciel asked Witness No. 15 if he had seen "Tito" around town. (15 RT 2010, 2012.) Witness No. 15 admitted he had seen Tito but did not say that Tito was hiding in the house. (15 RT 2012.)

Although Witness No. 15 thought Maciel seemed nervous, he didn't sense anything unusual at that time. (15 RT 2012-2013.) After a time, Maciel "broke out some drugs" and asked Witness No. 15 and Dido if they wanted to try some black tar heroin. (15 RT 2013.) Maciel asked them to try the heroin and then page him if they wanted more. (15 RT 2016.)

Witness No. 15 considered Maciel's offer of free heroin "suspicious," and figured that it was probably a "hot shot" – i.e., that the drugs were doctored with arsenic or some other poison. (15 RT 2013, 2021, 2035.) In the five years Witness No. 15 had known him, Maciel had never offered him free heroin before. (15 RT 2017.) Witness No. 15 later tried a small portion of the heroin and concluded it was not poisoned, so he and his brother injected it. (15 RT 2021.)

Several of the Morenos' neighbors on Maxson Road observed men visiting the house that afternoon. However, none of the neighbors saw anyone who resembled appellant and none of them identified him at trial as one of the men they saw that day. (13 RT 1697.)

Sometime around 12 or 12:30 in the afternoon, a neighbor who was having a yard sale at 3841 Maxson Road, Witness No. 9, observed a Jeep and a car arrive in the neighborhood. (13 RT 1685.) The Jeep parked in the street, blocking Witness No. 9's driveway, while the car parked in the driveway to the "other house." (13 RT 1685, 1688.) The four men in the

Jeep never got out; they remained inside with the engine running. (13 RT 1686-1687.)

Witness No. 9 saw several bald Hispanic men wearing white t-shirts get out of the car.[9] (13 RT 1688-1689.) She described the men as "cholos" and said that they made her nervous. (13 RT 1689.) She only looked at them quickly and then turned away, so she did not know if they went toward the house in the front or the apartment in the back. (13 RT 1689-1690) She next saw them come "from the same place" and go to their car, and then drive away. (13 RT 1691-1692, 1712.)

Witness No. 9 noticed that one of the men had a tattoo on his neck but she could not see what the tattoo was. (13 RT 1696.) She also observed that the man sitting on the driver's side of the Jeep had a heavy build. (13 RT 1713.)

A second neighbor who lived at 3849 Maxson Road, Witness No. 8, observed several men next door when she came home from work that day at about 2:00 or 2:30 p.m. (13 RT 1719, 1723.) As she went into her house she saw "about four" people speaking loudly. (13 RT 1722, 1724.) She had not seen them before and she could not see to whom they were speaking. (13 RT 1723.) She also did not notice any vehicles parked in the area. (13 RT 1724.) She did not overhear any of the conversation between the men and whomever they were speaking to. (13 RT 1725.) After the men left, Witness No. 8 saw "Tito," who appeared nervous and scared. (13 RT 1732.)

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[9] At trial, Witness No. 9 could not identify any of the men that she saw that day, but was positive that none of them were in court. (13 RT 1697.)

2. The Events at 3843 Maxson Road Later That Night

Sometime after 10 p.m. that night, several neighbors and other people in the vicinity heard or saw activity at the residence at 3843 Maxson Road.

Witness No. 1 was sitting in a truck outside a party on Maxson Road when at around 10 p.m. she heard what sounded like firecrackers. (14 RT 1916-1917.) As the truck backed out onto Maxson Road, Witness No. 1 looked around and saw a parked car and some people running out of a driveway. (14 RT 1917-1918.) Witness No. 1 could only see the driver inside the car but she saw somebody else standing by a passenger door. (14 RT 1918.) She then saw one or two other people come from the driveway and get into the car. (14 RT 1918.) She could not describe the people who got into the car. (14 RT 1918.)

Witness No. 1 did not see the car move or leave. (14 RT 1918.) The car was small, and she thought it could have been a Nissan because her friend has a similar car. (14 RT 1919.) The car "might have been" blue but looked darker because she was looking through the tinted window of the truck. (14 RT 1919-1920.)

Witness No. 2 was at a residence across the street when he saw a car park and block the driveway to the Morenos' residence. (14 RT 1925.) He saw three Hispanic men get out of the car, open the gate, and walk toward the house, but he did not see them after that because it was dark. (14 RT 1926-1927.) One of them was carrying a chrome or silver-colored automatic gun. (14 RT 1932.) One of the men wore a black sweater with "rain-washed" navy jeans, and another wore khaki pants and a white shirt. (14 RT 1933.) After the men passed out of sight, Witness No. 2 heard gunshots and saw the three men run back to the car. (14 RT 1929.) The

men got into the car and drove away, heading south, with the lights off. (14 RT 1929-1930.)

Witness No. 2 said the vehicle was a brown four-door 1985 to 1987 Nissan Maxima. (14 RT 1930-31.) On July 5, 1995, Witness No. 2 saw a car in the parking lot of the Temple Sheriffs' Station that he believed was the same car he saw on April 22nd. (14 RT 1932.)

Witness No. 3 was at a party on the evening of April 22, 1995, when he saw a car with its lights off chasing a man down Maxson Road. (14 RT 1935.) The man was someone he knew as "Tito," and the car was a four-door Nissan Maxima. (14 RT 1936-1937.) Witness No. 3 saw Tito run down the driveway toward his house and the Maxima stop in front of the driveway. (14 RT 1938.) Three men got out of the car and went to the back of the house while the driver stayed inside the car. (14 RT 1939.) One man carried a .45 or .9 millimeter handgun. (14 RT 1946.) Witness No. 3 heard about seven or eight gunshots and then saw the same three men run back to the car. (14 RT 1939.) The car quickly drove off, heading south, with its lights off. (14 RT 1942.)[10]

Witness No. 8, who lived at 3849 Maxson Road, testified that she heard shots at 3843 Maxson Road some time on the night of April 22, 1995. (13 RT 1726.) Prior to the shots, Witness No. 8 could hear her neighbor Maria and a male talking outside. (13 RT 1726-27.) There was a van in the driveway blocking Witness No. 8's view but she could see a portion of

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[10] On July 5, 1995, Witness No. 3 viewed a car at the Temple Sheriffs' Station which he said looked the same as the Nissan Maxima he saw on April 22nd. (14 RT 1943.) However, he testified that he could not identify the three men if he saw them again and could not recall their clothing, height, or race or ethnicity. (14 RT 1939-40, 1946.)

Maria's hair. (13 RT 1728.) Witness No. 8 did not see anyone shooting, but she did see Maria trying to close her door after the first shot. (13 RT 1730.) Witness No. 8 called the police. (13 RT 1731.)

3. The Police Respond to the Crime Scene

At approximately 10:34 p.m., the El Monte Police Department received a 911 call from a person at 3849 Maxson Road regarding a "possible shooting victim." (17 RT 2198.) Police officer Ronald Nelson arrived at 3849 Maxson Road at approximately 10:40 p.m. and saw several people, including a small child and a woman, on the porch. (17 RT 2199.) Officer Nelson was directed to the residence next door, which had two separate units. (17 RT 2200.) As Officer Nelson approached the rear unit, he saw a Hispanic man, who was subsequently identified as Anthony Moreno (22 RT 2945), lying in a pool of blood on the north side of the residence, right outside the door. (17 RT 2200; Exh. Nos. 36-B, 37-B.)

Four other victims were found shot to death inside the one-room residence. An adult woman, subsequently identified as Maria Moreno (22 RT 2944), was lying face down on the floor inside the front door of the residence. (17 RT 2202, 2210; 22 RT 2944; Exhs. 37-A, 37-B.) A small child of "toddler age" was found lying face down directly next to Maria Moreno's body. (17 RT 2202.) A "very small child" with a gunshot wound through the eye was lying on his back on the floor. (17 RT 2202.) An adult man, Gustavo "Tito" Aguirre, was lying face down between the bed and the wall. (17 RT 2202-2203.)

Two children who lived at the residence were found alive: the child who had been next door when Nelson arrived at the scene, and a three-year-old girl who was found hiding in a corner of the one-room residence. (17 RT 2204.)

4. Crime Scene Investigation

Stephen Davis, a deputy sheriff with the Los Angeles County Sheriff's Department assigned to the homicide investigation bureau, processed the crime scene at 3843 Maxson Road. (22 RT 2933-2934.) Davis recovered three .45 caliber shell casings from outside the doorway to the residence, near the body of Anthony Moreno. (19 RT 2440; 22 RT 2935, 2941.) He recovered two additional .45 caliber casings from inside the residence, one of which was recovered near the body of Maria Moreno. (22 RT 2937, 2944.)

Davis also recovered an expended .45 caliber bullet on the floor near a blue and white striped pillow and a white "infant blanket" with bloodstains on it. (19 RT 2438; 22 RT 2941, 2946-2948.) Davis collected three bullet fragments (22 RT 2937, 2940-2941) that were subsequently identified as the copper jacket and lead core from a .45 caliber bullet. (19 RT 2436.)

One of the adult male victims had a small amount of white or brown powder hidden in his pocket. (22 RT 2958.) The powder was never tested but was assumed to be narcotics. (22 RT 2958.) A syringe was also found inside the house. (22 RT 2958.)

On April 26, 1995, Dale Higashi, a criminalist with the Los Angeles County Sheriff's Department, recovered an expended .38/.357 Magnum caliber bullet from the east wall of the bathroom of the residence. (19 RT 2419-2420; 22 RT 2959.)

5. The Autopsies

Dr. Lakshmanan Sathyavagiswaran, chief medical examiner and coroner for the County of Los Angeles, testified about autopsies performed by pathologists with his office. (20 RT 2625-2665.)

On April 25, 1995, Dr. Yin, a visiting pathologist with the Los Angeles County Coroner's Office, performed an autopsy of Anthony "Dido" Moreno. (20 RT 2628-2632.) Anthony Moreno died of a single gunshot that entered his right ear and exited the left side of his head. (20 RT 2629.) The gunshot was a "contact" wound, meaning the gun was in contact with the skin when it was fired. (20 RT 2629.) Fragments of the bullet were recovered during the autopsy. (20 RT 2631.)

Dr. Golden of the Los Angeles County Coroner's Office performed an autopsy on Gustavo "Tito" Aguirre. (20 RT 2633-2639.) Aguirre had suffered a fatal gunshot wound to the head and a second non-fatal gunshot wound to the left shoulder. (20 RT 2634-2635.) The bullet from the wound to the head, a contact wound, was recovered from his brain and identified by a ballistics expert as a .357/.38 caliber bullet. (19 RT 2426-2427; 20 RT 2634; 22 RT 2939.) The other bullet entered Aguirre's left shoulder and exited through the left side of his back. (20 RT 2635.)

Drs. Gil and Rogers of the Los Angeles County Coroner's Office performed an autopsy on Maria Moreno. (20 RT 2640-2646.) She had suffered a fatal gunshot to the head and a second non-fatal gunshot to the buttock. (20 RT 2641.) The head wound was termed an "intermediate range wound," meaning the gun was fired a few inches to a foot away from her head. (20 RT 2641.) The bullet was recovered during the autopsy from the right side of her head. (20 RT 2641.) A ballistics expert identified the

bullets and bullet fragments recovered from Maria Moreno's wounds as being .45 caliber bullets. (19 RT 2434-2435; 22 RT 2940.)

Dr. Chin Wah of the Los Angeles County Coroner's Office performed an autopsy of Laura Moreno, who was born on December 9, 1989. (20 RT 2649.) Laura Moreno died of a gunshot wound that entered her back and exited the front of her chest. (20 RT 2650.) The trajectory of the bullet was slightly upward. (20 RT 2650.) Dr. Sathyavagiswaran testified that several scenarios were consistent with the upward trajectory of the bullet: (1) that she was shot while lying on the ground; (2) the shooter was bending forward in a running or walking position; or (3) the victim was leaning forward and the shooter fired at approximately the same level as the entrance wound itself. (20 RT 2656-2657.)

Finally, Dr. Golden of the Los Angeles County Coroner's Office performed an autopsy on Ambrose Padilla, who was born on October 4, 1994. (20 RT 2660-2664.) Padilla died of a "through-and-through" gunshot wound to the head and neck. (20 RT 2661.) The bullet entered his right upper eyelid and exited the back of his head, following an "up to down" trajectory. (20 RT 2661-2662.) Dr. Sathyavagiswaran testified that Padilla could have been lying on his back facing upwards when he was shot by someone standing above him. (20 RT 2664.)[11]

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[11] On cross-examination, Dr. Sathyavagiswaran testified that toxicological analyses performed during the autopsies of Anthony Moreno and Gustavo Aguirre detected the presence of alcohol, and free codeine and/or free morphine associated with heroin, in their blood. (20 RT 2666-2667.) The toxicological analysis of Maria Moreno's blood indicated that she had a blood alcohol content of .23 grams per cent, approximately three times the legal limit for driving under the influence. (20 RT 2667.)

B. Evidence Implicating the Mexican Mafia

1. Anthony Moreno's History with the Mexican Mafia Prison Gang

Anthony "Dido" Moreno became a member of the Mexican Mafia prison gang at San Quentin State Prison in 1973. (15 RT 2000.) Approximately 15 years later, Anthony "dropped out" of the Mexican Mafia and severed his ties to the gang. (15 RT 2001, 2030; 18 RT 2268.)

Anthony's brother, Witness No. 15, also had a lengthy involvement in street and prison gangs. He became a member of the El Monte Flores street gang in 1965. (15 RT 2018.) Then, in 1971, he was sent to San Quentin State Prison after being convicted of burglary and robbery. (15 RT 1999.) In prison, Witness No. 15 met an inmate named Raymond Shyrock, who was a member of the Mexican Mafia. (15 RT 1999.) Witness No. 15 also knew Shyrock by his gang nickname – or "moniker" – which was "Huero Shy." (15 RT 1993.)

In October 1994, Anthony Moreno was released from custody and went to live with his mother in an apartment complex on Maxson Road in El Monte. (15 RT 2032.) In January 1995, Witness No. 15 was released from prison and moved into the same apartment. (15 RT 2003-2004.) Raymond Shyrock lived in the apartment next door. (15 RT 2006.) During this period, Witness No. 15 often saw Luis Maciel at Shyrock's apartment. (15 RT 2006; 19 RT 2475.) At some point, Maciel told Witness No. 15 that he had become a member of Mexican Mafia. (15 RT 1998.)

Witness No. 15 told his brother Anthony to be careful and to "look out for those guys" because he believed "sooner or later they would want to do something." (15 RT 2006.) Witness No. 15 warned Anthony that they would "come after you and your family." (15 RT 2006.) Anthony would

respond that he would "take care of it later," but he never did. (15 RT 2006.)

Approximately a week after Anthony moved into his mother's apartment on Maxson Road, he moved out and into his sister's apartment "next door." (15 RT 2004, 2008.)

2. The Surreptitious Surveillance of Mexican Mafia Meetings in January and April 1995 by Federal Law Enforcement

Beginning in approximately October 1996, Richard Valdemar, a sergeant with the Gang Investigation Unit of the Los Angeles County Sheriff's Department, participated in a federal law enforcement task force investigating the activities of the Mexican Mafia.[12] (18 RT 2248-2249.) Over approximately 18 months, Valdemar surreptitiously monitored the monthly meetings of a group of Mexican Mafia leaders that were held at various locations in Southern California. (18 RT 2249-2250.) The investigators videotaped and audiotaped the meetings. (18 RT 2250.) The investigation led to the arrest of approximately 18 alleged members and associates of the Mexican Mafia on April 29, 1995, and ultimately led to the arrest of 25 alleged Mexican Mafia members and associates. (18 RT 2249.)

Raymond Shyrock attended all but one or two of the meetings that Valdemar monitored. (18 RT 2264, 2293-2294.) Valdemar had known Shyrock for 15 years and believed him to be a member of the Mexican Mafia. (18 RT 2259, 2260.) According to Valdemar, during the 18-month period in which the Mexican Mafia was under surveillance Shyrock

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[12] Valdemar was "cross-designated" as a United States Marshal for the purpose of participating in the federal investigation. (18 RT 2248-2249.)

"controlled" several parts of Los Angeles but his "primary area of responsibility" was the San Gabriel Valley. (18 RT 2267.) Shyrock was among the persons arrested in April 1995 and charged with various RICO offenses. (18 RT 2261.)

Valdemar testified that in January 1995, he surreptitiously monitored a Mexican Mafia meeting during which Shyrock referred to a person named "Dido." (18 RT 2281.) According to Sgt. Valdemar's notes about that meeting, Shyrock said to the other persons present:

> I don't know if you have ever heard of this brother Dido. He dropped out a long time ago. He's in an apartment where I was living. The motherfucker was living right downstairs but never showed his face. All kinds of people in the pad, bunch of young sisters and kids, all kinds of shit. So I'm trying to figure out how to – I need a silencer is what I need.

(18 RT 2281.) After that meeting, Sgt. Valdemar attempted to identify "Dido" but was unable to determine his name. (18 RT 2281-2282, 2300-2302.)

In early April 1995, Sgt. Valdemar monitored another Mexican Mafia meeting at which Luis Maciel was inducted as a member of the gang. (18 RT 2262, 2283-2284.) That meeting was also surreptitiously videotaped, but the audiotape was "very poor" and was not played for appellant's jury. (18 RT 2350) Valdemar claimed that after Maciel was inducted into the gang, he "controlled" the El Monte area for the Mexican Mafia and "reported to" Shyrock. (18 RT 2267.)

C. Evidence Implicating the Sangra Gang

At trial, it was undisputed that at one time appellant had been a member of a San Gabriel-based street gang called "Sangra."[13] Co-defendants Jimmy Palma, Anthony Torres, Jose Ortiz, and Danny Logan were also members of the Sangra gang. (13 RT 1734.)

1. Anthony Torres Borrows Victor Jimenez's Jeep on the Afternoon of April 22, 1995

Sometime between noon and 2 or 3 p.m. on April 22, 1995, Victor Jimenez drove his blue Jeep to the house of his friend Anthony Torres in Alhambra. (13 RT 1735-1736, 1742.) Jimenez had been discharged from the Marines the day before and was visiting friends from his former neighborhood in San Gabriel. (13 RT 1735, 1825.) Jimenez had been a member of the "Sangra" gang before he joined the Marines. (13 RT 1734, 1736.)

Several people were at Torres's house when Jimenez arrived on the afternoon of April 22, 1995, but not appellant. (14 RT 1832.) At some point Jimenez allowed Torres to borrow his Jeep.[14] (14 RT 1783, 1800.) Torres left by himself and was gone about "20 [minutes,] tops." (13 RT

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[13] At trial, appellant presented evidence that he had moved away from the neighborhood and was not an "active" member of the Sangra gang at the time of these events. (14 RT 1826-1832)

[14] As indicated *supra*, one of the Morenos' neighbors, Witness No. 9, observed a Jeep and a car arrive and park near the Moreno residence on the afternoon of the murders. (13 RT 1685-1688.) At appellant's trial, Witness No. 9 did not recognize Jimenez's Jeep as the one she had seen outside the Moreno residence that day. (13 RT 1692-1693.) She testified that the Jeep outside the Moreno residence was "lighter blue" and had a gray top – not a brown top like Jimenez's Jeep. (13 RT 1693-1694.)

1738, 1749, 1760.)[15] Shortly after Torres returned, Jimenez left in his Jeep and drove to San Diego County. (13 RT 1761.)

2. Sangra Gang Members Gather at Anthony Torres's House on the Evening of April 22, 1995

Witness No. 13 was the sister of Anthony Torres. On April 22, 1995, she got off work between 7 and 7:30 p.m. and went to her mother's house at 323 North Third Street in Alhambra. (15 RT 2074.) When she arrived, no one was there but her mother. (15 RT 2075-2076, 2078.) She stayed until about 8:30 or 9:00 p.m. and then went next door to her own house. (15 RT 2075, 2077.)

At some point before Witness No. 13's brother came home that night, a man came to the house asking for him. (15 RT 2079, 2080.) Witness No. 13 had never met the man before, but noticed the "Sangra" tattoo on his neck.[16] (15 RT 2079-2080; 17 RT 2194.) He told Witness No. 13 to tell her brother that "Jimmy" had stopped by, and then left. (15 RT 2080-2081.)

Her brother Anthony came home later with a man she knew as "Primo." (15 RT 2107.) When Witness No. 13 said that a man named

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[15] At trial, Jimenez denied that he told a Sheriff's Department investigator that Torres left for 30 to 45 minutes, and claimed that the investigator must have taken "the time down wrong." (13 RT 1759.) He asserted that the only time he said it was as long as 30 to 45 minutes was when he testified before the grand jury, and he claimed that the only reason he said that was because the prosecutor "got loud, and . . . I was in no state to argue with" him. (13 RT 1760.)

[16] Jimmy Palma had "Sangra" tattooed on his neck. (See Exh. 50 [1 SuppCT IV 108-109], Exh. 51 [1 SuppCT IV 110-111].)

"Jimmy" had stopped by to see him, Anthony responded: "It's not Jimmy, it's Jaime." (15 RT 2081.)[17]

Witness No. 13 did not recall whether the man named "Jimmy" or "Jaime" came back to her mother's house that evening, but several of her brother's other friends came over and went into his room. (15 RT 2081-2082, 2086, 2096.) A man named "Tricky" came with two men she did not know. (15 RT 2108.) Two other men, one with a Sangra tattoo on his neck, arrived about 15 minutes later. (15 RT 2108.) There was also a "brownish" Nissan car outside the house. (17 RT 2194, 2196.)

Because of "all the traffic coming in and out" of her mother's house, Witness No. 13 went next door to her own house. (15 RT 2082.) At about 10 p.m., her mother came to her house, and stayed there all night. (15 RT 2082.)

Elizabeth Torres, Anthony Torres's mother, also saw a number of her son's friends at her house that night, including Danny Logan and appellant. (14 RT 1883-1885, 1907, 1909.) A total of approximately 10 of her son's friends arrived, beginning around 6:00 p.m., and they all went into her son's room to drink. (14 RT 1891.)

Around 9:00 p.m., Mrs. Torres left her home and went over to her daughter's house to sleep. (14 RT 1890, 1901.) When she left, her son Anthony and his friends had already left the house. (14 RT 1893.) They did not all leave at the same time; one group left first and the rest left later.

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[17] Witness No. 13 was impeached at trial with her statements to the police on April 27, 1995, and her grand jury testimony. On both those occasions she said that the man who came by the house that night identified himself as "Jaime," and that her brother said he was "Jimmy." (15 RT 2117-2118.)

(14 RT 1912.) She could not remember when appellant left or how much time passed between the departures of the two groups. (14 RT 1912.)

Renee Chavez was the girlfriend of Danny Logan, another Sangra gang member. (14 RT 1948, 1951.) At about 10:15 p.m. on April 22, 1995, Chavez and a friend were driving past and saw Logan's car in Torres's driveway, so they stopped. (14 RT 1953; RT 15:1961, 1968, 1971.) Logan's car was a blue Nissan Maxima that belonged to his mother. (14 RT 1949.) Chavez saw Logan standing near the door of the car, and Torres and a third person standing nearby. (14 RT 1954-55; 15 RT 1968.) When Chavez and her friend left, after 10 or 15 minutes, Logan and the two others were still there. (15 RT 1972.)

Chavez testified that she had been in the car before and that the interior light stayed on in the car even after the doors were closed. (14 RT 1956.) She said that Logan did something to keep the light from going on, but she did not know what. (14 RT 1956.)

3. The Testimony of Witness No. 16

Witness No. 16 was a Sangra gang member who was granted immunity from prosecution in exchange for his testimony implicating his fellow Sangra gang members in the murders on Maxson Road. (20 RT 2677-2678, 2798.)

According to Witness No. 16's trial testimony, after he received a call from Palma during the late afternoon of April 22, 1995, he picked up Palma at his house.[18] (20 RT 2679; 21 RT 2761-2762.) The two men then

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[18] In his testimony, Witness No. 16 referred to most of the Sangra gang members either by their first names or their gang names. For the purposes of this discussion, appellant refers to each person by the name

(continued...)

drove around for several hours. (21 RT 2762-2765.) Palma told Witness No. 16 he expected to be paged later and needed Witness No. 16 to take him to Tony's house after he was.[19] (20 RT 2681.) Palma told Witness No. 16 that he needed to go to Tony's house because "they had to take care of something" and "the brothers wanted him." (20 RT 2683.)

A few hours later, Palma received the page and Witness No. 16 drove him to Tony's house. (20 RT 2681; 21 RT 2763-2765.) They arrived there sometime before 10 p.m. (21 RT 2766.) When they arrived, they went into Tony's room. (20 RT 2684.) A number of other Sangra members were already in Tony's room when they arrived, including Tony, "Pepe," "Tricky," "Primo," and "Creepy."[20] (20 RT 2684.) There was a shotgun at the foot of the bed in the room. (20 RT 2685.)

According to Witness No. 16, Pepe seemed to be in charge of what was going on that evening. (21 RT 2767.) While they were in Tony's room, Pepe announced that there was "a problem in El Monte" and that they had to go there "to take care of something." (20 RT 2687, 2691.) Witness No.

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[18] (...continued)
used by Witness No. 16 in his testimony.

[19] Witness No. 16 testified that he also knew Tony as "Scar," but that he did not know his real last name. (20 RT 2682.) He identified a photograph of Anthony Torres, in Exh. 14, as the person he knew as "Tony" and "Scar." (20 RT 2682.)

[20] Witness No. 16 identified photographs of Jose Ortiz, Daniel Logan, and appellant as the persons he referred to as "Pepe," "Tricky," and "Primo," respectively. (20 RT 2723-2726.) The prosecutor did not ask him to identify "Creepy." On cross-examination, Witness No. 16 testified that he did not know Creepy by any other name. (21 RT 2776.)

16 understood that to mean that they were going to assault or kill somebody. (20 RT 2687, 2694; 21 RT 2776, 2782, 2802, 2804-2805.)

Witness No. 16 saw Ortiz and Palma take methamphetamine in the bathroom at Tony's house. (21 RT 2819.) Those were the only people who he recalled using drugs that night. (21 RT 2819.) Palma also shaved his hair before the men left for El Monte. (21 RT 2757.)

The men were at Torres's house for 40 minutes before they left for El Monte. (20 RT 2685.) Tricky drove Scar, Primo, and Torres to El Monte in his Maxima. (20 RT 2697-2698.) Witness No. 16 followed in his Thunderbird with Pepe and Creepy. (20 RT 2697-2698; 21 RT 2775, 2801.)

According to Witness No. 16, the cars made a stop for gas en route to El Monte. (20 RT 2700; 21 RT 2779.) When the Maxima left the gas station, Witness No. 16 followed the Maxima onto the I-10 freeway and then exited when the Maxima turned off the highway. (20 RT 2701-2703.) At some point, Witness No. 16 lost sight of the Nissan but then came upon it again. (20 RT 2702.) When they arrived in El Monte the Maxima pulled into a driveway on Maxson Road and Witness No. 16 drove a few blocks further down the street and pulled over. (20 RT 2703.) At Pepe's direction, he turned off the car and the headlights. (20 RT 2703.)

Pepe got out of the car and went to the corner of the street where he "look[ed] up and down the street." (20 RT 2705.) When Pepe returned to the car, he said the police were behind them and said "Let's get out of here." (20 RT 2706.)

At Pepe's direction, Witness No. 16 then drove to an apartment in West Covina that Witness No. 16 believed was appellant's apartment.

(20 RT 2707-2708, 2785-2786.) Neither the Maxima nor any of the Sangra members were there. (20 RT 2708.)

After a time, Witness No. 16, Pepe, and Creepy left the apartment and drove to Tony's house in Alhambra. (20 RT 2709.) Tricky's Maxima was parked in the driveway. (20 RT 2709.) Tricky, Primo, "Jaime," and Tony were inside the house listening to a police scanner. (20 RT 2709-2710.)

According to Witness No. 16, the men were also talking about what took place at the residence on Maxson Road.[21] Witness No. 16 could not recall "exactly word for word" what Palma told him, but he remembered that Palma said "he had went and showed a man a piece of heroin to sell to him, and when he went with [*sic*] to show him that, Primo had shot him in the head." (20 RT 2711.) Palma also said that after the man was shot "the lady with the baby said that it wasn't her problem and he [Palma] had pulled out the gun and shot her and let off rounds on the kids." (20 RT 2712.)

According to Witness No. 16, appellant said that he had shot one man in the head and then shot another man running away from him. (20 RT 2712, 2820-2821.) Appellant supposedly said he shot the first guy inside the house, but Witness No. 16 was not sure where the second guy was shot. (21 RT 2821, 2827.) Torres said that he "stood by the door with the shotgun making sure nobody would walk up." (20 RT 2713.) Finally, Witness No. 16 testified that he was told that Logan drove the Nissan and waited in the car while the murders took place. (20 RT 2713.)

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[21] Prior to trial, the trial court ruled that Palma's statements implicating appellant in the crime were admissible against appellant as adoptive admissions. (12 RT 1570-1571.)

D. Evidence Linking Luis Maciel to the Sangra Gang Members on April 22, 1995

1. The Testimony of Witness No. 14

Witness No. 14 was a member of the El Monte Flores street gang. (19 RT 2475.) At trial, he testified that he left his job at about noon on April 22, 1995 and went to El Monte to buy heroin. (19 RT 2464.) While picking up the heroin, he saw a man called "Pelon" on Garvey Street.[22] (19 RT 2465.) At one time, Pelon had also been a member of the El Monte Flores street gang, but Witness No. 14 believed he had since become a member of the Mexican Mafia. (19 RT 2475.) Pelon invited Witness No. 14 to a party in Montebello for the christening of one of his children. (19 RT 2465.)

Later that evening, Witness No. 14 went to the party in Montebello with a young woman. (19 RT 2466.) When they arrived, Pelon greeted him and they then watched a fight on television. (19 RT 2466.) At some point, Pelon asked Witness No. 14 to take him somewhere, so they left the party in Montebello. (19 RT 2465.) A third man named "Diablo" came with them. (19 RT 2467.) The three men drove to Pelon's house in El Monte. (19 RT 2467.) When they arrived, they went in the house and Pelon gave Witness No. 14 some heroin. (19 RT 2468.) They were inside the house for about a minute and then went outside. (19 RT 2468.)

After the three men had been outside for about 10 minutes, a black Nissan Maxima pulled up at the corner, about three houses away. (19 RT 2470.) A man Witness No. 14 had never met got out of the backseat and approached them. (19 RT 2470.) Pelon introduced the men to each other as

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[22] At trial, Witness No. 14 was never asked to identify Luis Maciel as the man he knew as "Pelon."

follows: "This is my homeboy Clown,[23] this is my homeboy Diablo, this is Character; and if anything happens to me, go ahead and contact Diablo." (19 RT 2470.) At trial, Witness No. 14 identified co-defendant Palma as the man Pelon introduced to him that night as "Character." (19 RT 2472.)

According to Witness No. 14, Character told Pelon "he was strapping [and] he was going to take care of business." (19 RT 2472.) Pelon instructed Witness No. 14 to give Character a half gram of heroin. (19 RT 2473.) Witness No. 14, Pelon, and Diablo then went back to the party in Montebello. (19 RT 2473.)

2. Pager and Telephone Records

At trial, the prosecution introduced testimony and pager and telephone records showing that a number of calls were placed to Luis Maciel's pager from the residences of Jose Ortiz, Anthony Torres, and Jimmy Palma on the evening of April 22, 1995, and the next day.

According to that evidence, Maciel was paged three times from the residence of Jose Ortiz on April 22, 1995, at 10:51 a.m., 12:20 p.m., and 8:44 p.m. (20 RT 2608-2609; 23 RT 3027.) Maciel was paged five times from the residence of Elizabeth Torres on the evening of April 22, 1995, at 9:21 p.m., 9:22 p.m., 9:30 p.m., 10:59 p.m., and 11:00 p.m. (20 RT 2613-2614; 14 RT 1894.) The next day, Maciel was paged once from the Ortiz residence, at 9:35 a.m., twice from the Torres residence, at 12:52 p.m and at 2:03 p.m., and three times from the Palma residence, at 2:47 p.m., 2:48 p.m., and at 2:57 p.m. (20 RT 2616-2618.)

In addition, phone records indicated that five calls were placed from the Torres residence to Veronica Lopez's pager on April 22, 1995, at 11:05

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[23] Witness No. 14's gang moniker was "Clown." (19 RT 2471.)

p.m., 11:22 p.m. (two calls), 11:28 p.m., and midnight. (20 RT 2615; 13 RT 1660.) According to Lopez, she and appellant had dated at one time; however, she testified that she had not seen him since New Year's Eve. (13 RT 1667, 1671.)

The prosecution also presented evidence of a number of phone calls that were placed on May 15, 1995, the day that Palma and Torres were arrested.[24] At 3:14 p.m., a call was placed from a public telephone at the Los Angeles County Jail to the telephone of Alex Valdez, appellant's brother, at 1359 Peppertree Circle in West Covina. (20 RT 2588.) At 3:23 p.m., a collect call was made from a different public telephone at the Los Angeles County Jail to the Palma residence. (20 RT 2620.) At 3:51 p.m., a phone call was made from the Peppertree Circle residence to a telephone at Danny Logan's residence at 1138 Arden Road in Pasadena. (20 RT 2591; 21 RT 2880; 23 RT 3024.) Finally, at 4:44 p.m., a collect call was made from yet another public telephone at the Los Angeles County Jail to the Peppertree Circle residence. (20 RT 2589.)

E. Ballistics Evidence

Ballistics evidence recovered at the crime scene and from the autopsies of Maria Moreno and Gustavo Aguirre indicated that two different guns were used during the murders: a .45 caliber automatic and a .38 or .357 caliber revolver. (19 RT 2418, 2434.)

On May 2, 1995, Investigator Stephen Davis conducted a search of a residence at 2659 Greenleaf in West Covina, where appellant lived before moving to an apartment at 1359 Peppertree Circle in West Covina in early

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[24] See 19 RT 2550-2554 (Christian Mayhew testimony about arrest of Torres); 22 RT 2979 (Stephen Davis testimony about arrest of Palma).

April 1995. (21 RT 2882; 1 SuppCT IV 130; 22 RT 2971-2975.) Davis found graffiti, including the names "Scar" and "Primo," on the wall of the northeast bedroom of the residence. (22 RT 2972-2973.) He also saw what looked like several bullet holes in the bedroom and living room walls. (22 RT 2974.) On May 9, 1995, Davis and Dale Higashi of the Los Angeles County Sheriff's Department recovered two bullets, including an expended .38 caliber bullet, from a living room wall at the Greenleaf address. (22 RT 2974-2975.)

On May 15, 1995, Sergeant John View of the Los Angeles County Sheriff's Department served a search warrant at a two-story apartment or condominium located at 1359 Peppertree Circle in West Covina. (18 RT 2355-2356.) Appellant had signed a lease for the apartment on April 4, 1995. Appellant was not present when View searched the location, but his brother Alex Valdez was. (18 RT 2359.) Among the items that View recovered in that search was a bag of bullets found on a shelf in a closet in an upstairs bedroom. (18 RT 2357.) View testified that some of the bullets were .45 caliber bullets.[25] (18 RT 2356-2357.)

Higashi examined the five .45 caliber casings recovered from the crime scene and formed the opinion that they were all fired from the same semi-automatic pistol. (19 RT 2441.) Higashi also compared the .45 caliber bullets recovered from the autopsy of Maria Moreno with the .45 caliber ballistics evidence recovered from the crime scene and concluded

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[25] On cross-examination, View acknowledged that when he served the search warrant, appellant's brother, Alex Valdez, was sleeping in the master bedroom and that Alex Valdez told him that it was his closet in which the bullets were found. (18 RT 2368.)

that the .45 caliber bullets from the crime scene and the autopsy were all fired from the same gun. (19 RT 2442.)

Higashi compared the .38/.357 bullet recovered from the autopsy of Aguirre and the .38/.357 Magnum bullet recovered from the bathroom wall of the Maxson Road residence with the .38 caliber bullet recovered from the living room wall of the residence at 2659 Greenleaf Drive. (19 RT 2429-2431.) Higashi testified that all three of the .38/.357 bullets had the same general rifling characteristics and that they were all fired from a revolver. (19 RT 2430.) However, Higashi could not determine whether all three bullets were fired from the same firearm because the "general rifling characteristics" common to the three bullets were consistent with revolvers made by four different gun manufacturers. (19 RT 2451.)

Higashi also examined the bag of ammunition recovered by Sergeant View at 1359 Peppertree Circle. The bag contained live rounds of .45 caliber automatic ammunition, and .9 millimeter and .22 caliber long rifle ammunition. (19 RT 2444.) Higashi did not perform any analysis on the .22 caliber or .9 millimeter ammunition, but he did compare the .45 caliber ammunition with the five expended .45 automatic cartridge cases recovered from the crime scene. (19 RT 2445.) Higashi concluded that the live ammunition and casings had at some point been chambered in the same firearm. (19 RT 2445-2446.)

F. Gang Expert Testimony

At trial, the prosecution presented extensive testimony from two law enforcement officers, Richard Valdemar and Dan Rosenberg, about the Mexican Mafia and Hispanic street gangs.

Sergeant Valdemar testified about the Mexican Mafia and its relationship with Hispanic street gangs. (18 RT 2236-2351.) He testified

that the Mexican Mafia was formed in 1957 by Hispanic inmates in Tracy Prison, Deuel Prison Institute, at the invitation of the Sicilian Mafia. (18 RT 2251.) According to Valdemar, the Mexican Mafia originally was formed in defense against other groups in the prison system but "soon moved from prey to predator" and began preying on other Hispanic inmates who were not part of their gang. (18 RT 2252.) A rival gang, the Nuestra Familia, eventually formed to contest control of criminal activity within the prison system. (18 RT 2251.) By 1977, the Mexican Mafia had generally prevailed and "had control" of most of the prisons. (18 RT 2251.)

In 1993, the gang resurfaced on "the street" when a gang member named "Sana Ojada," whose real name was Peter Ojada, began conducting meetings in Orange County with representatives of the various Hispanic street gangs. (18 RT 2253.) Ojada instructed the gang members to stop engaging in drive-by shootings because they generated "a lot of negative publicity," but also encouraged them "to attack other races." (18 RT 2253.) Ojada instructed the gang members that if they had problems with each other they should resolve them through "face-to-face confrontation" or through mediation by the Mexican Mafia. (18 RT 2253.) He also instructed them to "tax" the drug dealers in the neighborhood, particularly the "Mexican alien" dealers, as a fee for mediating gang disputes. (18 RT 2253.) As a result, the Mexican Mafia "gained control of the whole Orange County area." (18 RT 2253.)

Valdemar testified that "doing time" did not mean anything to Mexican Mafia gang members and associates. (18 RT 2254.) Many of them were already serving sentences of life without possibility of parole and "vendetta is part of their lifestyle," "[s]o waiting 10 years or 15 years to kill someone is nothing to them." (18 RT 2254.) For example, Valdemar

testified that he had learned during his involvement in the RICO investigation that the Mexican Mafia was "actively seeking" to murder an informant who had provided information in the 1977 "Delia murder case," 19 years later. (18 RT 2254-2255.)

Valdemar testified that, "like the Sicilian Mafia," the Mexican Mafia requires members to take a "blood oath" swearing allegiance to the gang and does not allow them to leave – "death is the only way out." (18 RT 2255.) A gang member who wants to leave the gang – a "drop-out" – must immediately seek protective custody from law enforcement, particularly if he is in the prison system. (18 RT 2255.) He then goes through a lengthy process of "debriefing" and is required to provide information about the Mexican Mafia and any street gangs with which he was affiliated. (18 RT 2256.) The information is then cross-checked against information received from other sources for reliability, because some gang members claim to be drop-outs in order to be moved to an area of the prison where they can kill other informants. (18 RT 2256.)

Valdemar estimated that while the Mexican Mafia only had about 250 to 300 members, it had "numerous associates." (18 RT 2264, 2278.) The Mexican Mafia exerted influence over "all of the Hispanic gangs in Southern California" (18 RT 2272-2273) and "basically every Hispanic gang member in Southern California falls under their control." (18 RT 2278.) The 250-member Mexican Mafia is able to "control" a prison system with 100,000 prisoners because its members are "ruthless." (18 RT 2265.) Members of the gang are recruited from the "holes" and segregated housing units of the prison system – where the most incorrigible inmates are found. (18 RT 2265.) If anyone violates any of its regulations the Mexican

Mafia "discipline[s]" him once he comes into custody, which usually "means the person is killed." (18 RT 2265.)

Valdemar was aware that five people were killed in El Monte on April 22, 1995. (18 RT 2268.) An investigator on the case asked him to find out what he could about Anthony "Dido" Moreno. (18 RT 2268.) Valdemar determined that "Dido" had been a member of the Mexican Mafia, but dropped out in 1988. (18 RT 2268.)

Valdemar testified that some of Palma's tattoos – specifically, the letters "SUR" on the outer portion of his right hand and his left arm, and the word "surreno" on his body – indicated "his alliance and allegiance to the Mexican Mafia," because the word "surreno" means "southerner," and the Mexican Mafia originated in Southern California. (18 RT 2276-2280.)

Valdemar testified that a Sangra gang member who testified against another Sangra member would be in trouble. (18 RT 2284.) The Mexican Mafia and other gangs have "cardinal rules" against their members becoming informers or cooperating with law enforcement. (18 RT 2284-2285.) The police report or court transcript of the member's testimony reflecting his cooperation – the so-called "paperwork" – is the proof the gang needs "to issue a hit contract." (18 RT 2285.)

Valdemar opined that if Dido was a "drop-out" he was subject to being killed by the Mexican Mafia, even 10 or 15 years afterwards. (18 RT 2271.) Valdemar also opined that if anyone robbed someone paying "taxes" to the Mexican Mafia for protection the Mexican Mafia "would have to retaliate" and kill the robber "to maintain their power." (18 RT 2272.) Finally, Valdemar testified that, in his expert opinion, the murders of a mother and her two children could not have been carried out unless they

were "sanctioned or ordered" by the Mexican Mafia.[26] (18 RT 2273, 2336, 2341.)

On cross-examination, Valdemar testified that the Mexican Mafia has a "code of conduct" which forbids drive-by shootings and includes a "protocol" against killing children. (18 RT 2316, 2319.) Valdemar could not think of any situation in which the Mexican Mafia would authorize the murder of children. (18 RT 2316.) He explained that in Mexican Mafia terminology, a "clean killing" would be a "hit" that was within Mexican Mafia policy, while a "dirty killing" is not. (18 RT 2320.) He agreed that a "hit" involving children would be considered "dirty." (18 RT 2320.)

Sergeant Dan Rosenberg, a Los Angeles County Sheriff's deputy and Gang Unit supervisor, testified as an expert about the Sangra street gang. (19 RT 2505-2506.) He testified that Sangra was a "terrorist street gang," and had been classified as such by the Los Angeles Superior Court in March 1990. (19 RT 2506.) In support of that opinion, Rosenberg produced a copy of a court order that was marked for identification as Exhibit 71. (19 RT 2507.) He testified that, in his expert opinion, the Sangra street gang had a "common name" and a "common identifying sign or symbol," and that Sangra members "throw" gang signs unique to their gang. (19 RT 2508.) Rosenberg had "no doubt" that a primary activity of the Sangra street gang was the commission of various criminal offenses (19 RT 2507), and opined that it would enhance the gang's reputation to

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[26] Valdemar explained that the basis for this opinion was that if the crimes were sanctioned by the Mexican Mafia, the perpetrators would be able to "conduct normal business in the custody environment." Otherwise, if the crimes were not sanctioned by the Mexican Mafia, the suspects would have to "seek protective custody and lock up for fear that the Mexican Mafia" would seek to punish them. (18 RT 2274.)

commit a crime at the direction of or in association with the Mexican Mafia. (19 RT 2510.)

On cross-examination, Rosenberg acknowledged that although he been in charge of the Gang Unit since 1992 and was familiar with "quite a few" of the Sangra gang members, he had never had any contact with appellant before this trial. (19 RT 2519-2521.)

II. The Defense Case

The defense denied that appellant was involved in any way in the murders of the five victims on Maxson Road in El Monte. (13 RT 1655-1657.) The defense maintained that while appellant had been a member of the Sangra gang at one time, he had disassociated himself from the gang and was no longer an active member at the time of the murders. (13 RT 1655.) The defense elicited testimony from Victor Jimenez that appellant did not appear to be an active member of Sangra when Jimenez returned to San Gabriel from the Marine Corps; that appellant was working at an auto paint and body shop at the time; and that appellant moved away from the neighborhood, which was a "major step" that an inactive member would take to separate himself from the gang. (14 RT 1826-1832.) Similarly, Veronica Lopez testified that appellant was employed, that he worked a lot, and that she had never seen him with any gang members. (13 RT 1680-1681.)

The defense also elicited testimony from Witness No. 15 that Tito Aguirre may have provoked a gang called the "Border Brothers" by robbing drug "connections" associated with the gang. (15 RT 2044.) Witness No. 15 explained that the Border Brothers were from Mexico and other Latin American countries and were selling drugs in the United States. (15 RT 2042.) The Border Brothers didn't "listen to" the Mexican Mafia, which

had issued an "edict" during this period that gang members not kill each other. (15 RT 2048.) Witness No. 15 testified that there was a "split" in the drug business between dealers from Mexico and other Latin American countries, and the local "homeboys." (15 RT 2043.) He acknowledged that Tito and Tony Cruz sometimes robbed dealers associated with the Border Brothers, as well as those associated with the Mexican Mafia. (15 RT 2044.) Like the Mexican Mafia, the Border Brothers objected to such robberies and would protect their business with violence. (15 RT 2045.) Witness No. 15 testified that the Border Brothers killed people who stole "dope" from them and could be "pretty vicious" in protecting their interests. (15 RT 2045, 2048.)

In addition to eliciting this evidence from prosecution witnesses, each defendant called additional witnesses in his own defense.

A. Co-Defendant Palma's Defense Case

Palma called David Hooker, a state prison inmate, to testify about statements made by Witness No. 14 to Hooker while they were incarcerated at Delano State Prison. (23 RT 3103-3118.) Hooker testified that sometime around May 19, 1996, Witness No. 14 said that he was in protective custody because the Mexican Mafia had a "green light" on him because he had been "involved in a thing where some kids got killed during a murder." (23 RT 3105.)

According to Hooker, Witness No. 14 said that he had been dealing drugs in partnership with a Mexican Mafia member. (23 RT 3106.) When a customer he described as a guy from 18th Street[27] got behind in paying for

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[27] During the prosecution's case-in-chief, Witness No. 15 testified that Tito Aguirre was known as "Tito from 18th Street." (15 RT 1991.)

drugs, Witness No. 14 threatened him on the day of the murders. (23 RT 3106.) Hooker testified that, according to Witness No. 14, when the customer still did not pay his debt Witness No. 14 went to the Mexican Mafia and "arranged to get some vatos from San Gabriel to take the puto out." (23 RT 3106.) Hooker testified that after Witness No. 14 made these statements to him, he wrote a letter to Detective Frank Gonzalez of the Los Angeles County Sheriff's Department. (23 RT 3106-3107.) The reason he wrote to Detective Gonzalez was that Witness No. 14 had told him he was involved in the murder of five people.[28] (23 RT 3106.)

B. Appellant's Defense Case

Appellant called three witnesses in his defense: Richard Valdemar, Ravi Chavers, and Trent Hampton.

Prior to Valdemar's testimony, but while he was on the witness stand, appellant played a portion of the videotape of the January 1995, Mexican Mafia meeting for the jury. (23 RT 3119-3120.) Valdemar then testified that that was the first time that he had heard the videotape clearly.[29] (23 RT 3120.) Valdemar identified Shyrock's voice as the one on the videotape talking about "Dido," and testified that Shyrock said that "he

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[28] Palma also relied on a stipulation that Elizabeth Torres testified before the grand jury on September 11, 1995 that she did not recognize anybody in the photographic lineup contained in Exhibit 10, and that the man with the tattoo on his neck who came to her house on April 22, 1995 was not in that photographic lineup. (23 RT 3118.)

[29] After Valdemar testified in the prosecution's case-in-chief, the defense obtained a copy of the videotape of the January 1995 Mexican Mafia meeting and submitted it to an expert to improve the quality of the audio on the videotape. (19 RT 2393-2407; 19 RT 2476-2477; 19 RT 2557-2564; 22 RT 2982; 23 RT 2990-2991.) The copy of the videotape that the defense played for the jury was one on which the audio had been enhanced.

wanted to kill the vato" but "not the kids." (23 RT 3120.) Valdemar acknowledged that after listening to the videotape several times he had changed his opinion that the Mexican Mafia intended for the children to be killed, and he was now of the opinion that Shyrock did not order or intend for the children to be killed. (23 RT 3120-3122, 3130.) Valdemar also acknowledged that he did not recall any mention of the Sangra gang during the videotaped Mexican Mafia meetings. (23 RT 3130.)

Ravi Chavers, who had known appellant approximately seven or eight years, visited appellant frequently at his homes on Greenleaf Drive and Peppertree Circle. Chavers saw appellant about four days a week, and used to take him to his job sanding and priming cars in Paramount. (23 RT 3136.) According to Chavers, appellant lived with his brothers and his grandfather at the Greenleaf residence. (23 RT 3134.) When his grandfather died, appellant moved to the apartment on Peppertree, where he lived with his brother Alex and a girl named Rachel. (23 RT 3154.) After appellant left Peppertree, he moved to Utah. (23 RT 3153.)

Chavers never observed a gun in appellant's room or in his possession when he lived on Greenleaf Drive or on Peppertree Circle. (23 RT 3133, 3137.) Chavers never saw any bullet holes at the house on Greenleaf Drive. (23 RT 3155-3156.)

The only time Chavers saw appellant shoot a gun was at a public shooting range called Pigeon Ridge in Azusa Canyons in 1993. (23 RT 3138.) On that occasion, appellant fired Chavers's gun, a "Mac 90." (23 RT 3137-3138.) Appellant's brother and possibly also Chavers's brother were with them at the time. (23 RT 3139.) Chavers testified that as they left the shooting range they picked up 20 or 30 "shells" of different kinds, mostly empty cartridges but also possibly some full bullets. (23 RT 3140.)

Trent Hampton, appellant's stepfather, testified that appellant moved into his home in Utah in April 1995. (24 RT 3174-3175.) Hampton and appellant's mother picked appellant up at the airport on April 30, 1995. (24 RT 3174.) Appellant was at their house between April 30 and June 1, 1995, and never left or slept anywhere else overnight. (24 RT 3175, 3177.) While living in Utah appellant began working at a grocery store called Harmon's. (24 RT 3177, 3182.)

Appellant introduced into evidence an airline ticket issued to passenger Richard Valdez for a flight from Ontario, California to Salt Lake City on April 30, 1995. (26 RT 3331-3332; Exh. 100; 1 SuppCT IV 177-179.) In addition, the parties stipulated that "a Richard Valdez flew on Southwest Airline [*sic*] from Ontario to Salt Lake City" on April 30, 1995. (26 RT 3331-3332.)[30]

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[30] The testimony of Trent Hampton, the airline ticket for the April 30, 1995 flight to Salt Lake City, and the stipulation that "a Richard Valdez" flew on Southwest Airlines that day were introduced by the defense primarily to rebut testimony by prosecution witness Russell Sprague, a sergeant with the Los Angeles County Sheriff's Department. Sprague testified that on May 2, 1995, he participated in surveillance of co-defendant Palma's residence and that he observed co-defendant Daniel Logan arrive at the Palma residence in his Nissan Sentra at 11:28 a.m. that day. (22 RT 2898.) Sprague testified that he believed the passenger in the vehicle was appellant. (22 RT 2899.)

PENALTY PHASE

I. Circumstances in Aggravation

The prosecution presented no additional evidence in aggravation against appellant in its case-in-chief at the penalty phase.

II. Circumstances in Mitigation

Migel Valdez, appellant's father, testified about various aspects of appellant's upbringing, including his family history and his educational background. (39 RT 4044-4076, 4084-4089.)

Appellant was born in 1973 in Hayward. (39 RT 4044.) He has an older sister, Melissa, and two younger brothers, Alex and Matthew. (39 RT 4045-4046.) When the family lived in Hayward, appellant's father worked for Mack Trucks and his mother was a homemaker. (39 RT 4090.)

Appellant was raised and educated in the Catholic religion. (39 RT 4051.) He was baptized at San Gabriel Mission on December 28, 1973. (39 RT 4051; Exh. 101; 1 SuppCT IV190-191.) He received a religious education at St. Theresita School and received the sacraments of reconciliation and holy communion. (39 RT 4052; Exh. 103; 1 SuppCT IV 232-233.)

In 1978, when appellant was four years old and the family was living in Tracy, his parents divorced. (39 RT 4048, 4090.) Appellant's mother then took appellant and his brother and sister to live with her in the Los Angeles area – first in Alhambra, and later in Baldwin Park – while appellant's father remained in Tracy. (39 RT 4048, 4061.) In Alhambra, appellant played Pop Warner football and Little League baseball with both of his brothers and his sister. (39 RT 4047-4049, 4100; Exh. 102; 1 SuppCT IV 192, 215.) While living with his mother in Alhambra and Baldwin Park, Appellant attended Granada Elementary School and Charles

D. Jones Junior High School, and attended his freshman year at Baldwin Park High School. (39 RT 4050, 4056.)

David Casper, an electronics teacher at Baldwin Park High School for 33 years, testified that appellant was in his basic electricity and electronics classes when he was in the ninth grade in 1988. (40 RT 4240-4242.) Appellant received a "B-O" grade in his first semester and an "A-O" grade in the second semester, with the "O" indicating "outstanding citizenship." (40 RT 4241.) Casper described appellant as a "very responsible," hard-working student. (40 RT 4241.) On cross-examination, Casper agreed that appellant was above average intellectually, knew how to be responsible, and was one of his better students. (40 RT 4243.) He did not know appellant to be a member of a gang, or to have any kind of drug or narcotics problems or mental disability. (40 RT 4244.)

In 1998, when appellant was 15, he moved to West Covina to live with his father. (39 RT 4094, 4096.) Appellant attended tenth and eleventh grades at West Covina High School. (39 RT 4056; Exhs. 105, 107-113; 1 SuppCT IV 236-237, 240-255.) He also joined the Navy Reserves while living with his father. (39 RT 4068.)

Appellant and his father were in "constant conflict" when they lived together. (39 RT 4059, 4067-4068, 4086-4087.) In addition, appellant started getting involved with street gang members in San Gabriel through friends or school contacts, and his father disapproved of him associating with gangs. (39 RT 4060.) Appellant and his father attended counseling sessions to resolve their problems, but without success. (39 RT 4086.)

During his junior year in high school, appellant moved in with his grandparents who lived between Alhambra and West Covina in a house on Greenleaf Drive. (39 RT 4068.) Appellant transferred to San Gabriel High

School, and later to Century High School, after moving in with his grandparents. (39 RT 4056; Exh. 106; 1 SuppCT IV 238-239.)

After high school, appellant continued to live with his grandfather at his house on Greenleaf Drive. (39 RT 4073.) Appellant's grandfather became less able to care for himself, so appellant took it upon himself to care for his grandfather and to make sure that the bills were paid, and that there were food and clothes. (39 RT 4074-4075.) At that time, appellant worked for an auto body shop in Paramount and at a print shop in Baldwin Park. (39 RT 4073.) In addition, appellant helped support his younger brother Alex, who was heavily into drugs. (39 RT 4073.) Appellant, who was 18 or 19 at the time, took Alex in and provided him with food and clothes. (39 RT 4073.)

Appellant's grandfather died in December 1994, and appellant and Alex moved to a residence in West Covina. (39 RT 4075.) Appellant did not ask his father for any financial assistance at that time, or at any time after he left his father's house. (39 RT 4076.)

Gary Timbs, director of education at ITT Technical Institute in West Covina, testified that appellant enrolled for classes beginning in September 1992. (39 RT 4033.) The ITT Institute is a "proprietary technical institute" which trains students for a career in electronics. (39 RT 4037.) Appellant achieved high scores on the entrance exam, correctly answering 90 percent of the reading comprehension questions and 85 percent of the math questions. (39 RT 4034, 4040.) However, he earned a "high C grade average" in his classes and was terminated from the program in January 1993, due to absenteeism and failure to provide proof of high school graduation. (39 RT 4036.)

Dr. Ronald Fairbanks, a licensed educational psychologist, testified about appellant's intellectual ability and his potential to be productive in prison if sentenced to life imprisonment. (39 RT 4103-4105, 4107-4110.) Dr. Fairbanks testified that he interviewed appellant on October 9 and 18, 1996. (39 RT 4103.) Dr. Fairbanks noted appellant's "use of vocabulary" and his "quick insight," and developed a "clinical impression" that appellant was likely "above average" in his intellectual abilities. (39 RT 4104, 4105.) Appellant's scores on the reading and math portions of the ITT tests were consistent with this clinical impression. (39 RT 4109-4110.) Dr. Fairbanks opined that appellant could be productive within the prison system if given opportunities to work or assist others with reading or obtaining library materials. (39 RT 4109.)

In addition, Dr. Fairbanks reviewed a report that Barbara Ellen Kopp, a licensed Marriage, Family and Child Counselor, prepared in 1978, in connection with legal proceedings related to the dissolution of appellant's parents' marriage. (39 RT 4121.) Kopp recommended that the court give legal custody of the then four-year-old appellant to his mother, and advocated for restrictions on visitation rights by appellant's father. (1 SuppCT IV 258.) Kopp's report indicated that appellant had already experienced substantial "emotional trauma at the hands of his father":

> I first became aware of this situation in January, 1978 when I worked as a consultant to Alhambra Day Nursery. The staff there was experiencing a great deal of difficulty with [appellant]. They were aware that [appellant] had seen his father for the first time in many months. [Appellant] was acting out in class; soiling his pants, picking fights, yelling, screaming and generally creating chaos. His behavior was much more severe than would normally be indicated from a child in a more typical broken home. . . .

> [¶] It is my strong belief that [appellant] has suffered emotional trauma at the hands of his father and that it would be detrimental to his psychological health to have any close contact with his father at this time

(Exh. 115; 1 SuppCT IV 258.)

Kopp also prepared a "child study," which Dr. Fairbanks reviewed before testifying. That report provided a more detailed picture of appellant at four years of age:

> Fantasies of Daddy living at home were another form of [appellant] relieving anxieties. For weeks he would talk about Daddy living with them because he didn't have a job. [Appellant] had not seen his father for several months prior to this. When he finally did see him on a weekend visit, his following school days were filled with turmoil. He was extremely anxious and angry, and his emotional development and sense of well being had regressed six months. Visiting his father stirs up many negative feelings of the past.
>
> [¶] . . . [¶] [Appellant's] days of feeling happy do occur, but rarely. When he feels good inside it is illustrated by him being helpful, co-operative and having fun with the other children. To help adults is a big ego booster.
>
> The majority of [appellant's] days are troubled. Many times he wears a frown and seems to be feeling turmoil inside. The slightest incident may set him off for no apparent reason. I feel the home situation prior to his parents' separation has left a big scar on his life which still needs to be worked out psychologically through counseling.

(Exh. 115; 1 SuppCT IV 260-261.) Dr. Fairbanks testified that Kopp observed "some significant symptoms for a four year old," including "soiling his pants and acting out in a very significant way." (39 RT 4122.)

During his interview with Dr. Fairbanks, appellant was "negative" about his childhood and said that his "father drank some," but he did

notmake "anybody out in particular of being particularly bad." (39 RT 4126.) Appellant talked to Dr. Fairbanks about his education "very brief[ly]." (39 RT 4123.) Appellant said he had used drugs and had experienced hallucinations. (39 RT 4125.) Dr. Fairbanks concluded those hallucinations were associated with the use of drugs and not psychiatric in nature. (39 RT 4125.) Appellant also alluded to four previous suicide attempts. (39 RT 4120.)

The original draft of Dr. Fairbanks's report, dated November 18, 1996, indicated that appellant had already been convicted of a multiple-victim crime of murder, even though the verdict was not returned until after that date. (39 RT 4118-4119.) Dr. Fairbanks testified that he was not sure whether he obtained that information directly from appellant, but he "concluded from his statements that that's what [appellant] meant." (39 RT 4119.) Dr. Fairbanks testified that appellant's statements to the effect that he had already been convicted of murder were consistent with some of the results of the personality tests and "consistent with virtually sabotaging the psychological evaluation, which I would describe him as doing." (39 RT 4119.)

Dr. Fairbanks testified that he performed a battery of "psychodiagnostic" tests upon which he reached conclusions about appellant's personality. (39 RT 4118.) Two of the three psychological tests he gave to appellant had scales that indicated whether a person was malingering or lying to distort the results. (39 RT 4120.) Dr. Fairbanks testified that these scales indicated that appellant "had destroyed so much of [the results] that virtually the net results was that it was not worthy of anything," but when he reviewed the test results in greater depth he concluded "that [appellant's] destruction of the results was consistent with

other trends that I was seeing in the interview, for example, his suicidal tendencies in the past." (39 RT 4120.) Even given appellant's suicidal tendencies, Dr. Fairbanks opined that appellant "has the intelligence [to] be productive" in the prison system if provided with the opportunity. (39 RT 4129, 4172.)

Finally, Jesus Avila, an inmate on appellant's tier at the Los Angeles County Jail, testified that appellant had helped him with his writing, spelling, and drawing. (40 RT 4196.) Avila testified he had limited facility with English, and that appellant explained to him what certain unfamiliar words meant and how to spell them. (40 RT 4197-4198.) Appellant helped Avila write to his family. (40 RT 4198.) Avila testified that appellant was friendly with other prisoners, but spent most of his time reading, drawing, and watching television by himself. (40 RT 4199-4200.)

III. Rebuttal

In rebuttal, the prosecution presented testimony from a single witness, Tony France, about an incident that occurred on December 18, 1991, when appellant was a student at San Gabriel High School. The incident allegedly arose after France, a "campus supervisor" at San Gabriel High School, broke up a fight in which appellant and "a number of [other] people" were involved. (40 RT 5253-4254.) After France broke up the fight and detained appellant, he overheard appellant tell another supervisor that he was "going to kick his ass" and that the other supervisor was "his bitch." (40 RT 4255.) When France then took appellant to wait for the arrival of the police, appellant threatened to put a bullet in France's head. (40 RT 4255.)

On cross-examination, France testified that appellant was "very upset" and "agitated" when he made the statements, and that he did not take

those threatening statements "seriously." (40 RT 4256-4257.) France acknowledged that, in his experience, it was "standard" for students to make similar kinds of statements and threats when security officers broke up fights in which students were involved. (40 RT 4256.) Finally, France testified that he never saw appellant after this incident and was never threatened by appellant again. (40 RT 4257.)

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ARGUMENTS 1 AND 2

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THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTION TO PRESENT NUMEROUS PHOTOGRAPHS OF SANGRA GANG MEMBERS, GANG GRAFFITI, AND OTHER GANG EVIDENCE THAT WAS IRRELEVANT, CUMULATIVE, AND HIGHLY INFLAMMATORY

Over defense objection, the trial court allowed the prosecution to introduce extensive evidence that was not probative of any disputed issue at trial, including (1) numerous photographs of various members of the Sangra gang, some of which did not depict either of the defendants on trial; (2) photographs of the defendants' tattoos; (3) photographs of gang graffiti; and (4) a drawing that was recovered from the search of the residence of a Sangra gang member who was not on trial. Because appellant and co-defendant Palma offered to stipulate to the "exact" language of the gang-enhancement allegation the facts that the defendants were members of the Sangra gang, and that the offenses were gang-related, were not materially in dispute. Moreover, the numerous photographs of the defendants' tattoos, of gang graffiti, and of armed gang members – most of whom had nothing to do with the case – surely overshadowed the evidence that was actually relevant to the jury's determination of guilt.

The emotionally-charged gang evidence presented by the prosecution was inflammatory, cumulative, irrelevant, and far more prejudicial than probative. (Evid. Code, § 352.) The trial court's erroneous ruling in admitting the inflammatory and irrelevant photographs at issue here deprived appellant of his federal constitutional rights to due process, a fair trial, and to reliable determinations as to guilt and penalty. (U.S. Const., 6th, 8th & 14th Amends.; see *Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, 1225-1230.)

A. Proceedings Below

Prior to trial, the prosecution sought permission to admit "gang-related" evidence for a number of purposes at trial, including to establish that appellant and co-defendant Palma were members of the Sangra street gang.[43] (VI CT 1548.) At a pretrial hearing, the trial court entered a

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[43] The other purposes for which the prosecution sought permission to introduce gang evidence were, for the most part, concerned with establishing facts related to the Mexican Mafia gang – of which neither appellant nor co-defendant was alleged to be a member. Specifically, the prosecution sought to offer evidence to show that:

> "2. [. . .] RAYMOND SHYROCK and defendant LUIS MACIEL are members of the Mexican Mafia prison gang and that MACIEL is a member of the EL MONTE FLORES street gang;
>
> 3. [. . .] victim ANTHONY "Dido" MORENO was a Mexican Mafia prison gang 'dropout';
>
> 4. [. . .] victim VICTOR [*sic*] AGUIRRE had robbed a drug dealer who was 'protected' in the Mexican Mafia;
>
> 5. [. . .] [a] relationship [existed] between the Mexican Mafia prison gang and Hispanic street gangs in Los Angeles County including the SANGRA street gang;
>
> 6. [. . .] the defendants TORRES and ORTIZ attended certain Mexico [*sic*] Mafia meetings on behalf of the SANGRA street gang."

(VI CT 1548.)

At trial, the prosecution presented testimony from Witness No. 15 that (1) Shyrock and Maciel were members of the Mexican Mafia (15 RT 1994, 1998), (2) Anthony "Dido" Moreno was a Mexican Mafia prison gang "dropout" (15 RT 2001), and (3) Gustavo "Tito" Aguirre had robbed a drug dealer who was "protected" by the Mexican Mafia. (15 RT 2019-

(continued...)

preliminary ruling granting the prosecution's motion to admit gang-related evidence. As a general matter, the court ruled that "[e]vidence of relationship of gang is admissible for identification," and that "as long as there's been sufficient foundation laid for it, that type of evidence would be admissible." (2B RT 444.) However, the court also indicated that the motion was "better handled" at the time of trial, as the trial judge would be in a better position to determine the extent to which such matters "appear to be an issue at trial" and can thus "make an appropriate ruling" at that time. (2B RT 443-444.)

Before trial began, the trial court directed each party to disclose to the other side any exhibits it intended to use the following day in court. (10 RT 1474-1475.) Prior to opening statements, the defense moved in limine to exclude certain photographs the prosecution intended to introduce, including photographs showing various members of the Sangra gang "throwing gang signs," holding firearms, or standing in front of the "Sangra wall." (11 RT 1479-1480; 12 RT 1521-1528.)

Among the photographs that the prosecution proposed to use in its opening statement were the following:

> (1) a photograph of appellant showing tattoos of the word "Sangra," a shotgun barrel, and what the prosecutor called a "death skull" on his back (12 RT 1521);

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[43] (...continued)
2020.) The prosecution also presented testimony from Sgt. Richard Valdemar to establish that Shyrock and Maciel were members of the Mexican Mafia (18 RT 2259-2262) and that "Dido" Moreno was a Mexican Mafia "dropout" (18 RT 2268), and to describe the relationship between the Mexican Mafia and Hispanic street gangs. (18 RT 2253, 2265, 2272.) No evidence whatsoever was presented to establish that Torres or Ortiz had attended any Mexican Mafia meetings.

(2) a photograph showing a number of people, including appellant, in front of the "Sangra wall," some of whom, according to the prosecutor, were "throwing Sangra gang signs" (11 RT 1479);

(3) a photograph showing a total of six people, in which appellant is allegedly "throwing Sangra gang signs" while some of the other individuals hold firearms (11 RT 1479; 12 RT 1525);

(4) a photograph "with Sangra gang writing on it" showing a total of seven individuals, several holding firearms, including co-defendant Torres[44] but not appellant or co-defendant Palma (11 RT 1479; 12 RT 1526);

(5) a photograph of four individuals holding firearms, including a shotgun, and wearing bandanas that obscure their faces (11 RT 1479)[45];

(6) a photograph of a number of individuals – not including appellant, co-defendant Palma, or any other charged defendant[46] – at the Sangra wall throwing gang signs, one of whom has "187" written across his chest, and with "Sangra gang kills" written over it (11 RT 1480; 12 RT 1526);

(7) a photograph of a number of Sangra gang members seated on a stairway – including a witness in this case whose face has been

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[44] At the time of this pretrial proceeding, the trial court had already severed Torres's case from that of appellant and Palma. (VI CT 1569.)

[45] Although the prosecutor acknowledged that the individuals' faces could not be seen and that he had "no reason to believe they're any of the defendants," he maintained that this photograph was admissible to establish the gang enhancement. (11 RT 1479.)

[46] As the prosecutor explained to the trial court: "[N]one of the charged defendants are in this photograph but the relevance is these people are members of the Sangra gang. They are throwing the Sangra sign and up top somebody's written 'Sangra Gang Kills' and one of the individuals in the photograph has '187' [written] across his chest." (12 RT 1526.)

scratched out, and who has "187" written across his chest (11 RT 1480; 12 RT 1526);

(8) a photograph on which "someone" wrote "Sangra, touch this and you die" (12 RT 1525);

(9) a photograph of appellant with a group of gang members, in which appellant is allegedly "throwing gang signs," and other gang members are either holding guns or have guns in their waistbands (12 RT 1525);

(10) a photograph of various Sangra gang members at the "Sangra wall" (12 RT 1526);

(11) another photograph of various Sangra gang members, some holding guns (12 RT 1526);

(12) a photograph of various Sangra gang members throwing gang signs (12 RT 1526);

(13) a photograph showing co-defendant Luis Maciel and Raymond Shyrock, "a long-time Mexican Mafia member who is in federal custody right now, at a location in El Monte walking together. . . ." (12 RT 1527.)

The prosecutor acknowledged that neither appellant nor co-defendant Palma was shown in many of these photographs. (11 RT 1479.) However, the prosecutor maintained that all the photographs were relevant and necessary to establish the gang enhancement.[47] (11 RT 1479-1480; 12 RT 1522-1528.)

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[47] As to each count of the indictment, the People alleged, pursuant to sections 186.22, subdivisions (b)(1) and (b)(2), that the offense was "committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members." (IV CT 1142-1146.)

Counsel for appellant and co-defendant Palma objected that the photographs were cumulative of other evidence and offered simply for the purpose of prejudicing the jury against the defendants. (12 RT 1529.) They objected to admission of any photograph of Sangra gang members other than the defendants as irrelevant. (11 RT 1480-1481.) Counsel for appellant pointed out that it could not even be established that *any* Sangra gang members were in some of the photographs. (11 RT 1480; 12 RT 1529, 1539.)

Appellant also objected to photographs of gang graffiti, specifically graffiti including the word "Primo," on relevancy grounds because he asserted that there was more than one "Primo" in the Sangra gang.[48] (12 RT 1535.)

The defense offered to stipulate not only that the defendants were members of the Sangra gang, but also that the Sangra street gang was a "violent street gang" for the purpose of the gang enhancement. (12 RT 1522, 1528, 1541.) After the prosecutor argued that the proposed stipulation didn't "go far enough to take away from us the burden of proof as to that gang enhancement," both defense counsel offered to stipulate to the "exact" language of the gang enhancement allegation as set forth in the indictment, thereby offering to "relieve[] the burden of the People of proving that allegation." (12 RT 1528.)

Nonetheless, the prosecutor rejected the defense offer to stipulate to the gang enhancement. He argued that even if the defense was willing to stipulate to everything that the People believed they were required to prove

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[48] The prosecutor responded that he was not aware of any other person in the Sangra gang other than appellant with the moniker "Primo." (12 RT 1536.)

to establish the gang enhancement – that Sangra "is an association or group of three or more persons having as one of its primary activities the commission of assault and battery, robbery, and/or murder" – the photograph with the witness who was granted immunity and whose face was scratched out and had "187" written across his chest would still be admissible. (12 RT 1527.)

The trial court overruled all of the defense objections to the proffered photographs except one. The trial court allowed the prosecution to introduce photographs of Palma's and appellant's tattoos, reasoning that they "show a greater degree of affiliation" with the gang than someone in the gang who did not have tattoos. (12 RT 1528.) The trial court sustained the defense objections to a single photograph of gang members holding guns where the defense objected that the prosecution could not establish that any of the individuals shown were Sangra gang members, but reserved the right to revisit the issue during trial. (12 RT 1532.) The trial court overruled the objections to all of the other photographs. (12 RT 1533-1535, 1542.)

During his opening statement at trial, the prosecutor provided the jury with a lengthy introduction to the photographic evidence that the prosecution would use at trial:

> Now, ladies and gentlemen, we will have to show as part of the gang enhancement, that the defendants are members of the Sangra street gang and that that particular gang has as one of its major purposes the commission of certain felony offenses, and you'll hear more about that later on.
>
> But what we will show, ladies and gentlemen, is you will see one photograph of [appellant], and this is [appellant]. I know you can't see his face and that will be explained to you

later, where he has Sangra tattooed on his back alone with a – the barrels of a double-barreled shotgun and a death head. . . .

So we will prove in part through the use of the photographs in part through the use of expert testimony that these two gentlemen are members of the Sangra street gang.

As far as the criminal purpose of the Sangra street gang, you will see various exhibits along with testimony.

You will see – here is a photograph of a number of Sangra gang members holding firearms together. One of these individuals, this is Mr. Torres who's holding a gun, who's one of the defendants in this case, although he will not be before you in court.

Also, there will be a photograph of various members of the Sangra gang, and you may not get to see these now but you will see these later in front of the Sangra wall, and [appellant] is one of the individuals in that photograph.

There's a photograph here of six members of the Sangra gang, one's holding a handgun, one's holding what appears to be some type of rifle, one has a gun in his waistband, and you can see [appellant] with his arms around two of the individuals and he is actually flashing gang signs, the Sangra gang signs claiming Sangra.

Again, ladies and gentlemen, on the issue of Sangra and what some of its objectives are, here is a picture of Sangra gang members, and while none of the defendants are in this picture, it clearly indicates on the top someone has written in handwriting, "Sangra gang kills." And one of the individuals they've written "187," which is the California Penal Code for murder.

In addition, ladies and gentlemen, you'll see a picture that says "Sangra 1." It shows a number of Sangra gang members with their monikers off to one side. You can see the one individual's face has been crossed out. Now, this is a

> picture of the picture but you can see his face has been crossed out and someone's written "187" across him. This is the individual that I referred to during jury selection who has been given immunity and will testify in this case as a People's witness and will testify that if he testifies honestly he cannot be prosecuted.

(12 RT 1606-1608.)

At trial, the prosecution proffered a large volume of evidence whose relevance was limited to establishing that the Sangra gang was a "criminal street gang" within the meaning of the gang enhancement. This evidence consisted of numerous photographs of various Sangra members, some brandishing weapons and "throwing" gang signs.[49] In several of these photographs neither appellant nor co-defendant Palma was pictured; in one of them, Palma but not appellant was pictured.[50] In addition, the prosecution introduced a photograph of the tattoos on appellant's back;[51] seven photographs of various tattoos on Palma's neck, chest, arms, hands, back, and legs;[52] two photographs of urban gang graffiti;[53] and two pieces

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[49] Exh. 3 (13 RT 1673, 1743); Exh. 7 (13 RT 1740); Exh. 8 (13 RT 1746; 20 RT 2734); Exh. 12-A (14 RT 1846); Exh. 58 (20 RT 2720); Exh. 78 (21 RT 2754-2755); Exh. 79 (21 RT 2754-2755); Exh. 93 (23 RT 3029).

Exhibit 12-A consists of four photographs that were taken from the scrapbook that was marked for identification as Exhibit 12. (29 RT 3678-3679; 1 SuppCT IV 71-72.)

[50] Exh. 7 (13 RT 1740; 1 SuppCT IV 63-64); Exh. 58 (20 RT 2720; 1 SuppCT IV 124-125).

Palma, but not appellant, was identified in Exhibit 78. (21 RT 2754-2755; 1 SuppCT IV 145-146.)

[51] Exh. 57 (18 RT 2275; 19 RT 2523; 1 SuppCT IV 122-123).

[52] Exh. 50 (18 RT 2275; 1 SuppCT IV 108-109); Exh. 51 (18 RT 2275; 1 SuppCT IV 110-111); Exh. 52 (18 RT 2275; 1 SuppCT IV 112-

(continued...)

of paper with the word "Sangra" written in calligraphic letters, one of which also had the handwritten notation "touch this and you die."[54] Finally, the prosecution elicited testimony, also ostensibly for the purpose of proving the gang enhancement, about two exhibits that were marked for identification but were not ultimately introduced into evidence.[55] These exhibits consisted of a document from the Los Angeles County District Attorney's Office, dated March 8, 1990, titled "Notice of Determination that the Sangra Gang is a Criminal Within the Meaning of Penal Code Section 186.22 (marked for identification as Exhibit 71) and a hand-drawn drawing of a drive-by shooting recovered during a search of Jose "Pepe" Ortiz's residence (marked for identification as Exhibit 91).[56] All that

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[52] (...continued)
113); Exh. 53 (18 RT 2275, 2277; 1 SuppCT IV 114-115); Exh. 54 (18 RT 2275, 2280; 1 SuppCT IV 116-117); Exh. 55 (18 RT 2275; 1 SuppCT IV 118-119); Exh. 56 (18 RT 2275, 2280; 1 SuppCT IV 120-121).

[53] Exh. 72 (19 RT 2526; 1 SuppCT IV 137-138); Exh. 73 (19 RT 2526; 1 SuppCT IV 139-140).

[54] Exh. 60 (18 RT 2359; 1 SuppCT IV 126-127); Exh. 92 (23 RT 3028-3029; 1 SuppCT IV 165-166).

[55] Exh. 71 (19 RT 2507; 1 SuppCT IV 53); Exh. 91 (23 RT 3028-3029; 1 SuppCT IV 54).

[56] The prosecutor withdrew Exhibit 71 (26 RT 3291), but only after using it to examine gang expert Dan Rosenberg about the basis for his expert opinion that Sangra was a criminal street gang. (19 RT 2507.) Appellant objected to the admission of Exhibit 91, the drawing recovered from Ortiz's residence, on hearsay and relevance grounds; the trial court sustained the objection. (25 RT 3274-3275.) The prosecution, however, elicited testimony about this extremely inflammatory and utterly irrelevant drawing during the examination of its final witness, Los Angeles County Sheriff's Investigator Stephen Davis. (23 RT 3028-3029.)

evidence was used by the prosecution for the ostensible purpose of proving the gang enhancement allegation.

B. Applicable Legal Standards

Evidence Code section 1101, subdivision (a), prohibits the admission of evidence of a person's character, including specific instances of conduct, to prove his or her conduct on a specific occasion. Section 1101, subdivision (b), provides an exception to this rule for evidence which is relevant to establish some fact other than the person's character or disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Under section 1101, subdivision (b), character evidence is admissible only when "relevant to prove some fact (such as motive, opportunity, intent . . .) other than his or her disposition to commit such an act." (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.)

The rule excluding evidence of criminal propensity derives from early English law and is currently in force in all American jurisdictions. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 392; *People v. Alcala* (1984) 36 Cal.3d 604, 630-631.) Such evidence is impermissible to "establish a probability of guilt." As the United States Supreme Court stated in *Michelson v. United States* (1948) 335 U.S. 469:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. [footnote] The inquiry is not rejected because character is irrelevant; [footnote] on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its

> disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

(*Id.* at pp. 475-476.)

The admissibility of bad-character evidence depends upon the materiality of the fact to be proved or disproved, and the tendency of the proffered evidence to prove or disprove it. (*People v. Catlin*, *supra*, 26 Cal.4th at pp. 145-146.) There must be a strong foundational showing that the evidence is sufficiently relevant and probative of the legitimate issue for which it is offered to outweigh the potential, inherent prejudice of such evidence. (See *People v. Poulin* (1972) 27 Cal.App.3d 54, 65.) Because such evidence can be highly inflammatory and prejudicial, its admissibility must be "scrutinized with great care." (*People v. Thompson* (1980) 27 Cal.3d 303, 315, disapproved on another grounds, *People v. Williams* (1988) 44 Cal.3d 883, 907, n. 7.)

Gang-related evidence, like other bad character evidence, is not admissible when introduced only to "show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) Such evidence is admissible if it is relevant to issues in the case, is not more prejudicial than probative, and is not cumulative. (See *People v. Ruiz* (1998) 62 Cal.App.4th 234, 240.) In addition, this Court has cautioned that even if gang-related evidence is relevant, it may have a highly inflammatory impact on the jury, and therefore, "trial courts should carefully scrutinize such evidence before admitting it." (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Gurule* (2002) 28 Cal.4th 557, 653, quoting *People v. Champion* (1995) 9 Cal.4th 879, 922.)

Under Evidence Code section 352, a trial court must exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 973.) Evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant as an individual, and yet has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046.) Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14.)

In doubtful cases, the exercise of discretion to admit or exclude evidence pursuant to Evidence Code section 352 should favor the defendant, because in comparing prejudicial impact with probative value, the balance "is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; *People v. Murphy* (1963) 59 Cal.2d 818, 829.)

C. Because Appellant and Co-Defendant Palma Offered to Stipulate to the "Exact Language" of the Gang Enhancement, the Gang Enhancement Was Not "Actually In Dispute" and the Proffered Gang Evidence was Irrelevant

Any ultimate fact the prosecution seeks to establish with bad-character evidence must be both "material" and "'actually in dispute.'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 315, quoting *People v. Thomas* (1978) 20 Cal.3d 457, 467; see also *People v. Williams*, *supra*, 44 Cal.3d at p. 905; *People v. Hall* (1980) 28 Cal.3d 143, 152, overruled on other ground

in *People v. Newman* (1999) 21 Cal.4th 413, 419-420 ["If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible"].) "Materiality concerns the fit between the evidence and the case. . . . If [] evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial." (1 McCormick, Evidence (6th ed. 2006) Relevance, § 185, p. 729.) Here, whether or not the gang enhancement was true was not actually in dispute, because both appellant and his co-defendant offered to stipulate to the "exact" language of the gang-enhancement allegations. (12 RT 1528.)

"A stipulation is 'a[n] agreement between opposing counsel' [citation] . . . [that] serves 'to obviate the need for proof and narrow the range of litigable issues' [citation] . . . [and] 'may lawfully include or limit issues or defenses to be tried [citations]'" (*County of Sacramento v. Worker's Compensation Appeals Board* (2000) 77 Cal.App.4th 1114, 1118), and is "conclusive with respect to the matters stated in it." (*Harris v. Spinali Auto Sales* (1966) 240 Cal.App.2d 447, 452.) While this Court has recognized that the prosecution is not required to accept a stipulation as a general matter, it has consistently recognized an exception to that rule when the stipulation "constitute[s] an offer to admit completely an element of the charged crime." (*People v. Sakarias* (2000) 22 Cal.4th 596, 629.) Thus, "if the defendant offers to admit the existence of an element of the crime, the prosecutor must accept that offer, and refrain from introducing evidence to prove that element." (*People v. Hall*, *supra*, 28 Cal.3d at p. 152; accord, *People v. Bonin* (1989) 47 Cal.3d 808, 849 [because the defense offered to stipulate to an element, "the court should have compelled the prosecution to accept the defendant's offer and barred it from eliciting testimony on the facts covered by the proposed stipulation"]; compare *People v. Roldan*

(2005) 35 Cal.4th 646, 706-707, fn. 24 [where defendant declined to stipulate to an element, his not-guilty plea placed all elements in issue for purposes of section 1101].)

Here, defense counsel offered to stipulate not only to the defendants' membership in the Sangra gang (12 RT 1522, 1528, 1541), but also to the "exact" language of the gang-enhancement allegation as set forth in the indictment. (12 RT 1528.) Therefore, as defense counsel argued, the proposed stipulation would have "relieve[d] the burden of the People of proving that allegation." (12 RT 1528.) Thus, that stipulation would have relieved the prosecution of any burden to prove the gang enhancement. (See, e.g., *Harris v. Spinali Auto Sales*, *supra*, 240 Cal.App.2d at p. 452.)

Accordingly, this case is distinguishable from *People v. Arias* (1996) 13 Cal.4th 92, where the defendant, after "los[ing] his bid" to sever rape and robbery charges based on one incident from robbery and murder charges based on a subsequent incident, offered to "stipulate to his commission of [the rape and robbery] in order to keep [evidence of those crimes] from the jury considering his guilt" on the robbery and murder charges. (*Id.* at pp. 130-131.) This Court held that the proposed stipulation "was not an adequate substitute" for evidence about the other crimes because: (1) the defendant refused to admit the two material issues the prosecutor sought to prove with the other-crimes evidence; and (2) "the People would have lost material circumstantial evidence on [those] issues" if forced to accept the stipulation. (*Id.* at p. 131.)

Here, accepting the proposed stipulation would have cost the prosecutor nothing legitimate. It would only have cost him the improper windfall benefit of introducing a raft of extremely prejudicial, and minimally probative, evidence, the admission of which made it almost

certain that the jurors would decide the case based upon inappropriate considerations. The fact that the prosecutor rejected appellant's offer to stipulate to the "exact" language of the gang enhancement suggests that his real aim was to introduce the gang evidence precisely *because* it would be so prejudicial, and because the jurors would probably draw the forbidden inference from it that appellant "had a propensity to commit [such] crimes," and would treat that inference as "circumstantial evidence that [appellant] committed the charged offense." (*People v. Karis* (1988) 46 Cal.3d 612, 636.)

D. The Prejudicial Effect of the Evidence Far Outweighed Any Minimal Probative Value

In this case, the only purported probative value of the challenged gang evidence was to establish that appellant and co-defendant Palma were members of the Sangra street gang, and circumstantially that the Sangra gang was a "criminal street gang" within the meaning of the gang enhancement. However, neither of those propositions was in dispute.

There was no dispute that the defendants were members of the Sangra street gang. Indeed, both defendants had prominent "Sangra" tattoos – Palma on his neck and appellant on his back. (Exhs. 50-57; 1 Supp IV 108-123.) Prosecution witnesses Veronica Lopez, Victor Jimenez, Renee Chavez, and Witness No. 16 all testified, without objection from the defense, that they knew that appellant was a member of the Sangra gang.[57] Similarly, Jimenez, Witness No. 16, and Richard Valdemar provided testimony establishing that Palma was a member of the gang, again without

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[57] See 13 RT 1662-1663 (Veronica Lopez); 13 RT 1734 (Victor Jimenez); 14 RT 1949 (Renee Chavez); 20 RT 2677 (Witness No. 16).

defense objection.[58] Moreover, several witnesses testified that Torres, Logan, and Ortiz were members of the Sangra gang, and Victor Jimenez and Witness No. 16 acknowledged that they were themselves members.[59] Clearly, whether the defendants were members of the Sangra gang was not in dispute.

Moreover, the prosecution did not need the challenged gang evidence to establish that Sangra was a "criminal street gang" within the meaning of the alleged gang enhancement; it had ample expert testimony and documentary evidence to establish that proposition. Dan Rosenberg, a sergeant assigned to the gang unit of the Los Angeles County Sheriff's Department, offered his expert opinion that the Sangra gang was an "ongoing organization, association, or group of three or more members." (19 RT 2506.) Rosenberg further testified that it was his expert opinion that there was "no doubt" that one of the primary activities of the Sangra street gang was the commission of various felony offenses, that Sangra has a "common name" and "a common identifying sign or symbol," and that its members "throw particular gang signs exclusive to Sangra." (19 RT 2508.) Rosenberg testified that Sangra was a "terrorist street gang" and that it had been classified as such in March 1990 by the Los Angeles Superior Court. (19 RT 2506.) Without defense objection, the court order was marked as

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[58] See 13 RT 1734 (Victor Jimenez); 18 RT 2278 (Richard Valdemar); 20 RT 2678 (Witness No. 16).

[59] See 13 RT 1736 (Victor Jimenez about Torres); 14 RT 1913 (Elizabeth Torres about Torres); 14 RT 1950 (Renee Chavez about Torres); 19 RT 2542 (Jill Steele about Torres); 1 SuppCT IV 47 (Witness No. 13 tape-recorded statement about Torres); 14 RT 1948 (Renee Chavez about Logan); 14 RT 1969 (Renee Chavez about Ortiz); 13 RT 1734 (Victor Jimenez about himself); 20 RT 2677 (Witness No. 16 about himself).

Exhibit 71 and shown to Rosenberg to support his opinion that Sangra was a terrorist gang.[60] (19 RT 2507.) Although the prosecution did not bother to properly authenticate the court order, had it done so the court order alone would have conclusively established that Sangra was a "criminal street gang" within the terms of the gang enhancement, obviating the need for the prosecution to introduce all of the inflammatory gang-related evidence challenged here.

What was in dispute was not appellant's association with the Sangra gang, but, specifically, whether or not appellant was involved in the shootings at the Maxson Road residence. The prosecution's evidence in this regard was based primarily on the testimony of a fellow gang member, Witness No. 16, who testified under a grant of immunity and whose credibility was suspect. Consequently, the prosecution sought to bolster its case by introducing a raft of gang-related evidence, much of which had absolutely nothing to do with appellant, in order to frighten the jury and to insinuate that appellant was guilty by virtue of his association with the Sangra gang.

This evidence should not have been admitted under Evidence Code sections 352 and 1101. The admission of this evidence was extremely prejudicial to appellant, while its probative value was slight. Even if the evidence had some relevance to motive and intent, there was no connection between these photographs, drawings, and gang graffiti and the circumstances leading to the shootings in this particular case.

Moreover, there was a high degree of danger that the admission of the challenged gang-related evidence would confuse and prejudice the jury.

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[60] The prosecution subsequently withdrew Exhibit 71 because it was a hearsay document. (26 RT 3291.)

Most significantly, this evidence had no probative value as to the critical disputed question of whether appellant had any involvement in the charged offenses. However, because the evidence linked appellant to other Sangra gang members, it likely led the jury to believe that appellant had the propensity to commit the kind of crimes for which he was on trial because of his association with the gang.

Finally, the cumulative impact of this evidence shifted the focus from the properly-admitted testimony and turned the trial into what was essentially an exercise in character assassination and guilt by association. In light of its misleading and inflammatory nature, and its negligible probative value, the challenged gang-related evidence should not have been admitted.

E. The Admission of the Challenged Gang Evidence Violated Appellant's Constitutional Rights

The admission of this evidence violated appellant's right to due process under the Fourteenth Amendment, which "protects the accused against conviction except upon proof [by the State] 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.) The trial court's erroneous admission of the evidence lightened the prosecution's burden of proof, improperly bolstering the credibility of witnesses and permitting the jury to find appellant guilty in large part because of his criminal propensity. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Moreover, the introduction of the evidence so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378,

1385-1386 [admission of irrelevant propensity evidence rendered trial fundamentally unfair].)

In addition, the admission of this evidence violated appellant's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code sections 352 and 1101 not to have his guilt determined by inflammatory propensity evidence. By ignoring well-established state law which prevents the state from using evidence admitted for a limited purpose as general propensity evidence and which excludes the use of unduly prejudicial evidence, the state court arbitrarily deprived appellant of a state-created liberty interest. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

Appellant was also deprived of his right to a reliable adjudication at all stages of a death penalty case. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, abrogated on other grounds, *Atkins v. Virginia* (2002) 536 U.S. 304; *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

F. The Use of the Challenged Gang Evidence Was Not Harmless

As discussed above, the prosecution's case against appellant was far from overwhelming, and relied on witnesses of dubious credibility to establish the key facts that connected appellant to the shootings. To persuade the jury that appellant was guilty, the prosecutor sought to significantly bolster its case through innuendo, character assassination, and guilt by association by introducing extremely inflammatory evidence that impermissibly portrayed appellant as a person with a criminal propensity. None of this evidence had any relevance to the murders, but it had a strong likelihood to inflame the jury and mislead it with regard to appellant's guilt.

Moreover, the jury was never instructed that this evidence could not be used as evidence of appellant's bad character or criminal propensity. (See, e.g., CALJIC No. 2.50.) The lack of instructions to guide the jury permitted the unrestricted use of the objectionable evidence. While there is no duty to give limiting instructions sua sponte (*People v. Collie* (1981) 30 Cal.3d 43, 63-64), their absence from a case where highly inflammatory character evidence is introduced heightens the prejudicial effect of the error. Logically, the absence of limiting instructions enhances the likelihood that the jury will "misuse [the evidence] as character trait or propensity evidence" and "use such evidence to punish a defendant because he is a person of bad character, rather than focusing upon the question of what happened on the occasion of the charged offense." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 128-129.)

Finally, the fact that the jury deliberated at the guilt phase for more than 16 hours, over the course of six days, without reaching a verdict demonstrates that this was a close case. (See Argmt. 11, *infra*.) This Court has recognized that lengthy deliberations indicate that the case was close. (See, e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [12 hours of deliberation shows close clase]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [6 hours]; accord *Lawson v. Borg* (1995) 60 F.3d 608, 612 [9 hours].) During those eight days of deliberation, the jurors communicated with the trial court frequently, requesting readback of numerous witnesses and re-playing of videotapes. These facts were also indicative of a close case. (See *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295.)

Given the weakness in the prosecution's case, its reliance on this inflammatory evidence, particularly when considered in combination with the other gang-related evidence (see Argmt. 4, *infra*), was extremely

prejudicial especially in the absence of an adequate limiting instruction. Reversal is required because the People cannot establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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THE TRIAL COURT IMPROPERLY ADMITTED HIGHLY PREJUDICIAL AND IRRELEVANT TESTIMONY FROM THREE WITNESSES ABOUT THREATENING INCIDENTS, NONE OF WHICH WAS SHOWN TO BE RELATED TO APPELLANT, IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL AND RELIABLE JURY VERDICTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Over appellant's repeated objections, the trial court improperly permitted the prosecutor to elicit speculative, irrelevant and highly prejudicial testimony from three witnesses – David Sandate, Witness No. 16, and Witness No. 13 – about threatening incidents and about their fear of testifying in this case. The prejudicial impact of admitting that testimony was compounded by the prosecutor's references during closing argument to these incidents. The admission of this evidence fatally infected the trial with unfairness and violated appellant's rights to due process and a fair trial, an impartial jury, and a reliable penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

A. Factual Background

1. Testimony of Witness No. 13

As detailed in the Statement of Facts, *supra*, Witness No. 13, Anthony Torres's sister, testified that sometime between 7:30 and 9:00 p.m., approximately six to eight men, some of whom she recognized as her brother's friends, came to her mother's house and went into her brother's bedroom. (15 RT 2082, 2086, 2096.) From photographic lineups, Witness No. 13 identified her brother, appellant, and Daniel Logan as three of the men that she saw at her mother's house that night. (15 RT 2088-2092; Exhs. 15, 16, and 17.) After reviewing a fourth photographic lineup

containing a photograph of co-defendant Palma, Witness No. 13 testified that the person in photograph 3 looked "similar" to the man who had identified himself as "Jimmy" when he had come to her mother's house earlier that evening, but she could not be certain on the basis of the photograph in the lineup. (15 RT 2093-2094.)

The prosecutor then asked Witness No. 13 if she had been "scared" when her brother's friends came to the house, and she responded that she had not. (15 RT 2096-2097.) Despite Witness No. 13's response that there was nothing about the fact that the men went into her brother's room that scared her, the prosecutor then asked her whether the real reason she left her mother's house was that she was "scared." (15 RT 2097.) In response, Witness No. 13 acknowledged that the "traffic coming in and out" of her mother's house had made her "uncomfortable," so she left. (15 RT 2097.) The prosecutor then asked Witness No. 13 whether she was "concerned" at the time – and was "still concerned" at the time of her testimony – that the men had seen her and her two children at her mother's house. (15 RT 2097.) She acknowledged that she was. (15 RT 2097.)

The prosecutor then read from the transcript of Witness No. 13's May 1, 1995, interview with Investigator Davis, and asked whether she recalled what she told Davis. (15 RT 2097-2098.) When Witness No. 13 responded that she did not remember what she told Investigator Davis, the prosecutor again tried to elicit that Witness No. 13 was "scared." However, Witness No. 13 maintained that there was no "particular reason" why she was unable to recall certain details of what she had told Investigator Davis:

> Q. Do you remember what you said [when Investigator Davis asked you what the "guys" who came to the house looked like]?
>
> A. No, I don't.

Q. Is there a particular reason that you are unable to remember what you said?

A. No.

Q. No reason at all?

A. No.

Q. Are you afraid to testify?

MR. BESTARD: Objection as leading. No foundation.

THE COURT: Overruled.

THE WITNESS: Yes.

(15 RT 2097-2098.)

Over defense objection, the prosecutor then asked Witness No. 13 if she believed she and her children would be killed because of her testimony:

Q. Do you think you're going to be killed?

A. Yes.

Q. Do you think your two children are going to be killed?

MR. UHALLEY: Your Honor, I am going to object. Improper, calling for a conclusion.

THE COURT: Overruled. Goes to her state of mind as it affects credibility.

BY MR. MONAGHAN:

Q. Do you think your children are going to be killed?

A. Yes.

Q. I don't mean to put you on the spot, ma'am. Do you remember what you told the police?

A. I don't remember all of it.

Q. Do you remember more than you're admitting to me right now?

A. No.

(15 RT 2098-2099.)

The prosecutor then asked Witness No. 13 to identify co-defendant Palma as the man who had come by her mother's house earlier in the evening and identified himself as "Jimmy." (15 RT 2100.) Witness No. 13 responded that while Palma looked "similar," she could not identify him with certainty. (15 RT 2100-2101.)

In response, the prosecutor asked Witness No. 13 about two "drive-by shootings" that apparently had occurred at her former workplace:

Q. Now, you still work; is that correct?

A. Yes.

Q. But at a different location than you used to; is that correct?

A. Yes.

Q. The place that you work at now –

MR. BESTARD: Objection as irrelevant.

THE COURT: Overruled.

BY MR. MONAGHAN:

Q. Since you started working at that location, have there been two drive-by shootings in the middle of the night?

A. Yes.

MR. UHALLEY: Your Honor, objection.

THE COURT: Objection's overruled. Again, it goes to her state of mind as it affects her credibility.

BY MR. MONAGHAN:

Q. What shift do you work at that location?

A. Anywhere between 7:00 a.m. and 10:00 p.m. at night.

Q. And twice since you've been there that location's had the front glass windows shot out?

A. Yes.

Q. Does that scare you?

A. Yes.

(15 RT 2103.)[61]

The prosecutor concluded his examination of Witness No. 13 by asking this question:

Q. If you had to do this over and you had the information that you had, and I am not going to ask you what your brother told

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[61] At the conclusion of his direct examination of Witness No. 13, the prosecutor returned to the subject of her fear, asking a series of questions about her initial reluctance to come forward. He elicited from Witness No. 13 that: (1) when she first came forward she did not want anyone to know that she had done so (15 RT 2110); (2) she told Detective Penny at that time that she didn't want anyone to know what she was doing (15 RT 2110); and (3) she told Investigator Davis on April 27, 1995, that she did not want to ever come forward. (15 RT 2110.) She testified that she did not want to come forward because she was afraid (15 RT 2110) and that she never told her mother, brother or husband what she was doing. (15 RT 2111.) She acknowledged that "at some point" later the prosecutor and another investigator told her that they would relocate her so she would not be harmed. (15 RT 2111.) She testified that she had in fact moved from the house where she had been living at the time of the murders, and worked at a different location. (15 RT 2111.) Finally, she testified that at some point after she testified before the grand jury, she had a meeting with the prosecutor in which he told her that her name would be redacted, though it would be clear from the transcripts that she was Anthony Torres's sister. (15 RT 2112.)

While the defense did not object to the elicitation of this testimony, since the trial court had repeatedly overruled defense objections to similar testimony throughout Witness No. 13's direct examination, any such objection by the defense would have clearly been futile, and thus was unnecessary. (*People v. Antick* (1975) 15 Cal.3d 79, 95; *Green v. Southern Pac. Co.* (1898) 122 Cal. 563, 565. ["Where a party has once formally taken exception to a certain line or character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable matter arising in the examination of other witnesses; and his silence will not debar him from having the exception reviewed."].)

you, if you had that information all over again knowing what you know now, would you have come forward with it?

A. No.

Q. Why?

A. It's too scary. I'm afraid.

(15 RT 2113-2114.)

2. Testimony of David Sandate

David Sandate, the former custodian of records of Expo Electronics, the company that provided pager service to Luis Maciel at the time of the Maxson Street murders, [62] was called by the prosecution for the ostensible purpose of authenticating a copy of a contract between Expo Electronics and Maciel for pager service. (20 RT 2573-2575.) Without hesitation or difficulty, Sandate authenticated the document, and testified that the contract indicated that Maciel had pager service with the company on April 22, 1995, and that Maciel's pager number was (818) 710-4921. (20 RT 2573.)

After eliciting this perfunctory and uncontroversial testimony, the prosecutor asked Sandate if he had previously testified before the grand jury in this case, and if he had identified Maciel from a photograph at that time. (20 RT 2575.) Sandate acknowledged that he had. (20 RT 2575.) Using leading questions, the prosecutor then asked Sandate about a vaguely intimidating incident in which an unknown "individual" confronted him and asked him why he was testifying against Maciel:

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[62] Sandate no longer worked for Expo Electronics by the time of appellant's trial, and the record is not clear when he was employed by the company. He testified that he used to be employed by Expo Electronics and had then been the custodian of records, but the prosecutor did not establish when that was. (20 RT 2574.)

Q. Were you approached at your business by an individual?

A. Yes.

Q. And were you asked what you were doing testifying against Mr. Maciel?

A. Yes.

Q. And did you subsequently leave Expo Communications?

A. No, I did not leave the company because of that reason.

(20 RT 2575.)

Defense counsel objected that this testimony was irrelevant, but the trial court overruled the objection. (20 RT 2575.)

3. Testimony of Witness No. 16

As detailed in the Statement of Facts, *supra*, Witness No. 16 provided critical testimony implicating appellant and other Sangra members in the offenses. At no time during his testimony did Witness No. 16 indicate that he had any difficulty recalling events. Even so, over defense objections the prosecutor elicited from Witness No. 16 on direct examination that he initially refused to answer questions when called before the grand jury because he was scared for his safety and believed that his family would be killed:

Q. What did you believe would happen if you got on the stand on December 6 with your family still living in San Gabriel and told the truth about what Jimmy Palma and [appellant] and others did that night?

A. They'd be killed.

MR. UHALLEY: Object, your Honor, irrelevant.

MR. BESTARD: Join.

THE COURT: Objection's overruled.

MR. BESTARD: Your Honor, no foundation as to what made him believe.

THE COURT: Goes to his state of mind. Overruled.

(20 RT 2719.)

The prosecutor then showed Witness No. 16 a photograph of himself together with other members of the Sangra gang in which Witness No. 16's face had been scratched out of the photograph and the number "187" scratched onto his chest. (20 RT 2720; Exh. 58; 1 SuppCT IV 124-125.) The questioning proceeded as follows:

BY MR. MONAGHAN:

Q. Sir, regarding whether or not you believe that your family would have been killed [] in good faith or not, I want to show you Exhibit Number 58 for identification.
Have I ever shown you that picture before?

A. No.

Q. Today at lunchtime did I tell you that the picture existed?

A. Yes.

Q. Up until today had I even told you that I knew about the picture?

A. No.

Q. Are you in that picture?

A. Yes.

Q. With other members of the Sangra street gang?

A. Yes.

Q. And in what position are you, sir?

A. I am in the middle on the bottom.

Q. Has something been done to your face?

A. Yes.

Q. What's been done to it?

A. It's been scratched out.

Q. Has something been written on your chest?

A. Yes.

Q. What's that?

A. 187.

Q. Do you know what Penal Code 187 is?

A. Yes.

Q. What?

A. Murder.

Q. The person I'm pointing to right now in the exhibit, is that you?

A. Yes.

Q. Does this Exhibit 58 for identification concern you?

A. Yes.

(20 RT 2720-2721.)

B. Applicable Legal Standards

Evidence of third-party efforts to intimidate or dissuade a witness from testifying may be relevant and admissible for two purposes.

First, where there is evidence that the threats were authorized by the defendant, the evidence may be admissible to show the defendant's consciousness of guilt. (See, e.g., *People v. Hannon* (1977) 19 Cal.3d 588, 589; *People v. Terry* (1962) 57 Cal.2d 538, 565-566.) While authorization may be proved by circumstantial evidence, it is well-settled that proof of mere relationship between the defendant and the third party is, as a matter of law, "no proof of authorization." (*Terry*, at p. 567; *People v. Perez* (1959) 169 Cal.App.2d 473, 478.) Similarly, "proof of a criminal defendant's 'mere opportunity' to authorize a third person to attempt to influence a witness 'has no value as circumstantial evidence' that the

defendant did so." (*People v. Williams, supra*, 16 Cal.4th at p. 200, citing *People v. Terry, supra*, 57 Cal.2d at p. 566.) Threat evidence cannot be probative of the defendant's consciousness of guilt if the defendant did not make, authorize or even know of the threat. (*People v. Hannon, supra*, 19 Cal.3d at p. 589.) Hence, absent proof of authorization, the evidence is irrelevant and inadmissible against the defendant. (*Terry*, at pp. 565-566; *People v. Weiss* (1958) 50 Cal.2d 535, 554; *People v. Pitts* (1990) 223 Cal.App.3d 606, 778-781; *People v. Perez, supra*, 169 Cal.App.2d at p. 478.)

Moreover, this Court has warned that "evidence of an anonymous threat not connected with the defendant 'should at once be suspect as . . . an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily because he does not know the true identity of the pretender.' " (*People v. Mason* (1991) 52 Cal.3d 909, 946, quoting *People v. Weiss, supra*, 50 Cal.2d at p. 554.) Thus, evidence concerning the credibility of a witness should be excluded if the alleged motive or bias is speculative, conjectural or based on mere possibilities. (See *People v. Johnson* (1984) 159 Cal.App.3d 163, 168; *People v. Alfaro* (1976) 61 Cal.App.3d 414, 424; *People v. Avelar* (1961) 193 Cal.App.2d 631, 634-635.)

Second, such evidence may be admissible on the issue of the threatened witness's credibility. Thus, such evidence can, upon proper foundation, be admitted to explain how a witness's testimony changed to the detriment of the prosecution or why a witness was hesitant to identify a person. (See *People v. Malone* (1988) 47 Cal.3d 1, 30 [fear of retribution by gang members required showing that retaliation was part of gang practice]; *People v. Warren* (1988) 45 Cal.3d 471, 484-486 [evidence that

witnesses wanted nothing to do with the case relevant after they refused to identify defendant]; *People v. Chacon* (1968) 69 Cal.2d 765, 779 [prosecution witness evasive and uncooperative]; *People v. Yeats* (1984) 150 Cal.App.3d 983, 987 [evidence tending to show that witness was fearful provided a motive for him not to tell the truth].)

In such cases, the prosecutor should establish the relevance of the witness's state of mind by demonstrating that the testimony is inconsistent or otherwise suspect. (*People v. Yeats*, *supra*, 150 Cal.App.3d at p. 986.) If "the prosecution . . . first establish[es] the relevance of the witness's state of mind by demonstrating that the witness's testimony is inconsistent or otherwise suspect," third-party threats may be admissible to impeach a witness on the theory that it shows a "bias, interest, or other motive" not to tell the truth. (*Ibid.*; accord, *People v. Burgener* (2003) 29 Cal.4th 833, 868; *People v. Brooks* (1979) 88 Cal.App.3d 180, 187.)

C. The Trial Court Erroneously Admitted the Threat Evidence

In this case, there was no evidence that any of the threatening incidents were authorized by or attributable to appellant in any way. Therefore, none of the evidence of threats or of fear of testifying was admissible as direct evidence of guilt.

Over defense objection, the prosecutor elicited from Sandate that he was approached at his place of business by "an individual" who asked him what he was doing testifying against Luis Maciel. (20 RT 2575.) The fact that Maciel was charged as a co-defendant in this case was no evidence that appellant or the other co-defendants had authorized or had anything to do

with the threat at all.[63] (*People v. Terry*, *supra*, 57 Cal.2d at p. 567; *People v. Perez*, *supra*,169 Cal.App.2d at p. 478.) Hence, evidence of the incident was inadmissible unless it was relevant to Sandate's credibility or state of mind.

However, Sandate's credibility and state of mind were plainly not in issue. His perfunctory testimony authenticating a contract for Maciel's pager service provided no basis for admission of evidence of a threat by an anonymous third party. Consequently, it was improper to ask Sandate about the incident, since it was utterly irrelevant to this case.

Similarly, the prosecutor failed to establish a proper foundation to introduce the photograph on which "187" had been scratched onto Witness No. 16's image. As the prosecutor was well aware, Witness No. 16 had never seen the photograph until the prosecutor showed it to him while he was on the witness stand. (20 RT 2720-2721.) Since Witness No. 16 was not aware of the existence of the photograph at the time of his testimony, it could not conceivably have had any bearing on his state of mind, or account for any supposed evasiveness or inconsistency in his testimony. In any case, the prosecutor never demonstrated that Witness No. 16's testmony was "inconsistent or otherwise suspect." (*People v. Yeats*, *supra*, 150 Cal.App.3d at p. 986.) Therefore, the prosecutor failed to establish that the evidence was relevant to Witness No. 16's state of mind.

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[63] Moreover, the prosecutor's elicitation of testimony about this incident was particularly prejudicial to appellant because he had no way to rebut it without knowing the identity of the "individual" who approached Sandate. (*People v. Weiss*, *supra*, 50 Cal.2d at p. 554 [prosecutor's introduction of anonymous threats should "at once be suspect as . . . an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily because he does not know the true identity of the pretender"].)

With respect to the incidents at Witness No. 13's workplace, the prosecutor not only failed to establish that they were authorized by or attributable to the defendants in this case; as he acknowledged at a pretrial hearing, he could not prove that the incidents were related to this case at all. (3 RT 668.) As the prosecutor told the court at that hearing: "We've had another witness, *although we can't pinpoint this happening to that witness because of this case*, that witness works at a particular business, a supermarket, in a town that has no violence per se. . . . All of a sudden on two separate occasions since that witness has worked at that location the place has been shot up in the early morning hours when only several people would be there; *[but] again, we can't say for certain that's tied to this case* . . . ." (3 RT 668, italics added.) Because the prosecution could not establish that these incidents were even related to this case, this evidence also was not admissible as direct evidence of guilt.

Unlike Sandate and Witness No. 16, Witness No. 13 was unable to recall some details of the events about which she had previously told investigating officers. Thus, at trial she did not remember whether: (1) she had seen a Nissan Maxima at the house (15 RT 2085); (2) the men at the house had been paged on their pagers (15 RT 2086-87); (3) she had indicated that she knew appellant as "Primo" when she identified him from a photographic lineup on May 1, 1995 (15 RT 2089-90); (4) she had been able to identify Palma from a photographic lineup on May 1, 1995 (15 RT 2093-94); and (5) there were two guys with "Tricky" when he arrived at the house (15 RT 2095).

On each occasion, however, Witness No. 13 affirmed her prior statements to investigators and her preliminary hearing testimony when the prosecutor refreshed her recollection by reading them to her. (15 RT 2086,

2087, 2093, 2094, 2096.) Because Witness No. 13 never testified inconsistently with her prior statements or testimony, the testimony concerning the shooting incidents at her workplace were not relevant to her credibility.

People v. Brooks (1979) 88 Cal.App.3d 180, is instructive. In *Brooks*, two bakery employees, Shirley Mitchell and Audrey Blount, were in the bakery when it was robbed. (*Id.* at pp. 183-184.) During the police investigation of the robbery, both Mitchell and Blount identified the defendant as the robber. (*Id.* at p. 184.) Nadine Harris, a friend of the defendant, was seen speaking to him outside the bakery prior to the robbery. (*Ibid.*) At trial, Mitchell steadfastly maintained her identification of the defendant but Blount failed to identify him as the robber and retracted her pretrial identification. (*Ibid.*) The prosecutor attempted to elicit from Blount that the change in her testimony was attributable to an incident in which the defendant's mother came to the bakery and attempted to persuade the employees to change their minds about their identifications of the defendant. (*Id.* at p. 185.) In addition, the prosecutor elicited from Harris that she was "uneasy" because she had been "threatened." (*Ibid.*)

The Court of Appeal held that the evidence of threats with respect to Blount was admissible, because when she retracted her pretrial identification of the defendant it presented a credibility issue on which the jury was entitled to hear evidence of the threatening incident in order to understand the possible reasons for her contradiction. (*People v. Brooks*, *supra*, 88 Cal.App.3d at p. 187.) However, with respect to the evidence that Harris was threatened, the court held that because there had been no inconsistent testimony prior to the prosecutor's questioning of Harris, there was no issue of credibility. (*Ibid.*) Accordingly, the threat evidence was

immaterial to any issue and irrelevant to the case. (*Ibid.*) The fact that the prosecutor anticipated that a credibility issue might develop did not make the evidence admissible. The court reversed the defendant's conviction, finding that: (1) the evidence was erroneously admitted; (2) the cautionary instruction did not cure the error; and (3) the evidence was "extremely prejudicial" to the defendant's case. (*Id.* at pp. 187-188.)

In this case, while Witness Number 13 had difficulty recalling certain details about what happened at her mother's house on April 22, 1995, she consistently reaffirmed her prior statements to investigators when the prosecutor brought them to her attention. Nothing about Witness Number 13's testimony suggests that her inability to remember details of the events or the prior statements that she made concerning them was anything other than a simple loss of memory of events that took place more than a year-and-a-half earlier. As in *Brooks*, because no inconsistent testimony from Witness Number 13 preceded the prosecutor's questioning about her fear of retaliation, no issue was presented as to her credibility that warranted admission of the testimony about her fear of testifying and the threatening incidents. As a result, the trial court erred in permitting the prosecution to repeatedly elicit this extremely prejudicial and inherently speculative testimony.

D. The Evidence Should Have Been Excluded Under Evidence Code Section 352

Even assuming, arguendo, that the threat evidence possessed some probative value, the trial court abused its discretion under Evidence Code section 352 in admitting it. Evidence of third-party threats or witness intimidation should be excluded if its probative value is substantially outweighed by its danger of prejudice. (Evid. Code, § 352.)

Witness-intimidation evidence carries far less probative value when offered to *bolster* a witness's credibility rather than to *impeach* a recanting witness or to otherwise explain witness conduct that could damage the proponent's case. (*United States v. Thomas* (7th Cir. 1996) 86 F.3d 647, 654, and authorities cited therein.) Where evidence carries a substantial danger of prejudicing the jury and either has minimal probative value or is cumulative of other evidence on the same issue, any doubt should be resolved in favor of its exclusion under section 352. (See, e.g., *People v. Balcom* (1994) 7 Cal.4th 414, 423 [other crimes]; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 406 [same]; *People v. Thompson*, *supra*, 27 Cal.3d at p. 318 [same]; *People v. Cardenas, supra*, 31 Cal.3d at pp. 904-905 [gang membership]; *People v. Avitia* (2005) 127 Cal.App.4th 185, 193-194 [gang membership].)

As shown above, the threat evidence with respect to Sandate and Witness No. 16 was irrelevant because the prosecutor failed to establish how their state of mind was in issue. (See *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970-972 [due process violation to admit threat evidence purportedly to explain witness's "nervousness" where no record of such nervousness apart from that caused by the prosecutor herself].) Because the threat evidence as to Sandate and Witness No. 16 was not admissible for any purpose, it had no probative value whatsoever.

Further, it has long been recognized that evidence of unauthorized third-party threats to witnesses carries a substantial risk of unfair prejudice because of the likelihood that the jury will attribute the third party's conduct to the defendant, and infer from it that he is a bad man who is more likely than not guilty of the charged crime. (*People v. Terry*, *supra*, 57 Cal.2d at pp. 565-566 [admission of unauthorized third-party threats evidence

prejudicial error]; *People v. Perez*, *supra*, 169 Cal.App.2d at pp. 477-478 [same]; see also *People v. Brooks*, *supra*, 88 Cal.App.3d at p. 187 [evidence regarding threats to witnesses is "extremely prejudicial to defendant"]; *United States v. Thomas*, *supra*, 86 F.3d at p. 654 ["evidence of threats on witnesses can be highly prejudicial"]; *Ortiz-Sandoval v. Gomez* (9th Cir. 1996) 81 F.3d 891, 897 ["the potential of unfair prejudice from the introduction of threats is 'severe'"]; *United States v. Guerrero* (3rd Cir. 1986) 803 F.2d 783, 785-786 [threats evidence "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established portions of the case"].) Such evidence "can amount to an 'evidential harpoon'" which "'becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant.'" (*Dudley v. Duckworth*, *supra*, 854 F.2d at p. 970, citations omitted.) Indeed, the evidence is so prejudicial that its admission may deprive the defendant of a fair trial. (*Ibid.*)

E. The Trial Court Committed Prejudicial Error by Failing to Give Appropriate Admonitions and Instructions Limiting the Jury's Consideration of Evidence of Threats to Witnesses, and Witnesses' Fears of Retaliation, to Assessing Credibility

Even assuming, arguendo, that any of the threat evidence was admissible as bearing on the witnesses' credibility, none of the evidence of fear or threats was admissible as direct evidence of appellant's guilt. Threats by unidentified persons do not show a defendant's consciousness of guilt without some evidence – other than mere speculation and accusations by witnesses – that the defendant was responsible for the threats. (See, e.g.,

United States v. Young (4th Cir. 2001) 248 F.3d 260, 272.) Since there was no evidence that any of the threats was attributable to appellant in any way, it is clear that the evidence of these threats was admissible, if at all, solely on the issue of the witnesses' credibility.

Although this Court has held that a trial court generally has no sua sponte duty to instruct on the limited uses of evidence (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051), an exception to that rules applies when such evidence: (1) plays a dominant role in the prosecutor's case against the accused; (2) is highly prejudicial; and (3) is minimally relevant for any other legitimate purpose. (*People v. Milner* (1988) 45 Cal.3d 227, 251-252; *People v. Collie, supra*, 30 Cal.3d at pp. 63-64.) That exception applies to the evidence of fear and threats presented here, because the dominant theme of the prosecutor's case against appellant was the dangers and threats posed by street gangs.

During his closing argument at the guilt phase, the prosecutor made extensive reference to the testimony of Witness No. 13 and Witness No. 16 about the alleged threats. In doing so, the prosecutor went beyond arguing that the evidence was relevant to the witnesses' state of mind, and suggested that the witnesses would have to "look over [their] shoulders" and live in fear of retaliation from the defendants for the rest of their lives:

> What did [Witness No. 13] tell you? [She] told you that she was going to be killed because she came forward and that her children would be killed. When she first testified to that, let me ask you something, did anybody think, well, maybe she's overreacting a little bit? Did anybody think that might be the case?
>
> Well, you know, sure it's not going to be pleasant but does she really believe, really believe that she's going to be killed because of this and that her children would?

> And then what happened after she testified? A couple days later we put on Witness No. 16. Somebody took a razor blade and scratched out his face and wrote "187" for murder across his chest. What do you think they'd do to Witness No. 13 and her children? Can you blame her for not in this courtroom wanting to lay out every single thing she knew? Is she a degenerate? That's what she was called yesterday, ladies and gentlemen, a degenerate.
>
> A mother that works, the location where she works she testified to you, uncontradicted testimony, has been shot up twice recently, and that scares her. Wouldn't it scare you if you were her?
>
> Witness No. 16 has got a great life now, doesn't he? He has to be relocated but testified that his mother sold their house and at a loss. This is not the federal witness program, ladies and gentlemen. The County of Los Angeles does the best it can. Witness No. 16 has to look over his shoulders every day for the rest of his life. What do you think? Do you think that his life is a bowl of cherries, ladies and gentlemen?

(29 RT 3611-3612.)

By suggesting that the witnesses would have to "look over [their] shoulders" and live in fear of retaliation from the defendants for the rest of their lives, the prosecutor insinuated that there was a connection between the defendants and the threats, and encouraged the jury to speculate that the defendants would make good on the threats in the future. Thus, the threat evidence – which posed a serious risk of prejudice even when unconnected to the defendant (see, e.g., *People v. Weiss*, *supra*, 50 Cal.2d at p. 554) – was in fact prejudicial here because it was presented in a way that "left the jury free to find that the defendant was connected to the threats." (*People v. Brooks*, *supra*, 88 Cal.App.3d at p. 187.) Thus, in terms of the prosecutor's argument, this case could hardly be more different than that of *People v. Mason*, *supra*, where the prosecutor "made diligent efforts to ensure that no

prejudicial inference arose." (52 Cal.3d at p. 947.) Here, the prosecutor urged the jury to draw prejudicial, speculative, and improper inferences from the evidence, inferences that had absolutely nothing to do with the limited purpose for which that evidence was ostensibly admitted.

Nothing the trial court said to the jurors could have deterred them from treating this evidence of fear and threats as substantive evidence of appellant's guilt. Thus, while a general instruction on the consideration of evidence admitted for a limited purpose was given in the guilt phase, that instruction only directed jurors to follow any admonitions previously given regarding the limited purposes for which evidence was received. (CALJIC No. 2.09; VI CT 1769; 29 RT 3685-3686.) Moreover, while the guilt phase instructions also gave the jury guidance on how to evaluate the believability of witnesses, that general instruction did not tell the jurors that fear or threats were only relevant to the issue of witness credibility. (CALJIC No. 2.20 (1993 Rev.); VI CT 1772; 29 RT 3687-3688.) Because the threat posed by gangs was such a dominant part of the prosecution's evidence of guilt, the court had a sua sponte duty to give a limiting instruction at both phases of the trial. (Cf. *People v. Stewart* (2004) 33 Cal.4th 425, 493-494.) The failure to do so was error.

F. Reversal of the Entire Judgment is Required

In sum, the threat evidence was inadmissible under California law or, if admissible, was not properly limited to its admissible purpose. The admission of evidence of threats to witnesses, which the jury was permitted to consider for the truth of the matters asserted, deprived appellant of his right to assert credible defenses at either phase of the trial "free from 'evidential harpoons.'" (*Dudley v. Duckworth*, *supra*, 854 F.2d at p. 972.) The erroneous admission of the evidence, without a limiting instruction,

denied appellant his constitutional rights to due process and to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and arbitrarily deprived him of his state-created liberty interest in not being convicted on irrelevant, speculative and statutorily-prohibited evidence, also a due process violation. (U.S. Const., 14th Amend.; see, e.g., *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) In addition, since this inherently and highly prejudicial threat evidence was also improperly considered by the jury at the penalty phase, its admission violated appellant's constitutional right to a reliable penalty verdict (U.S. Const., 8th & 14th Amends.), and it is at least reasonably possible that it skewed the essentially "normative" penalty determination against him. (See *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) The entire judgment must therefore be reversed.

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THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE THE HEARSAY STATEMENTS OF RAYMOND SHYROCK AS "DECLARATIONS AGAINST INTEREST" UNDER EVIDENCE CODE SECTION 1230

The trial court erroneously allowed the prosecution to introduce out-of-court statements by a member of the Mexican Mafia under the hearsay exception for "declarations against interest" in Evidence Code section 1230. Those statements were inadmissible as declarations against interest because they failed to satisfy the requisite criteria under that hearsay exception. Moreover, the prosecution failed to meet its burden to show that the declarant was unavailable to testify at trial. The admission of this evidence also violated appellant's rights guaranteed by the confrontation clauses of the United States Constitution and the California Constitution. Because the state cannot prove the admission of this evidence was not harmless beyond a reasonable doubt, reversal of the entire judgment is required. (*Chapman v. California* (1967) 386 U.S. 18.)

A. Proceedings Below

1. Pretrial Proceedings

Prior to trial, the prosecution filed a motion and points and authorities in support of the admission of certain out-of-court statements made by non-testifying witnesses. (VI CT 1530-1546.) Among the statements the prosecution sought to present were statements by Raymond Shyrock, an alleged member of the Mexican Mafia prison gang. (VI CT 1531.) The prosecution intended to introduce Shyrock's statements through the testimony of Los Angeles County Sheriff Sergeant Richard Valdemar, who had monitored what the prosecution maintained was a meeting of

members of the Mexican Mafia that was held in an unidentified hotel room in January 1995. (VI CT 1531.) Valdemar testified that during that meeting Shyrock make the following statement:

> I don't know if you ever heard of this brother Dido. Dropped out a long time ago. He's in an apartment where I was living. The motherfucker was living right downstairs. Never showed his face. All kinds of people in the pad. Bunch of sisters and kids, all kinds of shit. So I am trying to figure how to – I need a silencer is what I need.

(VI CT 1539.)

At a pretrial hearing on the prosecution's motion, the prosecutor argued that while Shyrock's out-of-court statement was hearsay, it was admissible as a "declaration against interest" under Evidence Code section 1230.[64] (2B RT 506-510.) He said the statement would be offered to show "the identity at least of who would be involved in the conspiracy, that is, the Mexican Mafia, and why they wanted . . . these people killed." (2B RT 506.) As the prosecutor explained to the trial court:

> The reasonable interpretation or a reasonable interpretation of that statement is that Raymond Shyrock as an active member of the Mexican Mafia was going to make an

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[64] Evidence Code section 1230 provides:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

> effort to have that dropout killed, that he was aware that there were a number of people in the apartment. He found out. He knew where he was living and that in order to – to carry out the murder in such a way that he or whoever he had do it was not caught he talked about the fact that he needed a silencer.

(2B RT 508.)

When the trial court asked whether Shyrock was available to testify, the prosecutor asked the court to assume, "for the purpose of this proceeding," that "he's unavailable." (2B RT 508.) He told the court that Shyrock was in custody at the Metropolitan Detention Center, was a defendant in a RICO prosecution that was scheduled to go to trial in October, and had a Fifth Amendment privilege not to testify. (2B RT 508.) In order to establish that Shyrock would be "unavailable" at trial, the prosecutor told the court that he would "have his attorney fill out a document indicating that if he was called to testify he would take the Fifth." (2B RT 509.) The prosecutor added that the federal prosecutors had advised him that they would "oppose any motion to bring [Shyrock] over here either as a witness or a defendant." (2B RT 509.)

The prosecutor argued that Shyrock's out-of-court statements were sufficiently "reliable" because they were made "to other members of the Mexican Mafia." (2B RT 506.) As the prosecutor explained: "Clearly, that's the kind of time where he's going to be honest, above board. He's not going to believe that what he says is going to be repeated." (2B RT 506-507.)

Over defense objection, the court found that Shyrock's out-of-court statement (1) satisfied the requirements for admission as a declaration against interest, and (2) was more probative than prejudicial. (2B RT 510-517.)

2. Evidence Presented at Trial

During the guilt phase of trial, the prosecution called Sgt. Richard Valdemar to testify that, pursuant to a federal court order, he monitored a meeting of the Mexican Mafia in January 1995, at which Raymond Shyrock was present. (18 RT 2280-2281.)

> Q. In January of 1995 did you monitor pursuant to the federal judge's order a particular meeting?
>
> A. Yes, sir, I did.
>
> Q. And at that meeting did you overhear – and if you need to refer to something let me know and I will give you your notebook. Did you overhear Raymond Shyrock refer to a man Dido?
>
> A. Yes, sir, I did.
>
> Q. And can you tell us exactly what he said? Or if you need to refer –
>
> [. . .]
>
> A. During the meeting he mentioned, Raymond Shyrock, that is, mentioned – "I don't know if you have ever heard of this brother Dido. He dropped out a long time ago. He's in an apartment where I was living. The mother fucker was living right downstairs but never showed his face. All kinds of people in the pad, bunch of young sisters and kids, all kinds of shit. So I'm trying to figure out how to – I need a silencer is what I need."

(18 RT 2280-2281.)

B. Applicable Legal Principles

1. The General Rule Against Hearsay

Evidence of a statement offered to prove the truth of the matter asserted is inadmissible unless it comes within one of the established exceptions to the hearsay rule (Evid. Code, § 1200; *People v. Noguera* (1992) 4 Cal.4th 599, 620-621), and is not "inadmissible against the

defendant under the Constitution of the United States or the State of California" (Evid. Code, § 1204).

"The chief reasons for the general rule of inadmissibility [of hearsay] are that the statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements. [Citations.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 610; see also *Williamson v. United States* (1994) 512 U.S. 594, 598-599 [discussing similar rationale underlying federal hearsay rule].)[65] The "lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is reported is today accepted as the main justification for the exclusion of hearsay." (2 McCormick, Evidence (5th ed. 1999) Hearsay, § 245, p. 94.) Thus, as this Court has observed, the hearsay rule is "related" to the constitutional right of confrontation:

> The general rule that hearsay is inadmissible . . . has a recognized constitutional dimension, at least in the criminal context, because it is related to the confrontation clause of the Sixth Amendment to the United States Constitution. (See *Idaho v. Wright* (1990) 497 U.S. 805[. . .].)

(*In re Cindy L. v. Edgar L.* (1997) 17 Cal.4th 15, 27.)

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[65] "The exclusion of [hearsay], in other cases, stands upon the general consideration that it is not upon oath; that the party affected by it has no opportunity of cross-examination; that it often supposes better evidence behind; that it is peculiarly liable to be obtained by fraudulent contrivances; and above all, that it is exceedingly infirm, unsatisfactory and intrinsically weak in its very nature and character." (*Ellicott and Meredith v. Pearl* (1836) 35 U.S. (Mem.) 412, 436.)

2. The Confrontation Clause

The confrontation clause of the Sixth Amendment, extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant "to be confronted with the witnesses against him." (See *Pointer v. Texas* (1965) 380 U.S. 400, 406.) The confrontation clause "reflects a preference for face-to-face confrontation at trial" accomplished through cross-examination of witnesses. (*Ohio v. Roberts* (1980) 448 U.S. 56, 62-63.)

> In short, the Clause envisions "a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the consciences of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

(*Id.* at pp. 63-64, quoting *Mattox v. United States* (1895) 156 U.S. 237, 242-43.)

The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and ensures that convictions will not result from the testimony of individuals whose credibility has not been "test[ed] in the crucible of cross-examination." (*Crawford v. Washington* (2004) 541 U.S. 36, 61.) When the prosecution seeks to offer a declarant's out-of-court statements against the accused, the court must decide whether the confrontation clause permits the government to deny the accused his usual right to force the declarant "to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth.'" (*California*

v. Green (1970) 399 U.S. 149, 158, footnote and citation omitted; accord, *Lilly v. Virginia* (1999) 527 U.S. 116, 123-124.)[66]

For nearly 25 years, the question of whether an unavailable witness's prior statements could be used against a criminal defendant at trial was governed by *Ohio v. Roberts*, *supra*, 448 U.S. 56, which provides:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

(*Id.* at p. 66.)

However, the Court recently held that "testimonial" hearsay evidence can be admitted consistent with the confrontation clause only if the witness was unavailable and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington, supra,* 541 U.S. 36.) The Court ruled that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Id.* at p. 68-69.) The Court did not attempt to define all types of statements that might be deemed

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[66] The hearsay rule has been linked to goals that go beyond the concessions that might be obtained on cross-examination. The oath is believed to impress witnesses with the importance of testifying truthfully, and having witnesses testify before the factfinders enables them to take the witnesses' demeanor into account in assessing their credibility. Subjecting witnesses to a searching cross-examination also helps the opposing party expose inadvertent as well as conscious inaccuracies in perception, recollection and narration. (See Fed. Rules Evid., art. VIII Advisory Committee's Note.)

"testimonial," but held that "testimonial" statements include, at a minimum, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [statements made in response] to police interrogations." (*Id.* at p. 68.)

C. The Trial Court Erred in Admitting Evidence of the Out-Of-Court Statements, Because That Evidence Did Not Satisfy the Requirements of Evidence Code Section 1230

Evidence of a statement that is offered to prove the truth of the matter asserted therein is inadmissible unless it (1) comes within one of the established exceptions to the hearsay rule (Evid. Code, § 1200; *People v. Noguera*, *supra*, 4 Cal.4th at pp. 620-621), and (2) is not "inadmissible against the defendant under the Constitution of the United States or the State of California" (Evid. Code, § 1204).

Here, the prosecution offered Shyrock's out-of-court statements to prove the truth of the facts asserted therein – specifically, that Shyrock sought to have "Dido" killed because he was a drop-out from the Mexican Mafia. As such, Shyrock's statements were hearsay (Evid. Code, § 1200, subd. (a)), and were admissible only if they fell within a recognized exception to the hearsay rule (Evid. Code, § 1200, subd. (b)), *and* were relevant to the charges or issues involved in the case (Evid. Code, § 350). As the proponent of Shyrock's statements, the prosecution had the burden to establish that they came within an exception to the hearsay rule. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1177; *People v. Livaditis* (1992) 2 Cal.4th 759, 779.)

The prosecution urged that Shyrock's out-of-court statements were admissible under Evidence Code section 1230. However, it was error to admit evidence of those out-of-court statements under section 1230 because

they did not satisfy the requirements of that section or any other exception to the hearsay rule.

1. The Prosecution Failed to Meet its Burden to Show That Shyrock Was Unavailable

"A party who maintains that an out-of-court statement is admissible under this exception as a declaration against penal interest must show that the declarant is unavailable. . . ." (*People v. Cudjo* (1993) 6 Cal.4th 585, 606, italics omitted.) Under Evidence Code section 240, subdivision (a)(5), a witness is "unavailable" if he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) The proponent of the admissibility of the out-of-court statement has the burden of proof on the question of unavailability. (*People v. Price* (1991) 1 Cal.4th 324, 424; *People v. Enriquez* (1977) 19 Cal.3d 221, 235.) "As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate." (*Ohio v. Roberts*, *supra*, 448 U.S. at pp. 74-75.)

California courts have interpreted the requirement of "reasonable diligence" as requiring the proponent of the evidence to demonstrate that it exercised "due diligence" in attempting to obtain the in personam testimony of the witness. (*People v. Cromer* (2001) 24 Cal.4th 889, 892; *People v. Sanders* (1995) 11 Cal.4th 475, 523; *People v. Linder* (1971) 5 Cal.3d 342, 346-347.) "What constitutes due diligence to secure the presence of a witness depends upon the facts of the individual case. . . . The totality of efforts of the proponent to achieve [the] presence of the witness must be considered by the court." (*Linder*, at pp. 346-347.) The concept "connotes persevering application, untiring efforts in good earnest, [and] efforts of a

substantial character." (*People v. Sanders*, *supra*, 11 Cal.4th at pp. 523-525.)

The bare fact that the witness did not appear in court or refused to testify does not satisfy that burden. Rather, the prosecution must demonstrate that, in good faith, it used all the resources at its command to compel the attendance of the witness. "[A] witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." (*Barber v. Page* (1968) 390 U.S. 719, 724-725; *People v. Cromer*, *supra*, 24 Cal.4th at p. 892.)

In *People v. Sandoval* (2001) 87 Cal.App.4th 1425, the court observed that both *Barber v. Page*, *supra*, and *Ohio v. Roberts*, *supra*, place the burden on the prosecution to employ any reasonable method to obtain the presence and testimony of the witness at trial. Noting that while the law "does not require the doing of a futile act," the *Sandoval* court reasoned that before a prosecution witness could be deemed "unavailable," the prosecutor was under a constitutional imperative to try any authorized means of compelling the witness's presence. "[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation." (*Sandoval*, at p. 1438.)

Here, the prosecution failed to establish that Shyrock was unavailable and did not show that it made any efforts whatsoever to procure his attendance and testimony. At the time the prosecutor sought a pretrial ruling on the admissibility of Shyrock's out-of-court statements, the prosecutor asked the court, for the purposes of that proceeding, to "assume" that Shyrock would be unavailable, and pledged to obtain a declaration from Shyrock's attorney indicating that he would "take the Fifth" if called

to testify. (2B RT 509.) However, the prosecutor never subsequently mentioned any effort to procure Shyrock's presence and testimony at trial, and no document indicating that Shyrock would assert his right not to testify was ever made a part of the record.

Moreover, neither of the reasons that the prosecutor suggested at the pretrial hearing why Shyrock might be unavailable was sufficient, in and of itself, to satisfy the prosecution's burden to show that he was unavailable to testify at trial. The fact that a witness is out of state, and beyond the ordinary subpoena powers of the court in which the case is being tried, is not, in and of itself, sufficient to satisfy the prosecution's burden of demonstrating unavailability. (*Barber v. Page*, *supra*, 390 U.S. at p. 724.) By the same reasoning, the fact that Shyrock was in federal custody at the time of appellant's trial was insufficient to establish his unavailability. Moreover, it is axiomatic that anyone who seeks the protections of the privilege against self-incrimination must affirmatively assert that privilege. (*Minnesota v. Murphy* (1976) 465 U.S. 420, 429; *People v. Miller* (1989) 208 Cal.App.3d 1311, 1315; *United States v. Jenkins* (9th Cir. 1986) 785 F.2d 1387, 1393.) Here, Shyrock never asserted the privilege, either in court or in writing.

Because the prosecution failed to establish that Shyrock was unavailable, and did not show that it made any efforts to procure his attendance and testimony, the prerequisites for admission of Shyrock's statements under Evidence Code section 1230 were not satisfied and the statements should not have been admitted.

2. Shyrock's Statements Were Not Against His Penal Interest When He Made Them

To be admissible under Evidence Code section 1230 in a separate trial, an unjoined accomplice's "declarations against penal interest" must be (1) *relevant* to some issue in controversy, (2) against the speaker's penal interest *when made*, and (3) sufficiently reliable to withstand scrutiny under the confrontation clause of the Constitution. (*Lilly v. Virginia*, *supra*, 527 U.S. at pp. 130-139; *People v. Lawley* (2002) 27 Cal.4th 102, 152-153; *People v. Duarte, supra*, 24 Cal.4th at pp. 610-611.) Shyrock's statements met none of these criteria.

"The trustworthiness of a statement against penal interest lies in the assumption that the declaration is so contrary to the declarant's penal interest that the statement would not be made by a reasonable person unless true. [Citation.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1257, fn. 8.) Moreoever, only those portions of a declarant's statement that are specifically disserving to the declarant's penal interest are admissible under Evidence Code section 1230. (*People v. Lawley*, supra, 27 Cal.4th at p. 153; *People v. Duarte*, *supra*, 24 Cal.4th at p. 612; *People v. Leach* (1975) 15 Cal.3d 419, 438-442.)

Here, the court admitted all of the following statements by Shyrock as declarations against his penal interest:

> I don't know if you have ever heard of this brother Dido. He dropped out a long time ago. He's in an apartment where I was living. The motherfucker was living right downstairs but never showed his face. All kinds of people in the pad, bunch of young sisters and kids, all kinds of shit. So I'm trying to figure out how to – I need a silencer is what I need.

(18 RT 2281.) Other than the ambiguous statement "I need a silencer," none of these statements was "specifically disserving" to Shyrock's penal interest.

Moreover, the circumstances surrounding Shyrock's statements do not support the proposition that they were against his penal interest *when made*. Because the conspiracy had not yet been conceived and the crimes had thus not been committed when Shyrock made the statements, the statements had no tendency to subject him to criminal prosecution at that time. Further, there would have been no reason for Shyrock to believe that statements he made to fellow gang members in a private hotel room would potentially expose him to criminal prosecution. (See, e.g., *United States v. Seabolt* (8th Cir. 1992) 958 F.2d 231, 233 ["A statement by one criminal to another criminal . . . about a heist the first criminal allegedly pulled off is more apt to be jailhouse braggadocio than a statement against his criminal interest."].) In sum, Shyrock's statements were not, for the most part, "specifically disserving" to him and, in any event, were not against his penal interest when made. Consequently, they were not admissible under the hearsay exception for statements against penal interest.

3. Shyrock's Statements Lacked Sufficient Indicia of Reliability

Even when a hearsay statement runs generally against the declarant's penal interest, the statement may, in light of the circumstances, lack sufficient indicia of trustworthiness to qualify for admission. (See *People v. Shipe* (1975) 49 Cal.App.3d 343, 354 [to satisfy the requirements of Evidence Code section 1230, a declaration must be both against the declarant's penal interest and must "be clothed with indicia of reliability"].) To determine whether a particular declaration against penal interest passes

section 1230's required threshold of trustworthiness, a trial court "may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*People v. Cudjo, supra,* 6 Cal.4th at p. 607, internal citation omitted.) In this context, assessing trustworthiness "'requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.'" (*People v. Frierson* (1991) 53 Cal.3d 730, 745, quoting *People v. Gordon* (1990) 50 Cal.3d 1223, 1251.)

As a whole, Shyrock's statements lacked sufficient indicia of reliability for admission. (*Lilly v. Virginia, supra,* 527 U.S. at p. 130.) Indeed, other than the reference to "Dido," the statements contain little specific information from which it is possible to reliably conclude that they have anything to do with this case at all. Moreover, as argued above, the statements were not made under circumstances which suggest that the statements were sufficiently reliable for admission.

D. The Admission of Shyrock's Out-Of-Court Statements Violated Appellant's Constitutional Rights to Due Process and a Fair Trial, Confrontation, and Reliable Guilt and Penalty Determinations

The introduction of Shyrock's unreliable hearsay statements violated not only the state hearsay rule but also appellant's due process rights under the Fifth and Fourteenth Amendments, his right to confrontation under the Sixth and Fourteenth Amendments, and his right to a reliable guilt and penalty determination under the Eighth and Fourteenth Amendments.

Appellant does not contend that Shyrock's statements were testimonial in the manner suggested by the Court in *Crawford.*[67] However, under *Ohio v. Roberts*, hearsay statements are admissible only if the declarant is unavailable and his statement falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness. The trial court ruled that Shyrock's hearsay statements were statements against Shyrock's interest and fell within the hearsay exception of Evidence Code section 1230. (2B RT 510-517.) However, as applied to circumstances such as those of this case, that exception is not "firmly rooted," and Shyrock's statements are unreliable under any conceivable standard.

In *Lilly v. Virginia*, *supra*, 527 U.S. at p. 134 (plur. opn. of Stevens, J.), four justices of the Supreme Court opined that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." The same justices also held that the accomplice's statements did not contain the particularized guarantees of trustworthiness necessary to satisfy the concerns of the confrontation clause. (*Id.* at pp. 137-139.)

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[67] The Supreme Court did not define testimonial, but noted three formulations of "core" testimonial evidence: (1) "ex parte in-court testimony or its functional equivalent," such as affidavits, custodial examinations, prior testimony not subject to cross-examination, or "similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "extrajudicial statements" of the same nature "contained in formalized testimonial materials"; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 51-52.)

The plurality explained that statements against penal interest are offered into evidence in three principal situations: "(1) as voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) as evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant." (*Lilly v. Virginia*, *supra*, 527 U.S. at p. 127 (plur.opn. of Stevens, J.).) The plurality also observed that "statements in the first category – voluntary admissions of the declarant – are routinely offered into evidence against the maker of the statement and carry a distinguished heritage confirming their admissibility when so used." (*Ibid.*)

As the *Lilly* plurality explained, if the declarant was a codefendant in a joint trial "even the use of his confession to prove his guilt might have an adverse impact on the rights of his accomplices. When dealing with admissions against penal interest, we have taken great care to separate using admissions against the declarant (the first category above) from using them against other criminal defendants (the third category)." (*Ibid.*)

> In the years since *Bruton* was decided, we have reviewed a number of cases in which one defendant's confession has been introduced into evidence in a joint trial pursuant to instructions that it could be used against him but not against his codefendant. Despite frequent disagreement over matters such as the adequacy of the trial judge's instructions, or the sufficiency of the redaction of ambiguous references to the declarant's accomplice, we have consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person. [Citations.]

(*Id.* at pp. 127-128.)

The third category of statements against interest includes statements like the one at issue in *Lilly*: a statement by an accomplice that incriminates the defendant. In *Lilly*, the plurality explicitly stated: "The practice of admitting statements in this category under an exception to the hearsay rule – to the extent that such a practice exists in certain jurisdictions – is, unlike the first category or even the second, of *quite recent vintage*. This category also typically includes statements that, when offered in the absence of the declarant, function similarly to those used in the ancient ex parte affidavit system." (*Lilly v. Virginia*, *supra*, 527 U.S. at pp. 130-131, italics added; see also *Lee v. Illinois* (1986) 476 U.S. 530, 546 [insufficient indicia of reliability "to overcome the weighty presumption against the admission of" a codefendant's confession inculpating the accused].)

If Shyrock's hearsay statements are not admissible under the "firmly rooted hearsay exception" prong of the *Roberts* analysis, they must bear particularized guarantees of reliability to meet the second prong. As previously demonstrated, no such guarantees exist. Because Shyrock's out-of-court statements contained no particularized guarantees of trustworthiness necessary to satisfy the concerns of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, they should not have been admitted.

If nothing else, the trial court should have excluded Shyrock's hearsay statements under Evidence Code section 352. Where the probative value of the statement is slight, and its admission might confuse the jury, discretionary exclusion under section 352 is proper. (*People v. Chapman* (1975) 50 Cal.App.3d 872, 880.) Even assuming, arguendo, that Shyrock's statements satisfied the requirements for admissibility, they should have been excluded because they were "so ripe with condemning facts against

the defendant that they are devastating or crucial to his case." (*People v. Rios* (1985) 163 Cal.App.3d 852, 867.) At the same time, the statement was highly untrustworthy.

Under such circumstances, the court should have exercised its discretion to exclude the hearsay statements. Its failure to do so denied appellant his right to due process, a fair trial and a reliable guilt and penalty determination.

E. Reversal of the Entire Judgment Is Required

Under California law, this Court must reverse if it is reasonably probable that the error contributed to the verdict. (*People v. Watson* (1956) 46 Cal.2d 818.)

Under federal constitutional law, the State has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman v. California, supra*, 386 U.S. at p. 24; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680-681; *People v. Brown* (2003) 31 Cal.4th 518, 538.) "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. *(Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Under either the state or federal standard, there can be no question that appellant was prejudiced by the admission of Raymond Shyrock's out-of-court statements. Shyrock's statements were essential evidence for the prosecution's theory that the murders of the five victims were carried out by Sangra gang members at the behest of the Mexican Mafia. Indeed, Shyrock's statements were the *only* evidence that the prosecution presented that linked the Mexican Mafia to these crimes. Yet once Shyrock's

statements were admitted, this evidence served as the bridge to the prosecution's introduction of a raft of evidence about the Mexican Mafia, including the extensive testimony by Sergeant Valdemar about the Mexican Mafia's history and practices, that could not have been admitted otherwise.

Further, the admission of evidence of Shyrock's out-of-court statements, without providing appellant with an opportunity to confront Shyrock and cross-examine him, violated the Sixth and Fourteenth Amendments of the United States Constitution. The right to confront and cross-examine witnesses is more than a desirable rule of trial procedure – it is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295.) The constitutional error was not harmless beyond a reasonable doubt because it supplied highly prejudicial evidence underlying appellant's conviction and profoundly undermined the basic fairness of appellant's trial. Thus appellant's conviction and death sentence must be reversed.

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THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY THAT WITNESS NO. 16 WAS AN ACCOMPLICE AS A MATTER OF LAW

A. Introduction

The testimony of Witness No. 16 was the cornerstone of the prosecution's case against appellant. Witness No. 16 was the only witness who implicated appellant as one of the Sangra gang members who drove to the victims' residence in El Monte on April 22, 1995, and the only witness who specifically implicated appellant as the shooter of Dido Moreno and Tito Aguirre. While Elizabeth Torres and Witness No. 13 identified appellant as one of the men who were at the Torres house earlier in the evening on April 22, 1995, both witnesses left the house before Anthony Torres and his friends left, and therefore their testimony cannot establish that appellant left together with the other Sangra members and went to El Monte, much less that he played any role in the crimes. Witness No. 16's testimony was thus essential to the prosecution's case.

Witness No. 16's testimony established that he was an accomplice to the offenses.[68] Witness No. 16 repeatedly acknowledged during his testimony that when he and the other Sangra gang members left Torres's house to go to El Monte, he believed that the men were going there for the purpose of committing assault or murder. As a result, Witness No. 16 had reason to minimize his own involvement in the crimes and to shift blame to appellant.

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[68] While appellant sets forth Witness No. 16's testimony for the purpose of establishing that Witness No. 16 was an accomplice as a matter of law, he does not concede that Witness No. 16's testimony, at least insofar as it implicated appellant in the offenses, was truthful.

Because Witness No. 16's testimony established that he was "liable to prosecution for the identical offense charged against the defendant," the defense requested that the trial court instruct the jury that Witness No. 16 was an accomplice as a matter of law, and that it was required to acquit appellant unless there was other evidence, independent of all accomplice testimony, connecting appellant with the commission of the offense. (§ 1111.) The trial court refused to do so.

The trial court's failure to instruct the jury that Witness No. 16 was an accomplice as a matter of law allowed the jury to return convictions and death sentences against appellant based upon the unreliable and uncorroborated testimony of Witness No. 16 alone.

B. Proceedings Below

1. Witness No. 16's Testimony

As detailed in the Statement of Facts, *supra*, and incorporated by reference herein, Witness No. 16 testified that he drove Jose "Pepe" Ortiz – the Sangra gang member who appeared to be "in charge" of carrying out the crimes in El Monte – to a location about a block away from where the murders occurred, where Ortiz could monitor the commission of the crimes and serve as a lookout.

According to Witness No. 16's testimony, on the afternoon of April 22, 1995, Jimmy Palma asked him for a ride to Anthony Torres's house because "the brothers wanted him" and "they had to take care of something." (20 RT 2681, 2683.) Witness No. 16 understood Palma to be referring to the Mexican Mafia when he said "the brothers." (20 RT 2683.) A few hours later, Witness No. 16 drove Palma to Torres's house. (20 RT 2681; 21 RT 2763-2765.) Witness No. 16 went into the house with Palma, and went to Torres's room. (20 RT 2684.) A number of other Sangra

members were already gathered in Torres's room, including Torres, "Pepe," "Tricky," "Primo," and "Creepy." (20 RT 2684.) Witness No. 16 saw a shotgun by the foot of the bed in Torres's room. (20 RT 2685.)

According to Witness No. 16, "Pepe" Ortiz seemed to be in charge of what was going to take place that evening. (21 RT 2767, 2801.) Ortiz announced to the group that they had to "go to El Monte to take care of something." (20 RT 2687.) Witness No. 16 understood this to mean that they needed to go to El Monte to kill someone:

Q. And what did you take it to mean when Pepe in front of everybody in Mr. Torres's room said, "We have to go take care of something"?

A. That somebody might get killed.

Q. Might get killed or would get killed?

A. Would get killed.

(20 RT 2687.)

The men were at Torres's house for 40 minutes before they left for El Monte. (20 RT 2685.) When Witness No. 16 left Torres's house, he believed that the men were going to El Monte to commit murder:

Q. Sir, when you left at some point you left and went to El Monte; is that correct?

A. That's correct.

Q. I need to know your state of mind. Explain to the ladies and gentlemen of the jury what your state of mind was when you left Scar's house on Third Street and went to El Monte. Did you believe murder was going to take place?

A. Yes.

(20 RT 2694.)

Witness No. 16 drove Ortiz and Witness No. 12 ("Creepy") to El Monte in his Thunderbird, while Logan ("Tricky") led the way in his

Maxima. (20 RT 2697-2698; 21 RT 2775, 2801.) En route, Witness No. 16 followed the Maxima to a gas station. (20 RT 2700; 21 RT 2779.) Both cars stopped and someone got out of the Maxima to pump gas. (20 RT 2700.) When the two cars left the gas station, Witness No. 16 followed the Maxima to El Monte. (20 RT 2701-2703.) When the Maxima pulled into a driveway on Maxson Road, Witness No. 16 continued driving the Thunderbird a few blocks farther down the street, where Witness No. 16 turned off the car and the headlights. (20 RT 2703.) Ortiz got out of the car and went to the corner of the street, facing towards Maxson Road. (20 RT 2705.) Witness No. 16 observed Ortiz "looking up and down the street." (20 RT 2705.) When Ortiz returned to the vehicle, he said the police were behind them and said "Let's get out of here." (20 RT 2706.) Witness No. 16 then drove Ortiz and Witness No. 12 to an apartment in West Covina, and eventually back to Torres's house in Alhambra where they regrouped with the other Sangra gang members. (20 RT 2707-2709, 2785-2787.)

On cross-examination, Witness No. 16 was questioned further by counsel for co-defendant Palma about what he believed was going to take place when he and the other Sangra members left Torres's house. Witness No. 16 again reaffirmed several times that he believed that they were going to El Monte to commit murder:

Q. When you left the house, Mr. Torres's house, on the evening of the 22nd of April, it was your belief, your mental state, was that there was going to be a murder in El Monte, correct?

A. Correct.

Q. Or that there was going to be murders. Do you remember how many murders there were going to be?

A. No, I don't.

Q. Do you believe that when you went there that there was going to be a murder committed, right?

A. That there was going to be a possibility of that.

(21 RT 2776-2777.)

Q. Now, you've testified here in court on Thursday that it was your impression or your state of mind was that you were going to go to El Monte and that somebody was going to get killed that night?

A. That's correct.

(21 RT 2780-2781.)

In response to this testimony, counsel for co-defendant Palma attempted to impeach Witness No. 16 with prior statements he made to the prosecutor and to Officers Davis and Laurie that he "had no idea" what Ortiz meant when he said that "they had to take care of something in El Monte." (21 RT 2781.) Witness No. 16 acknowledged that he had not told Davis and Laurie that he knew there was going to be a murder, but he maintained that what he meant was that he "wasn't sure who or how many people would be killed." (21 RT 2782.) The cross-examination proceeded as follows:

Q. So that when you were interviewed by the police at that time you were lying, correct?

A. Well, we had to take care of something. What that was, I wasn't sure who or how many people would have been killed.

Q. Well, you didn't say anything during that interview about a killing, correct?

A. Correct.

Q. Now, you were – you testified here last week that your idea was or your state of mind was is [*sic*] that there was going to be a killing, correct?

A. Correct.

Q. Were you telling us the truth then?

A. Yes.

Q. Were you telling the truth back when you were interviewed by the police?

A. Yes.

(21 RT 2782.)

Later in his cross-examination, counsel for co-defendant Palma again attempted to impeach Witness No. 16 with prior statements he made during an interview with the prosecutor and Officers Davis and Laurie. (21 RT 2797.) During that interview, Witness No. 16 denied that he thought the Sangra gang members were going to kill people when they went to El Monte; instead, he said he thought they were going to "box, get some money. I don't know what they were going to do." (21 RT 2797.) When questioned about these prior statements by counsel for co-defendant Palma, Witness No. 16 acknowledged making the statements during the interview and maintained that he was telling the truth at the time. (21 RT 2797.)

Counsel for appellant further cross-examined Witness No. 16 about his prior statements about what he thought would happen when they went to El Monte. (21 RT 2802-2806.) The cross-examination proceeded as follows:

Q. And that first time when Mr. Uhalley was questioning you just a moment ago he asked you, Well, didn't you tell the police officers that you didn't know what they were going to do? You said they were going to box or get some money from some people in El Monte; is that correct?

A. I said I wasn't sure what they were going to do, if they were going to do that or kill somebody.

Q. You indicated you told the officers the first time you talked to them that they were going to kill somebody?

A. I didn't say that exactly.

Q. But you did say as recorded in the same page that was referred to by Mr. Uhalley in the discovery that you stated you were going to box and get some money and you didn't go any further than that, if you recall?

A. Yes.

[. . .]

Q. Can you tell us your thought process where you went from getting money to killing[?]

A. I said killing, too. I said anything could have happened that night.

(21 RT 2802-2804.)

2. Defense Request for Instruction That Witness No. 16 Was an Accomplice as a Matter of Law

In a motion joined by counsel for appellant,[69] counsel for co-defendant Palma asked the trial court to instruct the jury with CALJIC No. 3.16.[70] (25 RT 3246.) The defendants argued that Witness No. 16 was an accomplice as a matter of law because he was an aider and abettor and/or a co-conspirator to the murders, and thus liable for the same offenses charged

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[69] At the beginning of the jury instruction conference, appellant's counsel indicated that counsel for co-defendant Palma would argue defense objections for both defendants. (25 RT 3231.) Appellant's counsel subsequently joined counsel for co-defendant Palma's arguments. (25 RT 3257.)

[70] CALJIC No. 3.16 (Witness Accomplice as a Matter of Law) would have instructed the jury as follows:

> If the crime of _____ was committed by anyone, the witness _____ was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration. (CALJIC No. 3.16.)

against the defendants at trial, based on evidence establishing that: (1) he was present at Torres's house, together with other Sangra gang members, when Ortiz said they "had to take care of something" in El Monte; (2) at the time he left Torres's house with the other Sangra gang members, he believed they were going to El Monte to kill someone; and (3) he drove the car which transported Jose "Pepe" Ortiz – whom he described as the leader of the conspiracy – to El Monte for the purpose of being a lookout when the murders were committed. (25 RT 3247.)

In response, the prosecutor argued that Witness No. 16 was not an accomplice as a matter of law, and that it was within the jury's discretion to find that Witness No. 16 was an accomplice or not. (25 RT 3247.) The prosecutor argued that he had asked the grand jury to indict Witness No. 16 but the grand jury declined to charge him in the case, and claimed he had no evidence implicating Witness No. 16 other than his own testimony and statements.[71] (25 RT 3247, 3254.) The prosecutor argued that even if Witness No. 16 knew people were going to be killed, he still had not done anything "morally" that he had "to answer for," and that if Witness No. 16 was one of the defendants on trial the court would have to grant a motion for judgment of acquittal on the basis of the evidence presented at trial. (25 RT 3249.) The prosecutor argued that the only thing Witness No. 16 did

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[71] In fact, the prosecution possessed other evidence of Witness No. 16's involvement. In his testimony during the grand jury proceedings, Sergeant John Laurie of the Los Angeles County Sheriff's Department testified that Elizabeth Torres had identified Witness No. 16 as one of the three individuals who were at her house on the evening of April 22, 1995. (III CT 620, 624.) In addition, Laurie testified that Anthony Torres told him that Witness No. 16, Pepe Ortiz, and Witness No. 12 were parked down the street as "backup." (III CT 657.)

was drive the car, and that it could not be inferred from that act alone that Witness No. 16 knew someone was going to be killed. (25 RT 3249.)

The prosecutor also argued that when defense counsel cross-examined Witness No. 16 about his statements, the defense elicited that Witness No. 16 said he thought they were going to El Monte to fight or box, and that he did not know that people were going to be killed until afterwards. (25 RT 3250.) The prosecutor argued that while the jury would be within its discretion to find that Witness No. 16 was an accomplice, the defense had not met its burden to show that he was an accomplice as a matter of law. (25 RT 3250.)

Counsel for co-defendant Palma, joined by counsel for appellant (25 RT 3257), responded that the grand jury proceedings were irrelevant, and that the evidence presented at trial established that Witness No. 16 was an accomplice as a matter of law. (25 RT 3247, 3256.) The defendants argued that the only reason Witness No. 16 was not on trial was because he was granted immunity by the prosecution. (25 RT 3251.) With respect to Witness No. 16's state of mind, the defendants argued that Witness No. 16 repeatedly testified that he knew a murder was going to be committed when he drove Ortiz, the apparent leader of the group, to El Monte. (25 RT 3251.) In conclusion, counsel for co-defendant Palma summarized the trial evidence supporting the theory that Witness No. 16 was an accomplice:

> Clearly, I think there is sufficient evidence. One, he was there when the conspiracy was going on, he participated in the discussions, he knew when he left there that a murder was going to take place, he took the leader of the conspiracy in his car, provided the transportation, the leader was there, as [the prosecutor] indicated, to make sure that the carpool went and the murders took place and he provided transportation for that leader to see, to ensure that the actions had taken place.

> That should be sufficient for the court to find him an accomplice.

(25 RT 3257.)

The trial court agreed with the defendants that the determination of whether Witness No. 16 was an accomplice as a matter of law was based on the evidence at trial, and that the grand jury's decision not to indict him was irrelevant to that determination. (25 RT 3260.) However, the trial court agreed with the prosecutor that there was not proof beyond a reasonable doubt that Witness No. 16 was an accomplice. (25 RT 3260.) The trial court stated that counsel for co-defendant Palma undermined Witness No. 16's testimony that he knew murders were going to be committed when they went to El Monte. (25 RT 3260.) The trial court agreed with the prosecutor that mere presence at the scene or prior knowledge of the crime was not sufficient. (25 RT 3261.) The trial court stated that Witness No. 16 testified that he did not know why he went along, and that it was the trial court's impression that Witness No. 16 was "just a tagalong." (25 RT 3261.) As a result, the trial court denied the defense request for an instruction that Witness No. 16 was an accomplice as a matter of law. (25 RT 3261.)

At the close of the guilt phase, the jury was instructed as to the law regarding accomplice testimony as follows:

> An accomplice is a person who was or is subject to prosecution for the identical offense charged in Counts 2 through 6 against the defendants on trial by reason of aiding and abetting or being a member of a criminal conspiracy.

(CALJIC No. 3.10; VI CT 1714; 27 RT 3353.)

You must in this case determine whether Witness No. 16 and Witness No. 14 are accomplices as I have defined that term. The defendants have the burden of proving by a preponderance of the evidence that these witnesses are accomplices in the crimes charged against these defendants.

(CALJIC No. 3.19; VI CT 1720; 27 RT 3356.)

In regard to the meaning of "aiding and abetting," the jury was instructed using the language of CALJIC Nos. 3.00 and 3.01.[72] Finally, the jury was instructed on the use that may be made of the

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[72] The jury was instructed as follows:

The persons concerned in the commission or attempted commission of a crime who are regarded by law as principals in the crime thus committed and equally guilty thereof include:

1. Those who directly and actively commit or attempt to commit the act constituting the crime, or

2. Those who aid and abet the commission or attempted commission of the crime.

(CALJIC No. 3.00; VI CT 1712; 27 RT 3351-3352.)

A person aids and abets the commission of a crime when he or she,

(1) with knowledge of the unlawful purpose of the perpetrator and

(2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.

A person who aids and abets the commission of a crime need not be personally present at the scene of the crime.

Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.

Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

(CALJIC No. 3.01; VI CT 1713; 27 RT 3352-3353.)

testimony of a single witness. Using CALJIC No. 2.27 (1991 Rev.), the jury was instructed:

> You should give the uncorroborated testimony of a single witness whatever weight you think it deserves. However, 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 such fact depends.

(VI CT 1777; 29 RT 3690-3691.)

3. The Prosecutor's Closing Argument

In his closing argument to the jury at the guilt phase, the prosecutor argued that Witness No. 16 was not an accomplice because, if Witness No. 16 were on trial, the jury would not have had sufficient evidence upon which to convict him, because, apart from Witness No. 16's testimony, there was not sufficient evidence implicating him in the crimes. The argument went as follows:

> The defense will tell you that Witness No. 16 is an accomplice. They will tell you that he was involved in these crimes.
>
> I want to ask you a question, ladies and gentlemen. And I am not saying that Witness No. 16 does not have to answer to a higher authority for what he did, knew about that night. I am not saying that what Witness No. 16 did is morally right. But I ask you this, ladies and gentlemen[:] If Witness No. 16 was here as a defendant, would you convict him? Because without giving immunity, we wouldn't have had his testimony so we wouldn't know what to say.
>
> Do you know what evidence we had, ladies and gentlemen? The fact that Elizabeth Torres on May the 16th picked him out as having been at her son's house but she did not pick him out before you or at the grand jury. We have no other evidence of his involvement.

Would you have convicted him?

I am not asking you if you like him. I am asking you as fair members of our community would you have convicted him for these murders? There's no phone evidence that ties him in. Think about it.

I think you may have to be honest with yourselves and may well say, "I wouldn't have convicted him."

(27 RT 3450-3451.)

The prosecutor continued by arguing that even if the jury found that there were "many things that [Witness No. 16] did to help," it could still find that that was not "enough . . . to have convicted that man of five counts of murder":

But let me ask you something. Let's assume that Witness No. 16 knew that there were going to be murders that night. What did he do to aid and abet? Remember the judge told you that mere presence alone is not enough and mere knowledge that a crime is going to be committed without doing something to help it is not enough.

What did Witness No. 16 do to help? And you may find many things that he reasonably did to help but you also may decide there would not have been enough for me to have convicted that man of five counts of murder.

(27 RT 3452.)

Finally, the prosecutor argued that in order for the defense to satisfy its burden to show that Witness No. 16 was an accomplice, the defense had to prove to the jury that the crime could not have happened without his involvement:

Again, I am not saying that Witness No. 16 was morally correct in what he did that night or that he does not have to answer to a higher being for what his involvement was. But what did he do that assisted that crime? If Witness No. 16 did not drive [Pepe Ortiz and "Creepy"] there [. . .],

do you think this crime would not have happened? Think about it.

All I ask you to do, ladies and gentlemen, is use your good common sense and evaluate the testimony. Evaluate what Witness No. 16 had to say and take [--] listen carefully to what the defense tells you because, to be honest with you, I am very interested in possible things that one could argue that Witness No. 16 assisted in the commission of this crime. If he didn't drive him, somebody else would have.

And I ask you, when you go back there, the defense has the burden of proving both he and Witness No. 14 were accomplices or accessories. The burden is on them. I don't have to prove a thing on that one. And when you clearly review the evidence, you'll find they haven't met their burden.

(27 RT 3457.)

C. Applicable Legal Principles

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. . . ." (§ 1111; see also CALJIC No. 3.11; *People v. Zapien* (1993) 4 Cal.4th 929, 982.)

Penal Code section 1111 defines an accomplice as a person "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111; *People v. Brown*, *supra*, 31 Cal.4th at p. 555.) This definition encompasses all principals to the crime (*People v. Tewksbury* (1976) 15 Cal.3d 953, 960), including aiders and abettors and coconspirators. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90; *People v. Gordon* (1973) 10 Cal.3d 460, 468.)

To qualify as an aider and abettor, a person must act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing the offense or of encouraging or facilitating the commission of the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Thus, to be guilty of murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing. (*People v. Lee* (2003) 31 Cal.4th 613, 624.)

Furthermore, an aider and abettor is not only guilty of the offense he intends to assist, but also of any offense that is a natural, foreseeable, and probable consequence of that offense. (*People v. Prettyman* (1996) 14 Cal.4th 248, 260; *People v. Durham* (1969) 70 Cal.2d 171, 181.) Under the natural and probable consequences doctrine, it is not necessary to establish the aider and abettor's intent to kill for a conviction of murder or attempted murder. Instead, under that doctrine it is necessary to prove "that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime. . . . [T]he trier of fact must also find that (4) the defendant's confederate committed an offense other than the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Prettyman*, at p. 262.)

"Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of murder, even if

unintended, if it is a natural and probable consequence of the intended assault. [Citation.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

Where there is no dispute as to either the facts or the inferences to be drawn therefrom that the witness was an accomplice, the witness is an accomplice as a matter of law and the jury must be instructed that the witness's testimony must be viewed with distrust and corroborated by other evidence that tends to connect the defendant with the commission of the offense. (*People v. Zapien*, *supra*, 4 Cal.4th at p. 982; *People v. Fauber* (1992) 2 Cal.4th 792, 833-834; *People v. Robinson* (1964) 61 Cal.2d 373, 394; *People v. Valerio* (1970) 13 Cal.App.3d 912, 924.) The burden is on the defendant to prove by a preponderance of the evidence that a witness is an accomplice. (*People v. Fauber, supra*, 2 Cal.4th at p. 834; *People v. Tewksbury*, *supra*, 15 Cal.3d at p. 963.)

Distrust of accomplice testimony is an important component of a defendant's right to a fair trial and to a reliable jury verdict. (*People v. Guiuan* (1998) 18 Cal.4th 558, 564-569.) The due process roots for safeguards in the use of accomplice testimony are deep and well documented. (*Id.* at pp. 565-567.) As Justice Kennard explained in her concurring opinion in *Guiuan*:

> A skeptical approach to accomplice testimony is a mark of the fair administration of justice. From Crown political prosecutions, and before, to recent prison camp inquisitions, a long history of human frailty and governmental overreaching for conviction justifies distrust in accomplice testimony.

(*Guiuan*, at p. 570 (conc. opn. of Kennard, J.), quoting *Phelps v. United States* (5th Cir. 1958) 252 F.2d 49, 52.)

D. The Record Demonstrates That Witness No. 16 Was an Accomplice As a Matter of Law

The record in this case demonstrates that Witness No. 16 was an accomplice as a matter of law because, according to his testimony, he acted with knowledge of the criminal purpose of the alleged perpetrators and with the intent or purpose of encouraging or facilitating the commission of the offense. (*People v. Beeman, supra*, 35 Cal.3d at p. 560.)

Witness No. 16 testified to sufficient facts that collectively established his role as a principal to murder as an aider and abettor. Thus, Witness No. 16 testified that earlier that day Palma told him that "the brothers" – which Witness No. 16 understood to be a reference to the Mexican Mafia – wanted Palma to do something, and that Palma needed Witness No. 16 to drive him to Torres's house after Palma received a page. (20 RT 2681, 2683.) When Palma received the page, Witness No. 16 dutifully drove Palma to Torres's house as requested. (20 RT 2681; 21 RT 2763-2765.) Witness No. 16 went into Torres's house with Palma, where he observed as many as six other Sangra gang members, as well as a shotgun at the foot of Torres's bed. (20 RT 2684-2685.) Witness No. 16 heard Ortiz tell the group that they had to "go to El Monte to take care of something," which Witness No. 16 understood to mean that somebody "would get killed." (20 RT 2687.)

As Witness No. 16 repeatedly affirmed in his testimony, he believed that the Sangra gang members were going to commit murder when they left Torres's house to go to El Monte. (20 RT 2687, 2694; 21 RT 2776, 2781, 2782, 2784.) At the same time that he was aware of the group's criminal purpose, he facilitated the crimes by willfully agreeing to play the role that was assigned to him, by driving the back-up car that transported two gang

members, including "Pepe" Ortiz – the person who, according to Witness No. 16's testimony, "seemed to be in charge" (21 RT 2767) – to a location a short distance away from the residence on Maxson Road where Ortiz could monitor and supervise the carrying out of the offenses, and serve as a lookout. Then, after the offenses had been committed, Witness No. 16 drove Ortiz and Witness Number 12 back to Torres's house, where they reunited with the others involved in the offenses.

By driving the "backup car" to the crime scene with knowledge of the criminal purpose of the Sangra gang members, Witness No. 16 was an aider and abettor to the murders. "'By intentionally acting to further the criminal actions of another, the [accomplice] voluntarily identifies himself with the principal party.' [Citation]." (*People v. Luparello* (1986) 187 Cal.App.3d 410, 439.) In order for Witness No. 16 to be an accomplice as a matter of law, it need not be proven that he actually had the specific intent to commit murder. "[T]he intent requirement is satisfied if [the accomplice], prior to its commission, realized that [murder] was being planned and that []he was facilitating its commission." (*People v. Tewksbury*, *supra*, 15 Cal.3d at p. 960.) Moreover, "an act which has the effect of giving aid and encouragement, and which is done with knowledge of the criminal purpose of the person aided, may indicate that the actor intended to assist in fulfillment of the known criminal purpose." (*People v. Beèman*, *supra*, 35 Cal.3d at pp. 558-559.)

Further, under the natural and probable consequences doctrine, it is not necessary that Witness No. 16 intended or personally foresaw that the murders might be committed. It is sufficient that, objectively, it was reasonably foreseeable from the crime that he did intend to assist that the murders occurred. (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5 [the aider

and abetter must have "knowledge that an act which is criminal was intended, and . . . action taken with the intent that the act be encouraged or facilitated"].) Thus, even if Witness No. 16 only intended to facilitate a robbery or an assault in El Monte – and did not intend or foresee that the murders would be committed – he would still be liable for the offenses actually committed. (See *People v. Montano* (1979) 96 Cal.App.3d 221, 227 ["The frequency with which such gang attacks result in homicide fully justified the trial court in finding that homicide was a 'reasonable and natural consequence' to be expected in any such attack"].)

The facts of this case are similar to *People v. Solis* (1993) 20 Cal.App.4th 264. In *Solis*, the defendant, a gang member, went driving around the area where an earlier confrontation with rival gang members had occurred. (*Id.* at p. 268.) As the defendant and his fellow gang members drove past some youths, the defendant's accomplice, whom the defendant knew was armed, leaned out the window and fired three shots, killing one person. (*Ibid.*) The Court of Appeal found that the defendant was properly convicted of second degree murder based on a theory of aiding and abetting, where he admitted knowing that the shooter had a gun, even though the defendant denied knowing or expecting that the shooter would use it for any purpose other than to shoot in the air to scare the opposing gang. (*Id.* at pp. 269-275.) As the Court of Appeal explained:

> Whether there is a nexus of foreseeability between the predicate and the perpetrated offenses depends not on crime definitions but on the specific *facts* of each offense. In this case, for instance, the jury was obliged to consider whether a plan to drive by the Linda Vista youths with a passenger equipped with a firearm, who could be expected to either brandish or fire the gun into the air, should objectively have raised in the mind of the aider the expectation of a possible homicide (including in this consideration the background of

> animosity that existed between the two groups). It makes no difference to this deliberation whether the drive-by and use of the gun be deemed misdemeanor brandishing, assault with a deadly weapon, or any other possible definitional crime. So long as it is understood that the activity is in fact in some way criminal (which is not disputed) there is no need to focus on the legal definition of the elements of the predicate crime.

(*Id.* at pp. 273-274, italics in original.)

Although Witness No. 16 said in an earlier statement to investigators that he also thought it was possible that the Sangra gang members were only going to assault or rob someone in El Monte, under the natural and probable consequences doctrine it makes no difference what "predicate crime" Witness No. 16 thought they were going to commit "[s]o long as it is understood that the activity is in fact in some way criminal." (*People v. Solis*, *supra*, 20 Cal.App.4th at p. 274.) Here, a "nexus of foreseeability between the predicate and the perpetrated offenses" exists because the Sangra gang's plan to drive to El Monte to commit assault, robbery, and/or murder "should objectively have raised in the mind of" Witness No. 16 "the expectation of a possible homicide." (*Ibid.*) Indeed, as Witness No. 16 acknowledged repeatedly in his testimony, that was precisely what he believed was going to happen. (20 RT 2687, 2694; 21 RT 2776, 2781, 2782, 2784.) Thus, even if Witness No. 16 only believed that the Sangra members were going to commit robbery or assault in El Monte, he was still an aider and abettor to the murders because those crimes were the "natural, foreseeable, and probable consequences" of the offenses that Witness No. 16 anticipated.

Because there was no dispute as to either these facts or the inferences to be drawn therefrom, Witness No. 16 was an accomplice as a matter of law. (*People v. Zapien, supra*, 4 Cal.4th at p. 982; *People v.*

Fauber, supra, 2 Cal.4th at pp. 833-834; *People v. Robinson, supra*, 61 Cal.2d at p. 394; *People v. Valerio, supra*, 13 Cal.App.3d at p. 924.)

Finally, Witness No. 16's self-serving claim that he was "told to" go along to El Monte, and that (in the prosecutor's words) he "felt compelled" to go (21 RT 2775), did not relieve him of criminal liability for the multiple murders. Not even the threat of future danger of loss of life is a defense (*People v. Lewis* (1963) 222 Cal.App.2d 136, 141; *People v. Otis* (1959) 174 Cal.App.2d 119, 125-126), and the defense of coercion is not available at all when the charged offense is punishable by death (*People v. Petro* (1936) 13 Cal.App.2d 245, 248).

E. The Trial Court's Error In Refusing to Find That Witness No. 16 Was an Accomplice As a Matter of Law and in Failing to So Instruct the Jury Was Prejudicial

The People must prove the error harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 965.) The failure to instruct that Witness No. 16 was an accomplice as a matter of law is only harmless if there is sufficient corroborating evidence in the record. (*People v. Hayes, supra*, 21 Cal.4th at p. 1271; *People v. Miranda* (1987) 44 Cal.3d 57, 100.) The People cannot meet that burden here because there was insufficient evidence corroborating Witness No. 16's testimony implicating appellant in the charged offenses.

This Court has observed that a trial court's error in failing to instruct the jury with CALJIC No. 3.16 that a witness was an accomplice as matter of law is harmless if there is adequate corroboration of the witness. (*People v. Brown, supra*, 31 Cal.4th at pp. 556, 557.) The corroborating evidence "may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." (*Id.* at p. 556, citations

omitted.) Corroborating evidence will be sufficient "if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*Ibid.*)

1. The Testimony of an Accomplice Must Be Corroborated

To prevent convictions from being based solely upon evidence from the inherently untrustworthy source of an accomplice, the Legislature enacted section 1111 to require corroboration whenever an accomplice provided the evidence upon which a conviction is sought. (*People v. Belton* (1979) 23 Cal.3d 516, 525.) It places upon the prosecution the burden of producing independent evidence to corroborate the testimony of an accomplice. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 258.)

To corroborate the testimony of an accomplice, the prosecution must produce independent evidence that, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1206.) In this regard, the evidence must connect the defendant with the crime, not simply with its perpetrators. (*People v. Robinson, supra*, 61 Cal.2d at p. 400; *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543; *In re Ricky B.* (1978) 82 Cal.App.3d 106, 111.) If the corroboration merely raises a suspicion of guilt, however grave, it is insufficient. (*People v. Szeto* (1981) 29 Cal.3d 20, 27; *Robinson,* at p. 399; 3 Witkin, Cal. Evidence (4th ed. 2000), § 103, p. 140.) Likewise, it is insufficient to show mere suspicious circumstances. (*People v. Robbins* (1915) 171 Cal. 466, 476.)

The requirement that the corroborating evidence tie the defendant to some element of the crime is both explicit and purposeful. "We determined that the Legislature's purpose in enacting section 1111 was to prevent

convictions based solely on evidence provided by such inherently untrustworthy sources as accomplices. [Citations.]" (*People v. Andrews* (1989) 49 Cal.3d 200, 214, overruled on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237.) The tendency of accomplices to falsely implicate others in order to deflect their own responsibility, curry favor with prosecutors, or fulfill contingent plea agreements is a matter of both past and present concern. (See, e.g., Scheck, Closing Remarks: Symposium (2002) 23 Cardozo L.Rev. 899, 900-901.) The rationale for treating accomplice testimony with special care is that the accomplice is exposed to criminal liability for the offense about which he testifies. The underlying concern is that he might be motivated to shade his testimony in order to gain leniency from the prosecution or to minimize his own culpability for the offense. (*People v. Tobias* (2001) 25 Cal.4th 327, 331; *People v. Guiuan*, *supra*, 18 Cal.4th at pp. 567-568; *People v. Gordon*, *supra*, 10 Cal.3d at p. 469; *People v. Wallin* (1948) 32 Cal.2d 803, 808.)

An accomplice cannot corroborate himself (*People v. Andrews*, *supra*, 49 Cal.3d at p. 214), nor can the testimony of one accomplice corroborate another accomplice (*People v. Clapp* (1944) 24 Cal.2d 835, 837; *People v. Dailey* (1960) 179 Cal.App.2d 482, 486; CALJIC No. 3.13.)

To determine if sufficient corroboration exists, the accomplice's testimony must be eliminated from the case. The evidence of other witnesses must then be examined to determine if there is any inculpatory evidence tending to connect appellant with the offense. (*People v. Shaw* (1941) 17 Cal.2d 778, 803-804; *People v. Falconer, supra*, 201 Cal.App.3d at p. 1543.)

2. Apart from Witness No. 16's Testimony, the Evidence That Appellant Participated in the Homicides Was Insufficient As a Matter of Law

In the instant case, once Witness No. 16's testimony is eliminated from the case, there is insufficient evidence that appellant participated in the homicides or that he aided or abetted their commission. Because there was insufficient corroboration of Witness No. 16's testimony, the trial court's error in failing to instruct that Witness No. 16 was an accomplice as a matter of law, and in refusing appellant's request for that instruction, cannot be deemed harmless. Accordingly, appellant's convictions and death sentences must be reversed.

None of the witnesses who testified about the events at Maxson Road on the afternoon of the murders identified appellant, described seeing someone who resembled him, or implicated him in the crimes in any way. Witness No. 15 – the brother of Anthony and Maria Moreno – testified that Luis Maciel and two younger men came to the victims' house on Maxson Road on the afternoon of April 22, 1995, and Maciel gave Anthony Moreno a free sample of heroin. (15 RT 1997, 2008.) However, Witness No. 15 said that one of the younger men had the letters "EMF" – the acronym of the El Monte Flores street gang, a rival of the Sangra gang – tattooed on his arm. (15 RT 2027-2028.) Witness No. 15 also said that one of the two men had "short dirty blonde hair," which is not consistent with appellant's appearance. (15 RT 2054.) In any case, as the prosecutor acknowledged in his closing argument, Witness No. 15 did not identify appellant as one of the men he had seen that day. (27 RT 3408.) Similarly, two of the victims' neighbors (Witnesses Nos. 8 and 9) observed several men come to the victims' house on the afternoon of the murders (13 RT 1697, 1723), but, again as the prosecutor acknowledged in his closing argument, neither of

them could "identify anybody." (27 RT 3407.) Consequently, none of this testimony had any tendency to connect the defendant with the crime charged, and thus fails to provide the necessary corroboration of Witness No. 16's testimony.

With respect to the events later that day at the Torres house, Elizabeth Torres and Witness No. 13 identified appellant as one of the men who came to the house on the evening of April 22, 1995, but neither of them claimed to have seen appellant leave the house together with Torres and the other men.[73] The necessary corroborative evidence must connect the defendant with the crime itself, not simply with its perpetrators. (*People v. Robinson, supra*, 61 Cal.2d at p. 400; *People v. Falconer, supra*, 201 Cal.App.3d at p. 1543; *In re Ricky B., supra*, 82 Cal.App.3d at p. 111.) Thus, even if the jury credited Mrs. Torres and Witness No. 13's testimony, the jury could not reasonably infer from appellant's mere presence at the Torres house earlier in the evening that he left with the other Sangra gang members and went to El Monte later in the evening, much less that appellant played any role in the offenses.

Renee Chavez, Daniel Logan's girlfriend, testified that she saw Logan, Anthony Torres, and a third person whom she could not identify standing near Logan's blue Nissan Maxima in the driveway of the Torres residence at 10:15 p.m. on the night of the murders. (14 RT 1954-1955.) While Chavez was acquainted with appellant (14 RT 1949, 1951), she did not say that she saw him that night or identify him as the third person she

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[73] Mrs. Torres testified that when she left her house to go to her daughter's home at about 9:30 p.m., her son and his friends had already left the house. (14 RT 1893.) However, neither Mrs. Torres nor Witness No. 13 testified that they saw any of the men leave the house.

saw with Logan and Torres. Thus, Chavez's testimony did not have any tendency to connect appellant with the crime charged, and also fails to provide the necessary corroboration of Witness No. 16's testimony.

Witness No. 14's testimony tended to implicate co-defendant Palma in the crimes, but it had no tendency to implicate appellant in any way. Witness No. 14 testified that on the night of the murders he was with Luis Maciel at Maciel's house in El Monte when a black Nissan Maxima pulled up and a man approached them. (19 RT 2470.) Maciel introduced the man to Witness No. 14 as "Character," and Character told Maciel that he was "going to take care of business" and that he was "strapping." (19 RT 2470, 2473.) Maciel then instructed Witness No. 14 to give Character a half-gram of heroin. (19 RT 2473.) At trial, Witness No. 14 identified Palma as the man to whom Maciel introduced him that night. (19 RT 2472.) However, the only person Witness No. 14 saw that night was "Character"; he did not claim to have seen appellant with Palma that night. Thus, Witness No. 14's testimony had no tendency to connect appellant with the charged crimes and failed to provide the necessary corroboration of Witness No. 16's testimony.

The prosecution presented testimony from four witnesses (Witnesses Nos. 1, 2, 3, and 8) who were in the vicinity of the victims' residence on Maxson Road when the murders occurred that night. None of these witnesses identified appellant, described seeing someone who resembled him, or implicated him in the crimes in any way. While Witnesses Nos. 1, 2, and 3 testified that they saw a vehicle that appeared to be a Nissan Maxima (14 RT 1919-1920, 1930-1931), this testimony only tended to connect Logan, Torres, and Palma to the murders, because – unlike for the these co-defendants – there was no evidence, other than Witness No. 16's

uncorroborated testimony, that tended to connect appellant to a Nissan Maxima that night.

The prosecution's extensive testimony and evidence about the pager and phone calls similarly failed to connect appellant to the other defendants, much less to the murders. While that evidence indicates that Maciel was paged numerous times from the residences of Ortiz, Torres, and Palma on the night of the murders and the next day, there was no evidence of any contact at all between Maciel and appellant. (20 RT 2608-2618.)

In his closing argument at the guilt phase, the prosecutor placed great emphasis on the fact that the telephone records from the Torres residence indicated that *someone* used the telephone at Torres's house to page Veronica Lopez five times between 11 p.m. and midnight on April 22, 1995. (27 RT 3449-3450.) On the basis of Lopez's testimony that she and appellant had dated at one time (13 RT 1669), the prosecutor argued that these pages were appellant's "personal hand stamp" and showed that after appellant "went out there [to El Monte], took part in killing these people," he then "call[ed] Veronica Lopez for a date." (27 RT 3450.) This grossly improper argument was utterly without evidentiary support. In fact, Lopez testified that she did not recall receiving any pages from appellant that night, and that she had not seen him since New Year's Eve. (13 RT 1666.) It would be pure speculation to conclude that the pages were necessarily placed by appellant simply because appellant and Lopez had dated months earlier. Indeed, as defense counsel suggested, it would be just as plausible to conclude that one of the other Sangra members at Torres's house was paging Lopez in an attempt to contact appellant. (28 RT 3487.) In any event, even assuming, arguendo, that appellant paged Lopez from the Torres residence in Alhambra, such evidence simply has no logical

tendency to connect appellant to the murders that were committed in El Monte.

Finally, the ballistics evidence failed to provide sufficient corroboration of Witness No. 16's testimony. The prosecution presented testimony from ballistics expert Dale Higashi that a comparison of a .38 caliber bullet recovered from the living room wall of the residence at 2659 Greenleaf with a .38/.357 Magnum bullet recovered from the autopsy of Gustavo Aguirre and a .38/.357 Magnum bullet recovered from the crime scene indicated that all three bullets had the same "general rifling characteristics." (19 RT 2430.) However, this evidence simply indicated, *at most*, that the three bullets had been fired from the same *kind* of firearm; Higashi could not determine whether the three bullets had been fired from the same gun. (19 RT 2451.) In fact, the bullets may not have even been fired from the same kind of firearm; as Higashi acknowledged, the general rifling characteristics common to the three bullets were consistent with revolvers made by four different gun manufacturers. (19 RT 2451.)

Higashi also testified that he compared expended .45 caliber casings recovered from the crime scene with several .45 caliber bullets that were found in a bag of ammunition that was recovered from a search of appellant's former residence at 1359 Peppertree Circle, and he concluded that at some point the bullets and casings had been chambered in the same firearm. (19 RT 2444-2445.) However, the evidence at trial established that appellant was not living at the residence at 1359 Peppertree Circle when the .45 caliber bullets were recovered on May 15, 1995, and had not been living there for more than two weeks. (24 RT 3174-3177 [testimony of appellant's stepfather, Trentt Hampton, that appellant was living in his home in Utah between April 30 and June 1, 1995]; 26 RT 3331-3332 [one-

way Southwest Airline ticket for passenger Richard Valdez from Ontario, California to Salt Lake City, Utah, dated April 30, 1995].) In fact, at the time the search warrant was executed at 1359 Peppertree Circle, appellant's brother, Alex Valdez, told law enforcement officers that the closet in which the bullets were found was his. (18 RT 2368.) Alvina Luparello, the owner of the condominium at 1359 Peppertree Circle, testified that when she went to the apartment sometime in early May to collect rent, she did not see appellant at the apartment although she did see his brother Alex. (21 RT 2875-2876.) In addition, Luparello testified that she believed there were "a lot of people living inside" the apartment at that time, including one "guy [who] didn't sign the lease," but she did not know who they were. (21 RT 2876.) Further, it was clear from the testimony of several other witnesses that numerous Sangra gang members had access to the apartment at Peppertree Circle. Victor Jimenez testified that there were many people at the apartment when he visited it between April 21st and May 15th, including other Sangra gang members. (14 RT 1835-1836.) Similarly, Witness No. 16 testified that he saw several Sangra gang members when he visited the Peppertree Circle apartment, including "Mugsy" and "Listo." (21 RT 2852-2854.) In short, given all of this evidence, the jury could not reasonably infer that the .45 caliber bullets recovered from the Peppertree Circle apartment more than two weeks after appellant had last lived there were related to him at all.

Thus, once Witness No. 16's testimony is eliminated from the case, there is insufficient evidence corroborating his testimony regarding appellant's purported involvement in the homicides.

F. Appellant's Convictions and Death Judgment Must Be Reversed

The Supreme Court has recognized that where the prosecution's case in "may stand or fall on the jury's belief or disbelief of one witness, that witness's credibility is subject to close scrutiny." (*United States v. Partin* (5th Cir. 1974) 493 F.2d 750, 760, citing *Gordon v. United States* (1953) 344 U.S. 414, 417.) Here, the failure of the trial court to instruct the jury that Witness No. 16 was an accomplice of law allowed the jury to return a verdict on his testimony alone, without giving it the close scrutiny it warranted.

From a review of the entire record and with Witness No. 16's testimony removed, a rational trier of fact could not have found appellant guilty beyond a reasonable doubt, and, as a result, appellant's convictions must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) Therefore, the trial court's failure to properly instruct the jury effectively lightened the prosecution's burden of proof and thereby violated appellant's rights to a jury trial and to due process. (*Carella v. California* (1989) 491 U.S. 263; *In re Winship, supra*, 397 U.S. at p. 361; see also *Banks v. Dretke* (2004) 540 U.S. 668, 701-702 [defendant denied a fair trial in part because jury "did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants"].)

Further, because the law regarding accomplice-witness instructions is applicable to the penalty phase of a capital trial, it is ipso facto a necessary component of guaranteeing the reliability of the evidence which is presented to a jury making a life-or-death decision. Since double jeopardy considerations bar a retrial (*Burks v. United States* (1978) 437 U.S.

1), the trial court should be directed to dismiss these offenses from the accusatory pleading with prejudice.

Finally, because appellant was entitled under state law to have the jury which was determining his fate properly instructed, the trial court's failure to do so violated his right to due process under the Fourteenth Amendment of the United States Constitution. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 746 ["[c]apital sentencing proceedings must of course satisfy the dictates of the Due Process Clause"].)

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

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THE TRIAL COURT PREJUDICIALLY ERRED BY INSTRUCTING THE JURY WITH CALJIC NO. 2.11.5 BECAUSE THE JURY MAY HAVE INTERPRETED THE INSTRUCTION AS PRECLUDING IT FROM CONSIDERING WITNESS NO. 16'S IMMUNITY FROM PROSECUTION IN ASSESSING HIS CREDIBILITY

At the guilt phase, the trial court instructed the jury pursuant to CALJIC No. 2.11.5 (Unjoined Perpetrators of Same Crime) that it should not "discuss or give any consideration as to why" persons other than the defendant who may have been involved in the crime were not being prosecuted in this trial. (CALJIC No. 2.11.5 (1989 Revision); VI CT 1754; 27 RT 3380-3381.) There was evidence that Witness No. 16 was directly involved as an aider and abettor and/or co-conspirator in the crimes yet had been granted immunity in exchange for his testimony against appellant and his co-defendants. This Court has repeatedly held that it is error for the trial court to instruct the jury with CALJIC No. 2.11.5 when a person who might have been prosecuted for the crime has testified at trial. Because the testimony of Witness No. 16 was critical to the state's case against appellant, the trial court prejudicially erred in instructing the jury not to consider or discuss why he was not being prosecuted in this trial. Reversal of the entire judgment is required.

A. Proceedings Below

The prosecution's star witness, Witness No. 16, testified against appellant in exchange for immunity from prosecution. (20 RT 2678, 2798.) On the evening of April 22, 1995, Witness No. 16 drove Jimmy Palma to Anthony Torres's house because Palma told him "they had to take care of something" and "the brothers wanted him." (20 RT 2683.) At Torres's

house, Witness No. 16 and Palma met with a number of other Sangra gang members, and Pepe Ortiz announced that there was "a problem in El Monte" and that they had to go there "to take care of something." (20 RT 2687, 2691.) Witness No. 16 understood Ortiz to mean that they were going to assault or kill somebody. (20 RT 2687-2694; 21 RT 2776, 2782, 2802, 2804-2805.) Witness No. 16 saw a shotgun at the foot of the bed in the room. (20 RT 2685.) Witness No. 16 then drove Ortiz and Creepy to El Monte, where Ortiz got out of the car and "look[ed] up and down the street" as the murders were committed at the victims' residence on Maxson Road. (20 RT 2697-2705.) Witness No. 16, Ortiz, and Creepy then drove back to Torres's house where they regrouped with the other Sangra gang members. (20 RT 2709-2710.)

At the guilt phase, the trial court instructed the jury with CALJIC No. 2.11.5 (1989 Revision) (Unjoined Perpetrators of Same Crime). That instruction states:

> There may be some evidence in this case indicating that a person or persons other than the defendant was or may have been involved in the crime for which the defendants are now on trial.
>
> There may be many reasons why such persons are not here on trial; therefore, do not discuss or give any consideration as to why the other people are not being prosecuted in this trial or whether they have been or will not be prosecuted in the future. Your sole duty is to decide whether the People have proved the guilt of these defendants on trial.

(VI CT 1754; 27 RT 3380-3381.)

The trial court also instructed the jury, pursuant to CALJIC No. 3.10 (Accomplice – Defined), that "[a]n accomplice is a person who was or is

subject to prosecution for the identical offenses charged in Counts 2 through 6 against the defendants on trial." (VI CT 1714; 27 RT 3353.) Further, the trial court instructed the jury, pursuant to CALJIC No. 3.19 (Burden to Prove Corroborating Witness is an Accomplice), that the jury "must determine whether Witness No. 16 and Witness No. 14 are accomplices as I have defined that term." (27 RT 3356; VI CT 1720.)

B. The Trial Court Prejudicially Erred in Giving CALJIC No. 2.11.5 When There Was Evidence That Witness No. 16 Was Involved in the Crimes and Had Been Granted Immunity from Prosecution in Exchange for his Testimony

This Court has repeatedly held that trial courts should not give CALJIC No. 2.11.5 when a person who might have been prosecuted for the crime has testified at trial. (*People v. Hernandez* (2003) 30 Cal.4th 835, 875; *People v. Lawley, supra,* 27 Cal.4th at p.162; *People v. Williams, supra*, 16 Cal.4th at pp. 226-227; *People v. Cain* (1995) 10 Cal.4th 1, 35; *People v. Hardy* (1992) 2 Cal.4th 86, 190; *People v. Price* (1991) 1 Cal.4th 324, 446; *People v. Cox* (1991) 53 Cal.3d 618, 667; *People v. Carrera* (1989) 49 Cal.3d 291, 312, fn. 9; *People v. Marks* (1988) 45 Cal.3d 1335, 1347, italics added ["The Use Note to CALJIC No. 2.11.5 states: 'This instruction is *not* to be used if the other person is a witness for either the prosecution or defense.'"]; see also *People v. Rankin* (1992) 9 Cal.App.4th 430, 437 [CALJIC No. 2.11.5 should not be given when the non-prosecuted person testifies "because the jury is entitled to consider the lack of prosecution in assessing the witness' credibility"].)

In this case, the trial court gave CALJIC No. 2.11.5 when there was evidence presented to the jury that Witness No. 16 was involved in the offense and could have been prosecuted for the crimes about which he was

testifying. Indeed, the jury was instructed that it had to determine whether Witness No. 16 was an "accomplice," which the court defined as "a person who was subject to prosecution" for the same offenses for which the defendant was on trial. Had the jurors determined that Witness No. 16 was an accomplice, CALJIC No. 2.11.5 instructed the jurors not to "discuss or give any consideration as to why [they] are not being prosecuted in this trial or whether they have been or will not be prosecuted in the future." As this Court has repeatedly held, that was clearly error.

Because Witness No. 16 had been granted immunity from prosecution in exchange for his testimony against appellant – and because it would not be an unreasonable construction of the evidence for the jury to conclude that Witness No. 16 was falsely blaming appellant for acts that Witness No. 16 committed himself – it was essential for the jury to be able to discuss and consider his grant of immunity in assessing his credibility as a witness. Therefore, the trial court in the instant case erred when it instructed the jury not to "discuss or give any consideration why other people are not being prosecuted . . . or whether they have been or will not be prosecuted in the future." (VI CT 1754; 27 RT 3380-3381; CALJIC No. 2.11.5.) In fact, the jury was entitled to consider the fact that Witness No. 16 was not being prosecuted for his role in the offenses in assessing his credibility. (*People v. Hernandez, supra*, 30 Cal.4th at p. 875; *People v. Rankin, supra*, 9 Cal.App.4th at p. 437.)

The jury was also instructed with CALJIC No. 2.20, which permits the jury to consider "[t]he existence or nonexistence of a bias, interest or other motive" in evaluating a witness's testimony. (VI CT 1772; 29 RT 3688.) However, this instruction regarding a witness's "bias, interest or other motive" as a general matter did not negate the fact that CALJIC No.

2.11.5 *specifically* and *affirmatively* precluded the jury from considering an accomplice witness's immunity from prosecution in assessing his credibility. Thus, the jury may well have understood that, while they were permitted to consider a witness's "bias, interest or other motive" as a general matter, they were specifically forbidden from considering why an accomplice witness was not being prosecuted for the crimes about which he was testifying.

C. The Instruction Deprived Appellant of his Rights to a Fair Trial and to Present a Complete Defense

A criminal defendant has a right to a "meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690, quoting *California v. Trombetta* (1984) 467 U.S. 479, 485; see also *Washington v. Texas* (1967) 388 U.S. 14, 22.) A complete defense includes the right to present evidence which tests the credibility of prosecution witnesses through proof of bias, interest or inducements to lie. (*People v. Duran* (1976) 16 Cal.3d 382, 294.) Jury instructions which invade the province of the jury to determine the credibility of witnesses deprive the accused of a fair trial. (*United States v. Rockwell* (3d Cir. 1986) 781 F.2d 985, 990.)

Moreover, the Court has held that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility" violates due process. (*Giglio v. United States* (1972) 405 U.S. 150, 154, quoting *Napue v. Illinois* (1959) 360 U.S. 264, 269.) A jury instruction which directs the jury to disregard evidence bearing on the credibility of a critical witness who may well be determinative of guilt or innocence has exactly the same effect.

Here, the trial court's instructional error improperly assisted the prosecution in overcoming the credibility problems of Witness No. 16, its star witness. Because the trial court's delivery of CALJIC 2.11.5 undercut the defense effort to persuade the jury not to believe Witness No. 16, the instruction violated appellant's rights under the Sixth and Fourteenth Amendments to a fair trial and to present a complete defense.

D. Reversal of the Entire Judgment is Required

The trial court's error was not harmless. Again, Witness No. 16 was the only witness whose testimony implicated appellant as one of the two shooters in the murders. His testimony was indispensable to the prosecution's ability to obtain murder convictions against appellant in this case. In order to properly and fully assess his credibility, it was necessary for the jury to consider the fact that he had been granted immunity from prosecution. (See *People v. Hernandez, supra*, 30 Cal.4th at pp. 876-877 [instructional error related to prosecution witness was prejudicial where jury could have concluded witness was an accomplice and he was the "only witness who saw defendant attack" the victim and who saw them together at the crime scene].)

Moreover, the People cannot establish that, as to the guilt determination, the federal constitutional error in improperly buttressing the credibility of this critical prosecution witness was harmless beyond a reasonable doubt. Indeed, given the central role Witness No. 16 played in the prosecution's case, the error in instructing under CALJIC 2.11.5 cannot be deemed harmless beyond a reasonable doubt. (*Chapman v. California*, supra, 386 U.S. 18, 24.)

In sum, the trial court committed prejudicial error by preventing the jury from considering, in assessing the credibility of Witness No. 16, that he

had not been prosecuted and may have had a motive to lie for the prosecution. Reversal of the entire judgment is required.

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APPELLANT'S CONVICTIONS AND THE DEATH JUDGMENT MUST BE REVERSED BECAUSE LIABILITY CANNOT BE BASED ON AN UNCHARGED CONSPIRACY

A. Proceedings Below

Prior to trial, the prosecution filed a motion to be allowed to proceed on a conspiracy theory even though a conspiracy was not alleged in the indictment.[74] (VI CT 1554-1561.) The court granted the motion, stating: "I think the law is clear. Conspiracy does not have to be charged in order to produce evidence of a conspiracy." (2B RT 462.)

In a subsequent pretrial proceeding before the presiding judge at trial, the prosecutor explained that he filed a motion and points and authorities seeking to be allowed to proceed on a conspiracy theory even though one was not charged in the indictment, and that Judge Sarmiento ruled that he could do that. (3 RT 687.) Judge Trammell agreed: "Conspiracy is a theory of liability and you don't have to charge conspiracy." (3 RT 690.)

At the close of the guilt phase, the trial court gave the jury 12 instructions related to the law of conspiracy.[75]

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[74] The motion relied on *People v. Rodrigues* (1994) 8 Cal.4th 1060, and *People v. Balmontes* (1988) 45 Cal.3d 744, for authority. (VI CT 1555-1556.)

[75] CALJIC No. 6.10.5 (Conspiracy and Overt Act – Defined – Not Pleaded as a Crime Charged); CALJIC No. 6.11 (1991 Revision) (Conspiracy – Joint Responsibility); CALJIC No. 6.12: Conspiracy – Proof of Express Agreement Not Necessary; CALJIC No. 6.13 (Association Alone Does Not Prove Membership in Conspiracy); CALJIC No. 6.14 (Acquaintance with All Co-Conspirators Not Necessary); CALJIC No. 6.15 (continued...)

B. Failure to Charge Conspiracy in the Information Violates Federal Constitutional Principles

It is a fundamental principle of constitutional law that a person may not be convicted of an uncharged offense (other than lesser included offenses), whether or not the evidence establishes the uncharged offense. (*Cole v. Arkansas* (1948) 333 U.S. 196, 201; *People v. Toro* (1989) 47 Cal.3d 966, 973; *People v. Thomas* (1989) 43 Cal.3d 818, 823; *People v. West* (1970) 3 Cal.3d 595, 612.) "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (*Cole v. Arkansas, supra,* 333 U.S. at p. 201.) It is the accusatory pleading that provides notice that the prosecution will seek to prove the elements of an offense. (*West,* at p. 612.)[76]

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[75] (...continued)
(Liability for Independent Acts of Co-Conspirators); CALJIC No. 6.16 (When Conspirators Not Liable for Act of Co-Conspirator); CALJIC No. 6.17 (Conspirators Not Bound by Act or Declaration of Non-Conspirator); CALJIC No. 6.18 (Commission of Act in Furtherance of a Conspiracy Does Not Itself Prove Membership in a Conspiracy); CALJIC No. 6.19 (Joining Conspiracy After Its Formation); CALJIC No. 6.22 (Conspiracy – Case Must Be Considered as to Each Defendant); CALJIC No. 6.24 (1995 Revision) (Determination of Admissibility of Co-Conspirator's Statements). (See VI CT 1722-1733; 27 RT 3357-3364.)

[76] In a series of recent cases, the United States Supreme Court has reiterated the due process and jury trial guarantees of notice and jury determination of all elements based on proof beyond a reasonable doubt. (*Blakely v. Washington* (2004) 542 U.S. 296; *Ring v. Arizona* (2002) 536 U.S. 584; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Jones v. United* (continued...)

The accusatory pleading in this case did not charge appellant with conspiracy, yet the prosecution relied at least in part on a theory of derivative liability based on an uncharged conspiracy to obtain convictions on the five murder counts. That is, the prosecution argued that the jury could find murder by finding that appellant had engaged in a conspiracy resulting in a murder. (29 RT 3618 [prosecutor argued in closing argument to the jury that there was "[c]lear evidence that these men had to discuss, talk about, and plan what they were going to do"].) So while appellant was not technically "convicted" of conspiracy, he was forced to defend against the uncharged conspiracy claim in an attempt to avoid conviction for murder.

Allowing the uncharged conspiracy to be used as a theory of criminal liability for murder denied the federal constitutional due process and jury trial guarantees. The resulting murder convictions must be reversed.

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[76] (...continued)
States (1999) 526 U.S. 227.) As the Court stated in *Jones*: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime *must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt.*" (*Jones v. United States, supra,* 526 U.S. at p. 243, fn. 6, emphasis added.) The Fourteenth Amendment commands the same requirement in a state prosecution. (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 490.) While these recent cases concerned sentencing provisions, the due process and jury trial guarantees relied on in those cases stem from the basic principles long recognized by the Supreme Court as applying to guilt determinations. (See, e.g., *Cole v. Arkansas, supra,* 333 U.S. at p. 201.)

C. An Uncharged Conspiracy Violates the Principle of California Law Requiring That Crimes Be Defined Only By Statute

There are no common-law crimes in California. Criminal liability extends only to those who commit offenses defined as crimes by the Legislature. No court-created doctrine may create a new form of criminal liability. (§ 6; *In re Brown* (1973) 9 Cal.3d 612, 624; *People v. Apodaca* (1978) 76 Cal.App.3d 479, 491.)

Penal Code section 31 defines the principals that may be held liable for a crime.[77] Because the statutory definition of principals does not include conspirators, participation in a conspiracy alone is not an authorized basis for finding a person guilty of any offense other than conspiracy, a crime also defined by statute. (See § 182.)

The federal rule permits finding a co-conspirator liable for a substantive offense committed by another co-conspirator in furtherance of the conspiracy. (See *Pinkerton v. United States* (1946) 328 U.S. 640.)[78] However, the *Pinkerton* rule has been the subject of much criticism and has

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[77] At the time pertinent to this case, Penal Code section 31 provided:

WHO ARE PRINCIPALS. All persons convicted in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, areprincipals in any crime so committed.

[78] In *Pinkerton*, unlike the present case, the defendant *was charged* with conspiracy as well as the substantive offense.

been rejected by most states. As pointed out by LaFave and Scott, "the *Pinkerton* rule never gained broad acceptance," and has been widely rejected. (LaFave and Scott, Criminal Law (2d ed.), § 6.8, pp. 587-589 and fn. 16.) Most states, with a very few exceptions, have declined to include conspiracy as a basis or theory for criminal liability for substantive, non-conspiracy offenses. (*Ibid.*)

As noted above, section 31 does not provide a definition of principals liable for a crime subject to such a broad interpretation. Although liability extends to an aider and abettor, liability is not extended under the statute to a conspirator. California law does not permit liability for another crime to be based on an uncharged conspiracy.

The use of an uncharged conspiracy to support the murder conviction violated California law. This deviation from the authorized state statutory scheme also violated federal due process because appellant had a protected state-created liberty interest in enforcement of that statutory scheme. (See *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

D. This Court Should Re-examine Its Earlier Decisions Regarding the Concept of Uncharged Conspiracy

Appellant recognizes that, in *People v. Pulido* (1997) 15 Cal.4th 713, 720-725, this Court reaffirmed the notion that participation in an uncharged conspiracy may be a basis for finding vicarious liability for a substantive offense. The Court noted that the conspirator and the aider and abettor stand in the same position. (*Id.* at pp. 724-725.) While the decision did not address the distinction between co-conspirator liability and aider-and-abettor liability, the Court declined to extend vicarious liability to an aider and abettor for acts committed prior to his becoming an accomplice. If one

person, acting alone, kills in preparation of a robbery and another thereafter aids and abets the robbery by carrying away and securing the property, the second person is an accomplice to the robbery but not liable for murder under Penal Code section 189 because the killer and accomplice were not jointly engaged in the robbery at the time of the killing. (*Id.* at p. 716.)

Similarly, this Court's dicta approving the use of conspiracy as a theory of aiding and abetting liability in *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1134, and *People v. Belmontes* (1988) 45 Cal.3d 744, 788, should not control this issue. In *Rodrigues,* although the defendant was not charged with conspiracy, defense counsel and the prosecutor agreed that the court should instruct with the law relating to conspiracy and admission of co-conspirators' statements and set forth in CALJIC Nos. 6.10.5, 6.11, and 6.24. (*Rodrigues*, *supra*, 8 Cal.4th at p. 1133.) This Court held that consent of defense counsel to the instructions barred appellate review. (*Id.* at p. 1134.) Thus, any language in *Rodrigues* that conspiracy instructions are proper where there is evidence of an uncharged conspiracy is dicta.

Also, in *Belmontes*, liability properly was found for aiding and abetting because, even under the defendant's theory, he had not notified the other parties of his intention to withdraw from the crime nor had he done everything in his power to prevent the crime from being committed. Liability was also proper under the felony-murder doctrine, and, as this Court held, the jury's verdict reflected that it found liability under both theories. (*People v. Belmontes,* supra, 45 Cal.3d at p. 790.) Thus, the discussion of the conspiracy theory in the *Belmontes* decision was unrelated to any issue raised by appellant and unnecessary to affirming the conviction. (*Id.* at pp. 788-789.)

In *People v. Washington* (1969) 71 Cal.2d 1170, this Court suggested that it is permissible to instruct on conspiracy where only a substantive offense is charged if there is evidence of a conspiracy to commit the substantive crime. (*Id.* at pp. 1174-1175.) However, this portion of the discussion was not necessary to the decision. The jury's verdict in the *Washington* case necessarily meant that they rejected the defense that the defendant was not at the scene of the crime and did not participate in any way. The prosecution's evidence established defendant's liability as an aider and abettor. (*Id.* at pp. 1172-1174.) None of the above-cited cases identifies the statute showing that an uncharged conspirator can be held liable for a substantive offense based solely on the conspiracy, nor do they explain how this basis of liability would be constitutional under California law.

This Court should clarify that criminal liability under California law is controlled by statute and that no statutory authority allows an uncharged conspiracy to serve as a basis for liability for another crime.

E. An Uncharged Conspiracy As a Theory of Criminal Liability Creates an Impermissible Mandatory Presumption

Moreover, an uncharged conspiracy as a basis for criminal liability creates a mandatory conclusive presumption that a person who engages in an uncharged conspiracy to commit a substantive offense is guilty of the substantive offense later committed by others. Once the jury finds a defendant to be a co-conspirator, the instructions make it unnecessary for them to find that he acted as a principal by either directly committing the crime or aiding and abetting in its commission. This approach to vicarious liability creates a mandatory conclusive presumption because it informs the jury "'that it must assume the existence of the ultimate, elemental fact from

proof of specific, designated basic facts.'" (*People v. Roder* (1983) 33 Cal.3d 491, 498, quoting *Ulster County Court v. Allen* (1979) 442 U.S. 140, 167.) It "removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption." (*Francis v. Franklin* (1985) 471 U.S. 307, 314, fn. 2.)

Mandatory conclusive presumptions of guilt are prohibited by *Sandstrom v. Montana, supra*, 442 U.S. at pp. 512-515 and *Carella v. California, supra*, 491 U.S. at pp. 265-266, where, as here, the defendant could rationally be acquitted of the substantive crime without the improper mandatory conclusive presumption. An error of this kind, which lightens the prosecution's burden of proof, violates the federal constitutional guarantees of due process and the right to a trial by jury (U.S. Const., 6th & 14th Amends.;[79] *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740; see *In re Winship* (1970) 397 U.S. 358, 364), and requires reversal unless the error "surely" did not contribute to the verdict. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279). Such error requires reversal unless this Court is able to declare it harmless beyond a reasonable doubt. (*Rose v. Clark* (1986) 478 U.S. 570, 577; *People v. Reyes-Martinez* (1993) 14 Cal.App.4th 1412, 1416-1419.)

F. The Use of an Uncharged Conspiracy as a Basis for Liability for First Degree Murder Prejudiced Appellant

The People cannot establish harmless error in appellant's case. The jury found appellant guilty of first degree murder on general verdict forms. (VII CT 1800-1804.) Because of the general verdicts, it cannot be ascertained which theory or theories the jury relied on in convicting

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[79] It also violates article I, sections 7 and 15 of the California Constitution.

appellant of five counts of murder. Thus the State cannot show that the jury did not rely on the invalid conspiracy theory in arriving at the murder finding.

It is conceivable that the jury relied on a conspiracy theory to convict appellant of all five counts of murder. The only witness who implicated appellant as one of the shooters was Witness No. 16, who had been granted immunity from prosecution in exchange for his testimony and who, by his own admission, went to the crime scene with the other gang members on the night of the crimes. The jury may well have concluded that Witness No. 16's testimony implicating appellant as one of the shooters was unreliable, yet also relied on other evidence to conclude that appellant was culpable for the five murders, irrespective of whether he shot any of the victims, on the basis of the uncharged conspiracy theory. Under the court's conspiracy instructions, the jury could have found appellant guilty of all five murders if the jury concluded that he conspired with the other Sangra members and if a co-conspirator or co-conspirators committed the murders and they were a natural and probable consequence of the target offense. To prevail on this theory, the prosecution would not have had to prove that appellant shared his co-conspirators' intent with respect to any of the murders. In short, the conspiracy instructions created an additional theory of derivative culpability that, unlike aiding and abetting, did not require a finding that appellant shared the intent of the actual murderers. Consequently, the prosecution's use of the uncharged conspiracy theory requires that all five counts of murder be reversed.

At a minimum, the prosecution's reliance on the uncharged conspiracy theory requires that appellant's convictions for the murders of Maria Moreno, Laura Moreno, and Ambrose Padilla be reversed, because

the prosecution urged the jury to convict appellant on the basis of such a theory. The prosecution's theory at trial was that appellant shot the two adult male victims, Anthony "Dido" Moreno and Gustavo "Tito" Aguirre, while co-defendant Palma shot Maria Moreno and her two children, five-year-old Laura Moreno and six-month-old Ambrose Padilla. (12 RT 1606, 1632; 27 RT 3399, 3459.) Thus, the jury could have found appellant guilty of the murders of Maria Moreno, Laura Moreno, and Ambrose Padilla if the jurors believed appellant participated in an agreement to commit the murder of one of the other victims (e.g., Dido Moreno and/or Tito Aguirre) and if Palma, as a co-conspirator, committed the remaining offenses and they were a natural and probable consequence of the target offense. To prevail on this theory, the prosecution would not have had to prove that appellant shared Palma's intent with respect to the murders of Maria Moreno, Laura Moreno, and Ambrose Padilla. Since there was no evidence presented to the jury to suggest that appellant had *any* intent to murder Maria Moreno or her two children, it is likely that the jury's verdicts convicting appellant of Counts 4 (Maria Moreno), 5 (Laura Moreno), and 6 (Ambrose Padilla) were based on the uncharged conspiracy theory. Further, because the murders of Maria Moreno and her children were indisputably the most highly aggravated, appellant was prejudiced by the prosecution's reliance on the uncharged conspiracy theory at the penalty phase as well.

As shown above, giving instructions on the uncharged conspiracy theory violated state law and federal constitutional law. The error relating to reliance on the uncharged conspiracy theory cannot be considered harmless. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Reversal of appellant's convictions and death judgment is required.

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THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INCOMPLETE AND CONFUSING INSTRUCTIONS ON CONSPIRACY

A. Introduction

The United States Supreme Court has stated repeatedly the importance of ensuring that jurors in criminal cases are instructed adequately on the applicable law. "It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (*Gregg v. Georgia* (1976) 428 U.S. 153, 193 [opn. of Stewart, Powell, and Stevens, JJ.].) "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.) "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

This Court has also recognized the necessity of complete instructions on the applicable law. A trial court must instruct sua sponte on those general principles of law which are "closely and openly connected with the facts before the court, and which are necessary for a jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.)

In appellant's case, the trial court failed to give complete and accurate instructions relating to the law of conspiracy. Assuming arguendo that it is proper to base liability on an uncharged conspiracy in the first place (see Argmt. 8, *supra*), complete instructions on the law of conspiracy are at least required. Full and fair instructions were necessary because conspiracy served as one of the bases for the murder verdicts. The jury's

ability to fairly apply the conspiracy theory of liability depended on a proper determination of the existence of a conspiracy. That could not happen in appellant's case where the jury received only partial instructions on the law of conspiracy.

By failing to identify any overt acts, failing to identify the object or objects of the conspiracy, failing to require unanimous agreement on the object or objects and overall finding of conspiracy, and failing to require proof beyond a reasonable doubt, the trial court violated appellant's federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments to a fair jury trial, reliable guilt determination and due process. It also violated appellant's state constitutional and statutory rights as explained below. These errors resulted in a fundamentally unfair trial and unreliable conviction that must be reversed.

B. The Jury Instructions Failed to Allege Overt Acts

As noted previously, the prosecutor used an uncharged conspiracy as one possible basis for finding first degree murder. The jury heard 12 instructions concerning conspiracy,[80] including CALJIC No. 6.10.5, which

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[80] CALJIC No. 6.10.5 (Conspiracy and Overt Act – Defined – Not Pleaded as a Crime Charged (VI CT 1722; 27 RT 3356-3358); CALJIC No. 6.11 (1991 Revision) (Conspiracy – Joint Responsibility) (VI CT 1723; 27 RT 3358-3360); CALJIC No. 6.12 (Conspiracy – Proof of Express Agreement Not Necessary) (VI CT 1724; 27 RT 3360); CALJIC No. 6.13 (Association Alone Does Not Prove Membership in Conspiracy) (VI CT 1725; 27 RT 3360); CALJIC No. 6.14 (Acquaintance With All Co-Conspirators Not Necessary) (VI CT 1726; 27 RT 3360-3361); CALJIC No. 6.15 (Liability for Independent Acts of Co-Conspirators) (VI CT 1727; 27 RT 3361); CALJIC No. 6.16 (When Conspirators Not Liable for Act of Co-Conspirator) (VI CT 1728; 27 RT 3361-3362); CALJIC No. 6.17 (Conspirators Not Bound by Act or Declaration of Non-Conspirator) (VI CT 1729; 27 RT 3362); CALJIC No. 6.18 (Commission of Act in

(continued...)

requires that a conspirator must have committed at least one "overt act" in furtherance of the object of the conspiracy. The instruction states:

> In order to find a defendant to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one overt act. It is not necessary to such a finding as to any particular defendant that defendant personally committed the overt act, if he was one of the conspirators when such an act was committed.
>
> The term "overt act" means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a public offense and which step or act is done in furtherance of the accomplishment of the object of the conspiracy.
>
> To be an "overt act," the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that such step or act, in and of itself, be a criminal or unlawful act.

(VI CT 1722; 27 RT 3357-3358.)

This instruction failed to allege any specific overt acts supposedly performed by any conspirators. Since conspiracy was not charged as a crime in this case, the indictment also failed to allege any overt acts.

The silence of the indictment and jury instructions concerning any particular overt act left the jury with no guidance on this critical component

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[80] (...continued)
Furtherance of a Conspiracy Does Not Itself Prove Membership in Conspiracy) (VI CT 1730; 27 RT 3362); CALJIC No. 6.19 (Joining Conspiracy After its Formation) (VI CT 1731; 27 RT 3362-3363); CALJIC No. 6.22 (Conspiracy – Case Must Be Considered as to Each Defendant) (VI CT 1732; 27 RT 3363); CALJIC No. 6.24 (1995 Revision) (Determination of Admissibility of Co-Conspirator's Statements) (VI CT 1733; 27 RT 3363-3364).

of a conspiracy, and left appellant with no reasonable opportunity to defend against the uncharged conspiracy. This error constituted a violation of both state law and federal constitutional law.

The crime of conspiracy is defined in Penal Code section 182. The statute specifically mandates that one or more alleged overt acts must be "expressly alleged in the indictment or information" and at least one of the alleged overt acts must be proved. (§ 182, subd. (b).) An overt act allegation is also necessary to establish the proper venue. (§ 182, subd. (a);[81] § 184.[82]) CALJIC No. 6.23 also requires that the jury be instructed with the specific overt acts alleged.

Even where no conspiracy is charged, assuming arguendo that such a procedure is valid, the trial court is still required to instruct on the law of conspiracy when the prosecution hinges liability on a theory of conspiracy. (*People v. Ernest* (1975) 53 Cal.App.3d 734, 744-745.) To follow the prosecution's theory that appellant could be found liable for murder based on his participation in a conspiracy, the jury necessarily first needed to make a valid finding of a conspiracy. No such valid finding could be made without complete instructions on conspiracy.

The conspiracy instructions were incomplete, in part, because of the failure to allege specific overt acts. The allegation of overt acts serves

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[81] This subsection provides in relevant part: "All cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect the conspiracy shall be done."

[82] Section 184 provides: "No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done."

important purposes and is necessary to a proper determination of the existence of a conspiracy. "One purpose of the overt act requirement is to provide a *locus penitentiae* – an opportunity to repent – so that any of the conspirators may reconsider and abandon the agreement before taking steps to further it, and thereby avoid punishment for conspiracy." (*People v. Russo* (2001) 25 Cal.4th 1124, 1131; *People v. Morante* (1999) 20 Cal.4th 403, 416, fn. 4; see also *Hyde v. United States* (1912) 225 U.S. 347, 358.) "Another purpose is 'to show that an indictable conspiracy exists' because 'evil thoughts alone cannot constitute a criminal offense.'" (*People v. Russo, supra,* at p. 1131, quoting *People v. Olson* (1965) 232 Cal.App.480, 489.)

As the statutory law identified above shows, to establish a conspiracy specific overt acts must be alleged and found by the jury. Case law also makes clear that allegation and a finding of at least one overt act is necessary to find a conspiracy. (*People v. Russo, supra,* 25 Cal.4th at p. 1134; *People v. Morante, supra,* 20 Cal.4th at p. 416.) In *Russo*, ten specific overt acts were alleged. (25 Cal.4th at p. 1130.) Although this Court held in *Russo* that the jury did not have to agree unanimously on which overt acts were committed, the Court recognized that "the requirement of an overt act is an element of the crime of conspiracy in the sense that the prosecution must prove it to a unanimous jury's satisfaction beyond a reasonable doubt. But that element consists of *an* overt act, not a *specific* overt act." (*Id.* at p. 1134, emphasis in original text.) That does not mean that there is no requirement that an overt act be alleged, for such an allegation is required by section 182, subdivision (b), which, as recognized in *Russo*, also requires that at least one overt act be proved. (*Id.* at p. 1134.)

The failure of the prosecution to identify any overt acts allegedly performed by the defendants violated not only state law, but also federal constitutional requirements. "The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. . . . Jury instructions relieving States of this burden violate a defendant's due process rights." (*Carella v. California*, *supra*, 491 U.S. 263, 265.) Error of this type, which lightens the prosecution's burden of proof, violates the federal constitutional guarantees of due process and the right to trial by jury. (U.S. Const., 6th & 14th Amends.; *In re Winship*, *supra*, 397 U.S. at p. 364; *Conde v. Henry, supra,* 198 F.3d at p. 740.) Appellant also had a protected liberty interest in proper application of the California statutory scheme for alleging crimes. (U.S. Const., 14th Amend.; see *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

C. The Jury Instructions Failed to Properly Allege the Object of the Conspiracy

Adding to the confusion surrounding the jury's task of determining whether a conspiracy existed, already made difficult by the failure to allege any overt acts, the prosecution and trial court failed to provide clear guidance on the alleged object of the conspiracy. Designation of the alleged object is essential because the jury must determine whether the purported conspirators had the specific intent to agree to commit a criminal offense. (*People v. Morante, supra,* 20 Cal.4th at p. 416.)

In this case, the trial court gave inadequate instructions relating to the alleged object. Pursuant to CALJIC No. 6.10.5, the trial court instructed: "A conspiracy is an agreement between two or more persons with the specific intent to agree, to commit a public offense *such as murder*,

and with the further specific intent to commit such offense. . . ." (VI CT 1722, italics added; 27 RT 3356-3357.) Rather than directly alleging murder as the alleged object of the conspiracy, the version of CALJIC No. 6.10.5 used at appellant's trial contained the inexact and confusing phrase, "*such as murder.*" This imprecise language suggested that murder was an example of offenses that might constitute the object of the conspiracy rather than clearly setting out the alleged target crimes or objects.

This instruction failed to provide adequate guidance to the jury about how to determine the object or crime originally contemplated by the conspiracy. Case law often refers to the "originally contemplated" criminal objective as the "target crime." This Court has recognized the importance of properly identifying any target crimes. As the Court explained in *People v. Prettyman*, *supra*, 14 Cal.4th 248, 267: "[I]n an aiding and abetting case involving application of the 'natural and probable consequences' doctrine, *identification of the target crime* will facilitate the jury's task of determining whether the charged crime allegedly committed by the aider and abettor's confederate was indeed a natural and probable consequence of any uncharged target crime that, the prosecution contends, the defendant knowingly and intentionally aided and abetted." (Emphasis added.)

While the "natural and probable consequence" doctrine in *Prettyman* involved aiding and abetting, the Court stated that the doctrine applied equally to conspiracy. (*Id.* at pp. 260-261.) As noted in *Prettyman*, "a conviction may not be based on the jury's generalized belief that the defendant intended to assist and/or encourage unspecified nefarious conduct." (*Id.* at p. 268.) This Court concluded that defining the target crime would eliminate the risk that the jury would "rely on such generalized beliefs as a basis for conviction." (*Ibid.*)

In appellant's case, the failure to identify the object of the alleged conspiracy permitted such improper "generalized belief" on the part of the jurors. (Cf. *People v. Liu* (1996) 46 Cal.App.4th 1119, 1134 [instruction specifically referred to allegations in the information charging conspiracy which identified the target offense].)

D. The Jury Instructions Failed to Require Unanimous Agreement on the Object or Objects and Overall Finding of Conspiracy, and Failed to Require Proof Beyond a Reasonable Doubt

The failure to require jury findings on the overt act and the objects of the conspiracy led to further error. Thus, the trial court omitted a paragraph from CALJIC No. 6.22 (Conspiracy – Case Must be Considered as to Each Defendant). The instruction that the trial court gave read as follows:

> Each defendant in this case is individually entitled to, and must receive, your determination whether he was a member of the alleged conspiracy. As to each defendant you must determine whether he was a conspirator by deciding whether he willfully, intentionally and knowingly joined with any other or others in the alleged conspiracy.

(VI CT 1732; 27 RT 3363.)

The court omitted the following paragraph from the instruction:

> Before you may return a guilty verdict as to any defendant of the crime of conspiracy, you must unanimously agree and find beyond a reasonable doubt, that (1) there was a conspiracy to commit the crime[s] of _____, and (2) a defendant willfully, intentionally and knowingly joined with any other or others in the alleged conspiracy. You must also unanimously agree and find beyond a reasonable doubt, that an overt act was committed by one of the conspirators. You are not required to agree as to who committed an overt act, or which overt act was committed, so long as each of you finds beyond a reasonable doubt, that one of the conspirators committed one of the acts alleged in the [information] [indictment] to be overt acts.

(CALJIC No. 6.22.)

The court also failed to give CALJIC No. 6.25 which provides:

> Defendant[s] [is] [are] charged [in Count[s] _____] with conspiracy to commit the crime of _____, in violation of _____ Code, § _____, and the crime of _____, in violation of _____ Code, § _____.
>
> In order to find the defendant[s] guilty of the crime of conspiracy, you must find beyond a reasonable doubt that the defendant[s] conspired to commit one or more of the crimes, and you also must unanimously agree as to which particular crime or crimes [he] [they] conspired to commit.
>
> If you find the defendant[s] guilty of conspiracy, you will then include a finding on the question as to which alleged crimes you unanimously agree the defendant conspired to commit. A form will be supplied for that purpose [for each defendant].

Although the omitted paragraph of CALJIC No. 6.22 and CALJIC No. 6.25 both refer to a charged conspiracy, these instructions should have been given, notwithstanding the fact that the prosecution did not charge conspiracy in this case, because one of the theories presented by the prosecution was that appellant was culpable for the murders of Maria Moreno, Laura Moreno, and Ambrose Padilla because he was a party to a conspiracy to murder Dido Moreno, Tito Aguirre, or both. The prosecution's decision to present multiple theories of liability, including conspiracy, required the jury to make certain foundational findings. To find murder under the conspiracy theory, the jury first had to properly determine that a conspiracy existed to commit a specific offense and to make that determination unanimously and based upon proof beyond a reasonable doubt.

A jury verdict in a criminal case must be unanimous. (*People v. Russo, supra,* 25 Cal.4th at p. 1132; *People v. Collins* (1976) 17 Cal.3d 687, 693; see Cal. Const., art. I, §16 [expressly stating that in a civil case a verdict may be rendered by agreement of the three-fourths of the jury, which implies a unanimity requirement in criminal cases].) "Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime." (*Russo,* at p. 1132, original emphasis; accord *People v. Diedrich* (1982) 31 Cal.3d 263, 281.) The requirement of unanimity as to the criminal act "is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." (*Russo,* at p. 1132, quoting *People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.)

Lower courts have held that there need not be unanimous jury agreement on a specific object of the conspiracy so long as the jurors agree that the conspiracy had some crime as the object. (See, e.g., *People v. Vargas* (2001) 91 Cal.App.4th 506, 558.) But this Court has held that while there need not be unanimous agreement on the overt acts, the jurors must agree on a particular crime. (*People v. Russo, supra,* 25 Cal.4th at p. 1134.) In the context of conspiracy, this means that the jurors must agree on the particular object of the conspiracy because a conspiracy to commit burglary is a different crime from a conspiracy to commit murder or conspiracy to falsely imprison. Each of these is a separate crime subject to different punishment. (See § 182 ["When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony"].) Without a unanimity requirement and instruction, there is a danger that some jurors will think a defendant was guilty of one conspiracy and others will think he was guilty

of a different one. (*People v. Russo, supra,* 25 Cal.4th at p. 1135.) Such an instruction "is necessary to minimize the risk that the jury, generally unversed in the intricacies of criminal law, will 'indulge in unguided speculation' when it applies the law to the evidence adduced at trial." (*People v. Prettyman, supra,* 14 Cal.4th at p. 267, quoting *People v. Failla* (1966) 64 Cal.2d 560, 564.)

It makes no difference that in this case no crime of conspiracy was charged. This Court has held that "as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty." (*People v. Santamaria* (1994) 8 Cal.4th 903, 918.) That holding applied, however, to the issue of whether the jury had to decide unanimously whether the defendant was an aider and abettor. (*Ibid.* ["More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator"].) Aiding and abetting, which is only a theory of culpability and not a discrete and separate offense, differs fundamentally from conspiracy, which is a separate crime and not merely a theory of culpability. In appellant's case, guilt on the murder charges could have been predicated on a theory dependent on appellant's guilt of a conspiracy. That means to sustain the murder convictions, the jury should have been required to find appellant guilty of a conspiracy beyond a reasonable doubt and unanimously.

The due process clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship, supra,* 397 U.S. at p. 364.) That requirement applies not only to every "element," as that term is formally understood, but also to each of the

"facts necessary to establish each of those elements." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278.) Instructional error relating to the reasonable-doubt requirement vitiates "all the jury's findings" and constitutes structural error. (*Id.* at p. 281, original emphasis.) And state constitutional law requires that any jury findings must be unanimous. (*People v. Collins, supra,* 17 Cal.3d at p. 693.) Appellant had a protected due process liberty interest in enforcement of this state law requirement. (See *Hicks v. Oklahoma, supra,* 447 U.S. at pp. 346-347.)

The omission of the paragraph in CALJIC No. 6.22 and the failure to give CALJIC No. 6.25 resulted in the absence of any instructions specifying that a finding of conspiracy must be unanimous and based upon proof beyond a reasonable doubt. The failure to give complete and accurate instructions on conspiracy could have resulted in an erroneous determination of guilt on all of the murder counts. That instructional error violated appellant's state and federal constitutional rights.

E. Reversal of the Entire Judgment is Required

Instructional error occurs if there is a "reasonable likelihood" that the jury has applied any challenged instruction in a way that violates the United States Constitution. (*Boyde v. California* (1990) 494 U.S. 370, 380.) Appellant has established that the incomplete and confusing jury instructions on conspiracy law violated his federal constitutional rights to trial by jury, a reliable guilt determination and due process. Where the prosecution presents alternative theories of guilt and the general verdict leaves the reviewing court unable to determine whether the guilty verdict may have had a proper basis, "the unconstitutionality of any of the theories requires that the conviction be set aside." (*Id.* at pp. 379-380.) Reversal is required here where appellant's murder convictions on Counts 4, 5, and 6

may have been based on unconstitutional application of the instructions on conspiracy.

The conspiracy instructions were incomplete, vague and reasonably susceptible to misunderstanding by the jurors. Extensive empirical research has demonstrated that juries often misapprehend jury instructions. (See, e.g., Hans, *Jury Decision Making* in Handbook of Psychology and Law (Kagehiro & Laufer, eds. 1992) pp. 56, 67 ["Jury researchers are nearly unanimous in the view that jurors have trouble understanding and following the judge's legal instructions"]; May, *"What Do We Do Now?" Helping Juries Apply the Instructions* (1995) 28 Loy.L.A.L.Rev. 869, 872 ["Studies literally abound demonstrating the extent to which jurors misapprehend the relevant law"].) The incomplete and conflicting instructions on uncharged conspiracy made it even less likely in this case that the jurors could apply the instructions fairly and correctly in order to reach valid murder verdicts.

The instructions were particularly deficient in failing to require proof beyond a reasonable doubt and unanimity. The failure to provide adequate instruction on the reasonable-doubt requirement constitutes structural error requiring reversal. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 281; *Carella v. California*, *supra*, 491 U.S. at p. 268 (conc. opn. of Scalia, J.); cf. *People v. Marshall* (1996) 13 Cal.4th 799, 879 (conc. and dis. opn. of Kennard, J.) [trial court's failure to submit special-circumstance allegation to jury violated jury-trial guarantee; error was therefore structural].) Thus, the failure to provide any instruction that a conspiracy finding must be based on proof beyond a reasonable doubt is reversible per se.

Even under harmless error analysis, reversal of appellant's convictions and the death judgment are required. An instruction that omits an element of an offense violates a defendant's due process right to a jury

trial and is subject to the *Chapman* federal constitutional standard of harmless error. (*Chapman v. California, supra,* 386 U.S. at p. 24; *Neder v. United States* (1999) 527 U.S. 1, 15; *People v. Williams* (1997) 16 Cal.4th 635, 689; *Evanchyk v. Stewart* (9th Cir. 2003) 340 F.3d 933, 940.) Incomplete and confusing instructions constitute harmless error under the *Chapman* test only if the People can establish beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

The People cannot meet that burden here where the murder convictions may have depended on conspiracy findings without the jury making valid findings as to the overt acts and objects of the conspiracy and without finding proof beyond a reasonable doubt and unanimously. Indeed, these errors were so fundamental and unfair that even under the state law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, it is "reasonably probable" that a different result would have been reached absent the errors. Reversal of appellant's convictions and the death sentences are required.

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THE TRIAL COURT FAILED TO MAINTAIN THE PROPER JUDICIAL DECORUM BY ADDRESSING AND REFERRING TO THE JURORS, COUNSEL, AND COURT PERSONNEL BY MOCK "GANG MONIKERS" THAT RIDICULED THE DEFENDANTS AND UNDERMINED THE SOLEMNITY OF THE PROCEEDINGS, REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

A fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of life or liberty without due process of law. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 7, subd. (a); see e.g., *Tumey v. Ohio* (1927) 273 U.S. 510, 523; *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266.) There are many components to a fair and impartial trial, one of which is the manner in which the judge conducts the trial. The United States Supreme Court has noted that the judge governs the trial for the purpose of assuring its proper conduct and, in doing so, the judge has the responsibility to maintain decorum in keeping with the nature of the proceeding. (*United States v. Young* (1985) 470 U.S. 1, 10-11.)

Here, the trial judge made remarks during the course of the trial that set an improper tone considering the ultimate determination that the jurors would have to make – a decision as to whether appellant would live or die. The trial judge's failure to maintain proper decorum in this case deprived appellant of his rights to a fair trial and a fair determination of penalty, in violation of the Sixth and Fourteenth Amendments.

A. Proceedings Below

During the guilt-innocence phase of trial, at the conclusion of court proceedings on October 29, 1996, Judge Trammell said to the jurors:

> I have ascertained one thing and that is that apparently one of you has now acquired a moniker. I am not going to tell you what it is but – because if I were to tell you what it is you would know who it was, but maybe by the time we're through all 18 of you will have a moniker that's assigned to you out here unbeknownst to you. I'm not sure.

(18 RT 2391.) The judge provided no further explanation about what he was talking about.

Several days later, however, on the morning of November 6, 1996, Judge Trammell commenced proceedings before the jury by announcing that he would open the record "a little bit differently." (23 RT 3014.) Then, referring to the jurors and those present in the courtroom, the judge proceeded to identify all of the participants by mock gang "monikers":

> The record in this instance will reflect that Character is present with his attorney Comet; Primo is present with his attorney Slippers; the District Attorney is present in the person of Windex; the jury in the person of Incognito, Booky, Ill-Bit, Fidler, Coco, Eagle Scout, Sharpy, Rabbit, Curly, Tree, it's either V or 6, Sleepy [–] I know who that is [–] Foxy, Sharper [–] who didn't make it to Nordstroms this morning [–] The Suit, Smiley, Snickers, and Dopey are all present along with Coach, Racer, Bambi, and Flash.

(23 RT 3014-3015.)

Judge Trammell then turned to a witness whose testimony was about to resume, and asked: "Do you have a moniker?" (23 RT 3015.) The witness – Stephen Davis, a Los Angeles County deputy sheriff – responded: "No, your Honor." (23 RT 3015.) The judge then addressed the prosecutor, to whom the judge had given the moniker "Windex,"and made

the following joke: "Mr. Monaghan, or I should say Windex, I want to make sure that the record is clear." (23 RT 3015.) Playing along with the judge, the prosecutor responded: "Yes, we do, your Honor, we want to make sure the record is clear." (23 RT 3015.)

Judge Trammell explained his remarks to those in the courtroom, including defense counsel and the defendants, as follows: "[Y]ou guys probably don't know why I was doing this, [but] I got this from the jury this morning signed by each of their monikers and then I found out what your monikers are." (23 RT 3015.) By "this," the judge referred to a document, which he said would be marked as "Exhibit 14,391." (23 RT 3015.) However, whatever the document was, it was not made a part of the record.

At the conclusion of Investigator Davis's testimony, the judge again made reference to the jurors' "gang monikers." For no apparent reason related to the court proceedings, the judge asked the jurors which one of them was "Dopey." (23 RT 3102.) He then said to the jurors: "I was getting to where I was kind of worried because for the first two weeks I had never seen people who were expressionless and not responsive to anything. I said something to Flash over here [like] 'Were they still breathing?' and [I was] concerned because you take 18 people who are total strangers and put them in a little room without coffee and you have real problems, but I am glad to see that you have conquered all that and really do have a good sense of his [*sic*] humor among the collective group of you." (23 RT 3102.)

B. Judge Trammell's Jokes Mocking the Defendants' "Gang Monikers" Violated the Canons and Standards Governing Judicial Conduct

The California Code of Judicial Ethics states, "A judge shall require order and decorum in proceedings before the judge." In 1998, the Commission on Judicial Performance imposed discipline or sent advisory

letters to judges of this state on 90 occasions. Over 10 percent of these occasions were prompted by a judge's inappropriate demeanor and decorum, including inappropriate humor. This category of misconduct tied for the most common type of misconduct. (Cal. Com. on Jud. Performance, Annual Report (1988) at p. 17.)

The American Bar Association has promulgated standards for judicial performance which recognize that a fair trial requires that the judge maintain courtroom decorum by exercising control over the proceedings and those participating in them. (1 ABA Standards for Criminal Justice, §§ 6-1.1, 6-2.3, 6-2.4, 6-3.1, 6-3.2, 6-3.3, 6-3.5 (2d ed. 1980).) These standards define the general responsibility of the trial judge, in pertinent part, as follows:

> *Standard 6-1.1. General responsibility of the trial judge*
>
> The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.

(1 ABA Standards for Criminal Justice, § 6-1.1.) The Commentary to this Standard provides the following elaboration on the duty of the trial judge:

> This standard recognizes that it is ultimately the authority and responsibility of the trial judge to maintain the atmosphere appropriate for a fair, rational and civilized determination of the issues and to govern the conduct of all persons in the courtroom, including the attorneys. All the

> standards generally recognize that the judge possesses the power and authority to maintain order, and that this function is best performed in the interest of the proper administration of criminal justice when judicial powers are used impartially in a firm and dignified manner.

(*Id.* at pp. 6.6-6.7.) The judge also has the duty to "maintain order":

> *Standard 6-3.3. General responsibility of the trial judge*
>
> The trial judge has the obligation to use his or her judicial power to prevent distractions from and disruptions of the trial. . . .

(1 ABA Standards for Criminal Justice, § 6-3.3.)

Here, Judge Trammell clearly had a duty, when presented with the jury's note reflecting that the jurors had given themselves mock "gang monikers," to take steps to preserve an appropriately serious atmosphere in the courtroom. Not only did Judge Trammell abdicate this duty, he indulged and encouraged the jurors' attempt to poke fun at the defendants.

Although humorous or sarcastic remarks do not always rise to the level of misconduct (21 Cal.Jur.3d, Criminal Law, § 2938, pp. 526-528), Judge Trammell's jokes at the defendants' expense – particularly in a capital case – were grossly improper. (*People v. Melton* (1989) 44 Cal.3d 713, 753-754.) As this Court has stated, "Obviously, . . . the court should refrain from joking remarks which the jury might interpret as denigrating a particular party or his attorney." (*Ibid.*) By addressing the jurors and other court personnel by mock "gang monikers," the judge was effectively ridiculing the defendants, each of whom was known by similar nicknames.

Judge Trammell's remarks had the effect of conveying to the jury that he believed the defendants were properly objects of ridicule and derision. "It needs no citation to convince an unbiased observer that a jury

has both ears and eyes open for any little word or act of the trial judge from which they may gather enough to read his mind and get his opinion of the merits of the issue under review." (*Sanguinetti v. Moore Dry Dock Co.* (1951) 36 Cal.2d 812, 823; *People v. Frank* (1925) 71 Cal.App. 575, 581.)

A capital trial is not a joking matter. Because Judge Trammell injected unnecessary and prejudicial levity into a serious proceeding at which the defendant's life was at stake, and thereby undermined the jury's responsibility regarding the gravity of its task, appellant's convictions and death judgments must be reversed.

C. Judge Trammell's Remarks Violated Appellant's Rights to a Fair Trial and a Fair and Reliable Penalty Determination

Appellant was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution to due process and to be free from the determination of guilt and imposition of the death penalty following a trial that was not conducted with due regard for the gravity of the occasion.

The duty to keep order and to maintain an appropriate judicial atmosphere rests squarely with the trial judge, because it is the judge's responsibility to protect the defendant's right to procedural due process. (*Sheppard v. Maxwell* (1966) 384 U.S. 333, 357-364.) Thus, where a defendant was denied a fair trial due to the "carnival atmosphere" created by the presence of the press, the Supreme Court warned:

> The court must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for the defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.

(*Id.* at p. 363.)

A criminal defendant, especially one facing a death sentence, is entitled to a trial in a solemn and serious judicial atmosphere to minimize any possibility that he will be deprived of his life on the basis of emotional or extraneous considerations, rather than on the facts and evidence. As the Supreme Court stated in *Estes v. Texas* (1965) 381 U.S. 532:

> The Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial. Over the centuries Anglo-American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function. . . . We have always held that the atmosphere essential to the preservation of a fair trial – the most fundamental of all freedoms – must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions.

(*Id.* at p. 541.)

"[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584.) A trial judge who repeatedly injects humor or sarcasm into the proceedings effectively undermines the proper decorum of a death-penalty case.

D. Defense Counsel's Failure to Object Did Not Waive the Court's Error

The fact that trial counsel did not object to any of these comments does not bar appellate review of this issue. Issues relating to the bias of a trial judge have been found cognizable on appeal notwithstanding the lack

of an objection in the trial court. (See *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 244.) As commentators have observed, the rule that an appellate court will not consider points not raised at trial does not apply to "[a] matter involving the public interest or the due administration of justice." (9 Witkin, Cal.Procedure (3d ed. 1985), Appeal, § 315, p. 326.) This is an issue involving the due administration of justice.

Further, misconduct can be raised on appeal even absent an objection at trial if the misconduct is such that an objection and admonition to the jury to disregard the improper matter would have proved fruitless. (*People v. Malone* (1988) 47 Cal.3d 1, 36-37.) This case presents an unusually clear illustration of this principle. Because the judge was the source of the objectionable misconduct, there was no one to object to. Moreover, defense counsel could not reasonably be expected to object where an objection would have only incurred the wrath and antipathy of the jurors, who had chosen their own gang monikers and may have been entertained by Judge Trammell's levity.

E. Reversal of the Entire Judgment is Required

Measuring the precise impact of remarks and jokes that disparaged the defendant and undermined the solemnity of the proceedings is a difficult, if not impossible, task. Judicial misconduct is of such import that appellate courts have departed from the general rule that an appellant must make an affirmative showing of prejudice when the appearance of unfairness colors the trial record. In such a case, the test is whether the court's comments would cause a reasonable person to lack confidence in the fairness of the proceedings. (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 461.)

That test is satisfied in this case. Judge Trammell did not simply make inappropriate humorous remarks; he made jokes that held appellant up to the jury as an object of ridicule and derision. (See *People v. Harmon* (1992) 7 Cal.App.4th 845, citing 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989), § 2891, p. 3530.)

Similarly, in determining whether a constitutional error is reversible under the federal constitution, the Supreme Court has distinguished between "trial errors," which are subject to prejudice analysis, and "structural errors," which require automatic reversal. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-310.) In *Fulminante*, *supra*, the Court described trial errors as those that occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt." (*Id.* at pp. 307-308.)

In contrast, "structural errors" are "structural defects in the constitution of the trial mechanism . . . 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 pp. 309-310.) A paradigmatic example of a "structural error" is a biased judge. (*Ibid.*) In the absence of such a basic protection, 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.'" (*Id.* at p. 310, quoting *Rose v. Clark* (1986) 478 U.S. 570, 577-578.) Structural errors are reversible per se because their effect cannot be "'quantitatively assessed' by comparison to other evidence admitted at trial." (*People v. Flood* (1998) 18 Cal.4th 470, 510, quoting *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 307-308) (conc.opn. of Werdegar, J.).)

Even if not structural error, reversal of the entire judgment is required because the People cannot establish that this federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

"The courtroom is not a circus; the trial judge owes a duty to see that proper demeanor is maintained." (*People v. Polite* (1965) 236 Cal.App.2d 85, 92.) Here, Judge Trammell failed in this duty; reversal of the entire judgment is required.

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THE TRIAL COURT'S RESPONSE TO THE JURY'S ANNOUNCEMENT THAT IT HAD REACHED AN "IMPASSE" IN ITS GUILT-PHASE DELIBERATIONS VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. Introduction

On the sixth day of guilt-phase deliberations, the jury sent the trial court a note advising that it was at an "impasse" and was unable to reach a verdict as to any count. (33 RT 3789; VI CT 1696, 1698.) In response, the trial court summoned the foreperson and the jurors into court and inquired whether any further re-reading of testimony or "additional jury instructions" would assist them in reaching a verdict. (33 RT 3793-3794.) The jurors indicated that no additional read back of testimony or clarification of instructions would assist them in reaching a verdict. (33 RT 3793-3794.) Further, the foreperson informed the court outside the presence of the other jurors that he believed all of the jurors had "deliberated in good faith." (33 RT 3795.) Rather than respect the jury's statement of deadlock, however, the court insisted that the jury continue to deliberate.

The trial court's response to the jury's deadlock violated appellant's state and federal constitutional rights, including his rights to due process, to a jury trial, to a fair adversarial proceeding, and to an independently determined unanimous verdict. (U.S. Const., 6th, 8th, and 14th Amends.; Cal.Const., art. I, §§ 1, 7, 15, 16.) The court's response to the jury's note also violated appellant's state constitutional right to a unanimous verdict, which includes the right to an independent and impartial decision of each juror. (Cal. Const., art. I § 16.) Because the court's actions and instruction deprived appellant of his state-created liberty interest, appellant's due

process right under the Fourteenth Amendment was similarly violated. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Reversal of the entire judgment is therefore required.

B. Proceedings Below

The jury began deliberating at 9:15 a.m. on November 18, 1996. (VI CT 1685.) The jury deliberated approximately two hours and 10 minutes before breaking for lunch. (VI CT 1685.) The jury requested a readback of Witness Number 9's testimony and of testimony related to telephone records. (VI CT 1683, 1685; 30 RT 3713-3715, 3719-3720, 3723-3724.) A juror was involved in a traffic accident over the lunch recess so no further deliberations were conducted that afternoon. (30 RT 3712-3713, 3721-3722.)

Jury deliberations resumed on November 19, 1996, at 9:05 a.m. (VI CT 1688.) From 10:10 a.m. to 10:55 a.m., the court reporter read the testimony of Eileen Hilburn's and Witness Number 9 to the jury. (VI CT 1688.) The jury submitted two notes to the court: a request for a readback of the testimony of Elizabeth Torres (VI CT 1686), and a request to view a videotape of a Mexican Mafia meeting twice. (VI CT 1687.) From 1:55 p.m. until 2:35 p.m., the court reporter read the testimony of Elizabeth Torres to the jury. (31 RT 3755.) The jury then resumed deliberations from 2:50 p.m. to 4:00 p.m., before adjourning for the day. (VI CT 1688.)

Jury deliberations resumed on November 20, 1996, at 9:00 a.m. (VI CT 1691.) The jury submitted two more notes to the court: a request for a readback of a portion of Dale Higashi's testimony (VI CT 1689), and a request for readback of the testimony of Witness Number 14 and David Hooker. (VI CT 1690.) At 2:30 p.m., the jury viewed videotape of the Mexican Mafia meeting. (VI CT 1691.) From 3:00 p.m. until 3:40 p.m.,

the court reporter read back the testimony of Dale Higashi, Witness Number 14, and Daniel Hooker. (VI CT 1691; 32 RT 3760, 3763.) At 4:00 p.m., the jury was released for the day. (VI CT 1691.)

Jury deliberations resumed on November 21, 1996, at 9:00 a.m. (VI CT 1693.) The jury requested a readback of a portion of the testimony of Witness Number 16 and of Stephen Davis. (VI CT 1692.) At 3:30 p.m., the jury was released for the day. (VI CT 1693.)

Jury deliberations resumed on November 22, 1996, at 10:15 a.m. (VI CT 1695.) The jury requested a readback of testimony of Witness Number 16 and of Stephen Davis. (VI CT 1694.) The court reporter read back requested testimony three times that day: from 10:52 to 11:35 a.m., from 2:05 to 2:50 p.m., and from 3:00 to 3:30 p.m. (VI CT 1695.)

Jury deliberations resumed on November 25, 1996 at 9:45 a.m. (VI CT 1698.) The jury deliberated between 9:45 and 10:47 a.m., 11:07 a.m. and 12:00 p.m., and 1:30 and 2:00 p.m. (VI CT 1698.) At 2 p.m., the jury sent out a note stating: "We are at an impasse. . . . We cannot come to a unanimous decision on any count." (33 RT 3789; VI CT 1696, 1698.) The defense moved for a mistrial on the grounds that the jurors had been deliberating for more than five days and had already requested readback of a great deal of trial testimony. (33 RT 3789-3791.) The trial court stated it was "reluctant to do that," and proposed bringing the jurors into the courtroom to inquire "whether or not there is anything that can be done by the way of re-read of additional testimony or testimony that's already been read once or any additional instructions" and then to inquire specifically of the foreperson, outside the presence of the other jurors, whether "everyone is deliberating . . . in a good faith attempt to reach a verdict." (33 RT 3790.) Counsel for appellant objected and argued that there was no reason to "put

any of the [jurors] on the spot." (33 RT 3791.) Counsel for co-defendant Palma argued further that in the absence of some indication from the jury that there was "any reluctance on [the part of] any member of the jury to deliberate," the court's proposed inquiry would improperly "invad[e] the purview of the jury." (33 RT 3791.)

The court overruled the defense objections, stating:

> What I want to do is [–] I don't think there's anything wrong with my inquiries, that is, in fact, verifying from the foreperson and the jury as a whole that they feel they're at an impasse, finding out whether or not there's anything that can be done to assist them, and assuming that I get no responses from that, asking the foreperson to remain to inquire with respect to good faith deliberations.

(33 RT 3792.)

When the jurors were brought into the courtroom, the trial court asked the foreperson if "anything can be done that I can do by a re-reading of any testimony including that which has already been re-read or by any jury instructions to clarify any legal point if that is necessary?" (33 RT 3793.) The foreperson responded "no." (33 RT 3793.) The judge then addressed the same question to the remaining eleven jurors. (33 RT 3793-3794.) No juror responded. (33 RT 3794.)

The judge then had all of the jurors, except the foreperson, leave the courtroom, and asked the foreperson if any of the other 11 jurors were not "deliberating in a good faith attempt to reach a verdict." (33 RT 3794.) The foreperson responded: "I think we have all deliberated in good faith." (33 RT 3795.)

After this inquiry, the defense renewed the motion for mistrial. (33 RT 3796.) The trial court denied the motion and instead determined that it would order the jurors to continue deliberating. (33 RT 3796.) The jurors

were brought back into the courtroom and the trial court instructed them as follows:

> I don't know how you are divided numerically and . . . it is not my place at this point to be inquiring. I am going to assume only because statistical probabilities favors [*sic*] my assumption that you are not deadlocked 6-6, that it's some other numerical division. I am not at this time going to stop this trial or declare a mistrial. I am ordering you to continue with your deliberations. I am not convinced that you have put in enough time, especially when I had been told the amount of time that has been utilized in rereads. And I am not minimizing those rereads. As a matter of fact, in this case I think it's probably very important. But it would appear we lost a half day last Monday and I understand there were two substantial days last week, Tuesday and Wednesday, in which most of the day was consumed in read back and a fair portion of this morning.
>
> I say this to you: Those of you in the minority, if I am right that it is not just 6-6, I ask that you listen to the arguments of those in the majority, reweigh your positions, and I also ask that you, those of you in the minority, continue to argue the positions that you believe to convince those in the majority. And say the same thing to the majority. I ask that you reweigh your positions in the light of all the arguments to see whether or not those of you in the majority still feel the way you have voted and, at the same time, ask that you, each of you as a part – the deliberation process is not only listening to others with an open mind toward reevaluation, if you believe it's appropriate, but it's also taking an active part in sharing what you feel and how you feel and perhaps how you arrive at your feelings. And I say to both the majority and the minority that that's what deliberations are and I ask that both – I don't want to call it sides because then all of a sudden it becomes confrontational and it shouldn't be that way.
>
> At the same time, I would say this to you[:] this is not a labor negotiation. In a labor negotiation we always know when the baseball players go on strike there's going to come a

time when somebody is going to have pressure and they're going to yield, economic pressure. There's obviously no economic pressure here. You're all well paid. But I want to emphasize that this is not a matter of compromise. One should not compromise just for the purpose of reaching a verdict. But, at the same time, I expect from each one of you, we all expect that you are going to in good faith be engaging in the deliberation process, sharing your views of the evidence, and how you got there with the others with a mind toward convincing them of your position and that's whether you're in the minority or the majority, and then the opposite that you have an open mind, each of you, whichever side you're on, to reevaluating.

At this time I order that you return to the jury deliberation room, continue your deliberations. If at any time – and I don't want anybody to be hesitant about asking even if you had it read once to have it re-read a second time the testimony or any clarification what you feel is necessary to any points of law. If you'll continue your deliberations."

(33 RT 3798-3799.)

At 2:15 p.m., the court ordered the jury to continue its deliberations. (33 RT 3797-3799; VI CT 1698.) The court denied a second defense motion for mistrial on the ground that instructing the jury to continue deliberating "invaded the purview of the jury." (33 RT 3800.)

Jury deliberations resumed on November 26, 1996, at 9:10 a.m., jury deliberations resumed for the seventh day. (VI CT 1701.) The jury sent out a note asking if a finding of guilt required that the defendant be an actual shooter as opposed to a conspirator, and asked for an explanation/definition of hearsay and when it could be considered as evidence. (VI CT 1699, 1701.)

On November 27, 1996, the court and counsel reviewed the jury's request for explanations that had been sent out the previous day. (34 RT

3801-3809; VI CT 1702.) Over defense objections, the trial court responded to the jury's questions. (34 RT 3809, 3812-3814.) At 9:45 a.m., jury deliberations resumed for the eighth day. (VI CT 1702.)

At 10:40 a.m. on November 27, 1996, Juror No. 128 sent a note to the court saying that she was "struggling" to decide whether she was "incapable of reaching a rational decision based on my fear of the sentence that I may have to impose," and that she feared she "may not or could not have been totally objective" in her "interpretation of the evidence." (34 RT 3819-3820.) In response, the trial court decided to summon Juror No. 128 and to "go back through the Hovey questions with her" outside the presence of the other jurors. (34 RT 3820.)

Juror No. 128 was duly questioned by the trial court. In response to that questioning, Juror No. 128 indicated that she would not always vote to impose the death penalty, but did not think she "could vote for the death penalty." (34 RT 3828.) The judge then asked her whether her reluctance to sentence the defendant to death would cause her to refuse to find him guilty of first degree murder or refuse to find the special circumstance of multiple murder true, even if she was convinced beyond a reasonable doubt that he was guilty and/or that the special circumstance was true. (34 RT 3829.) This colloquy between the juror and the court followed:

> JUROR NO. 128: Well, this is where I'm wrestling.
>
> THE COURT: That's why I put it last.
>
> JUROR NO. 128: Yeah. I honestly am not sure what's happening in my mind and I think that it's preventing me from being able to make my judgment. So I guess my answer would be yes –
>
> THE COURT: All right.
>
> JUROR NO. 128: – that it's preventing me –

> THE COURT: Let me – so instead of being general, you're then saying specifically in this case, knowing that if you find someone guilty and the special circumstance to be true that you're then going to be facing it that you're finding, even though I tell you you can't consider it –
>
> JUROR NO. 128: Right.
>
> THE COURT: – as a human being you're finding that it is in your mind and that you feel that it's affecting your objectivity on the guilt phase? And I don't want to put words in your mouth.
>
> JUROR NO. 128: No, that's exactly right.

(34 RT 3829-3830.)

Counsel for each of the defendants then questioned Juror No. 128. Counsel for co-defendant Palma asked her whether, notwithstanding her professed inability to vote for the death penalty, she could "still go on in the case as a juror deliberating the guilt phase of this case and be honest, be fair, be impartial, and engage your other jurors in terms of discussion of the evidence of the case?" She responded: "I've tried[,] and no. That's why I wrote the letter." (34 RT 3837.)

Subsequently, counsel for appellant moved for a mistrial on the ground that Juror No. 128 had been death-qualified prior to trial and that her feelings about her ability to impose the death penalty in this case had changed only because the presentation of the evidence at trial "persuaded [her] to really took at the death penalty, to really look at this case and all the ramifications of what this case means. . . ." (34 RT 3838-3839.) The trial court denied a mistrial; instead, the court made a "formal finding of juror misconduct" and excused Juror No. 128 from the jury. (34 RT 3840-3841.) An alternate juror, Juror No. 125, was selected at random to replace Juror No. 128. (VI CT 1702.)

On December 2, 1996, the trial court instructed the jury to begin deliberations anew. (35 RT 3848.) On December 4, 1996, after two days of deliberation, the jury returned verdicts finding appellant guilty on all counts, and finding the special circumstance and the other enhancement allegations true. (VI CT 1825-1834.)

C. Applicable Legal Principles

Penal Code section 1140 requires the trial court to discharge the jury without reaching a verdict where both parties consent or where "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." The trial court's authority under this section "is not an absolute, uncontrolled discretionary power. It must be exercised in accordance with established legal rules and a sound legal discretion in the application of such rules to the facts and circumstances of each particular case. . . ." (*Paulson v. Superior Court* (1962) 58 Cal.2d 1, 6, quoting *Ex parte McLaughlin* (1871) 41 Cal. 211, 216.)

This Court has held that before a court discharges a jury because there is no reasonable probability that it can reach a verdict, the trial court should first question the jurors individually as to whether such probability exists. (*Paulson v. Superior Court*, *supra*, 58 Cal.2d at 7.) Specifically, the trial court should "obtain from the jurors an expression of their judgment. . . [and], in the exercise of the discretion committed to it, . . . give such weight to this opinion as the surrounding circumstances seem to demand." (*Ibid.*)

In the event that the trial court decides to instruct the jury to continue deliberating, the court must be careful to exercise its power "without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency."

(*People v. Rodriguez* (1986) 42 Cal.3d 730, 775; see also *People v. Rojas* (1975) 15 Cal.3d 540, 546; *People v. Carter* (1968) 68 Cal.2d 810, 817.)

Jury coercion can exist, even where the message to the jury is not that it must return a particular verdict, but rather that the trial court expects a verdict, one way or another. (*People v. Carter, supra*, 68 Cal.2d at 817 ["It is clear . . . that coercion of the jury can occur absent any intimation, express or implied, that the court favors a particular verdict."].) "Reversible error may be found in excessive pressure upon the jury 'to reach a verdict, whatever its nature, rather than no verdict at all.' " (*People v. Gainer* (1977) 19 Cal.3d 835, 848, quoting *People v. Carter, supra*, 68 Cal.2d at 817.) The relevant inquiry is not as to the trial judge's subjective intent in insisting on further deliberations, but rather what a reasonable juror could understand from the judge's refusal to accept the jurors' unanimous statement of deadlock. (*Francis v. Franklin, supra*, 471 U.S. 307 at p. 315; *People v. Crossland* (1960) 182 Cal.App.2d 117, 119 [although "the able and experienced trial judge did not intend such coercion, . . . our concern must be what the jury of laymen may have understood him to mean"].)

Coercive supplemental jury instructions to a divided jury are not simply a violation of state law; they may also violate the due process clause and the right to a fair trial under the United States Constitution. (See *Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976, 979-980 [whether the comments and conduct of the state trial judge infringed defendant's due process right to an impartial jury and fair trial turns upon whether "the trial judge's inquiry would be likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision"]; see also *Lowenfield v. Phelps* (1988) 484 U.S. 231, 241 ["[a]ny criminal defendant ... being tried by a jury is entitled to the uncoerced verdict of that body"].)

An instruction that obligates the jurors to convince one another that one position is superior to another without reminding them not to relinquish their own beliefs is coercive and unconstitutional in that it deprives the defendant of his right to the individual determination from each juror. (*United States v. Mason* (9th Cir. 1981) 658 F.2d 1263, 1268 ["[i]f cases grappling with *Allen* have a common thread, it is this: the integrity of individual conscience in the jury deliberation process must not be compromised"].) Such individual judgment is guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and state law to assure a reliable determination of penalty.

D. The Trial Court Abused Its Discretion in Refusing to Grant a Mistrial When the Jurors Unanimously Reported That They Were Hopelessly Deadlocked After More Than 16 Hours of Deliberation

In this case, the trial court responded to the jury's declaration that it had reached an impasse by conducting an inquiry to determine whether there was a reasonable probability that the jury could reach a verdict. The clear and resounding "expression of the judgment" of the jurors was that there was nothing that the trial court could do, either by re-reading testimony or by clarifying any legal instruction, to aid them in reaching a verdict. (33 RT 3793-3794.) Further, the foreperson affirmed that he believed that all the jurors had been deliberating in good faith. (33 RT 3795.) Even so, the trial court disregarded the jurors' representations and ordered them to continue deliberating.

Moreover, the "surrounding circumstances" demanded that the trial court give controlling weight to the jurors' unanimous judgment that further deliberations would be either futile or counterproductive. When the jurors informed the trial court that they had reached an impasse, they had already

deliberated for approximately 16½ hours over the course of a six-day period of time.[83] It was clear at that point, after lengthy deliberations and extensive rereading of testimony, that the jurors – who were in the best position to determine whether they had reached the point where further deliberations were not appropriate – had come to the honest and thoughtful judgment that a unanimous verdict could not be reached. The jurors presumably expected the trial court to honor that judgment and to discharge them. Instead, the court disregarded the "expression of the judgment" of the jurors and ordered them to continue deliberating.

The trial court's sole basis for ordering the jury to deliberate further was that it did not believe the jury had "put in enough time. . . ." (33 RT 3796-3797.) That was an improper basis upon which to order further deliberations because "[s]tanding alone, the period of deliberations is not determinative; the judge must make his assessment of reasonable probability of the jury reaching a verdict on a number of factors, of which the period of deliberation is just one." (*People v. Caradine* (1965) 235

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[83] According to appellant's calculations, the record indicates that the jurors deliberated for approximately 2 hours and 10 minutes (from 9:15 to 10:30 a.m., and from 10:55 to 11:50 a.m.) on November 18th (VI CT 1685); 3 hours and 20 minutes (from 9:05 to 10:10 a.m., from 10:55 to 11:40 a.m., from 1:30 to 1:55 p.m., and from 2:50 to 4:00 p.m.) on November 19th (VI CT 1688); 4 hours (from 9 to 10:30 a.m., from 10:50 a.m. to 12:00 p.m., from 1:30 to 2:30 p.m., and from 3:40 to 4:00 p.m.) on November 20th (VI CT 1691); 4 hours and 40 minutes (from 9:00 to 10:30 a.m., from 10:50 a.m. to 12:00 p.m., and from 1:30 to 3:30 p.m.) on November 21st (VI CT 1693); and 2 hours and 25 minutes (from 9:45 to 10:47 a.m., from 11:07 a.m. to 12:00 p.m., and from 1:30 to 2:00 p.m.) on November 25th (VI CT 1698). The total time spent in deliberations equals 16 hours and 35 minutes.

Cal.App.2d 45, 50.) Because the trial court based its decision entirely upon this one factor, its ruling was an abuse of discretion.

In sum, this is a case where the record indicates, without any evidence to the contrary, that (1) the jury had deliberated in good faith on the matter and had extensively reviewed the evidence; (2) the jury had no questions concerning the applicable law; and (3) there was nothing the trial court could do to aid the jury in reaching a verdict. (33 RT 3793-3794.) Considering all the circumstances, the unanimous declaration of all the jurors that they could not reach a verdict and that further deliberations would be futile or counterproductive were controlling and necessitated a mistrial. (See, e.g., *People v. Rojas*, *supra*, 15 Cal.3d at p. 546 [trial court properly declared mistrial after five-and-one-half hours of deliberations, where foreperson stated that she did not feel further deliberations would be of value, trial court asked if anybody on the jury thought so, and various jury members shook their heads negatively]; *People v. Sullivan* (1950) 101 Cal.App.2d 322, 327-328 [proper to declare mistrial after five hours of deliberation where 11 jurors said that they did not think they could arrive at a verdict if sent back for further deliberations and foreperson said she felt to the contrary].)

E. The Trial Court's Supplemental Instruction to the Jury Was Improper Because it Encouraged the Jurors to Consider the Numerical Division

In *People v. Gainer*, *supra*, 19 Cal.3d 835, this Court held that "it is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion on the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried." (*Id.* at p. 852.) The Court explained that instructing minority

jurors to reconsider their position is erroneous for two reasons. First, it "directs the jurors to include an extraneous factor in their deliberations, i.e., the position of the majority of jurors at the moment." (*Id.* at p. 848.) Second, it places "excessive pressure on the dissenting jurors to acquiesce in a verdict," and thereby threatens the right to jury unanimity. (*Id.* at p. 850.) Moreover, "[s]ince recognition of the existence of a majority or minority faction on the jury is irrelevant to the issue of guilt, such reference is erroneous, even if contained in an arguably noncoercive, 'balanced' . . . charge which explicitly admonishes the majority as well as the minority to reconsider their views." (*Id.* at p. 850, fn. 12.)

The Supreme Court has long condemned the practice of inquiring of a jury unable to reach a verdict the extent of its numerical division, "even if a response indicating the vote in favor of or against conviction was neither sought nor obtained." (See *Brasfield v. United States* (1926) 272 U.S. 448, 449, citing and discussing *Burton v. United States* (1905) 196 U. S. 283, 308.) In *Brasfield*, the Court said:

> *We deem it essential to the fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal.* Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. *Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive.* It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

(*Id.* at pp. 449-450, italics added.)

In this case, although the trial court disclaimed any intent to inquire of the numerical division of the jury, the court advised the jurors that it "assume[d]" they were "not deadlocked 6-6, that it's some other numerical division." (33 RT 3798.) Then, after assuming that the jury was split between a "majority" and a "minority," the trial court addressed its instructions to each side. (33 RT 3798.)

If inquiry into numerical division "itself should be regarded as grounds for reversal" – even in circumstances where "a response indicating the vote in favor or against the conviction was neither sought nor obtained" – then the trial court's statement to the jurors here that it "assume[d]" they were numerically divided into a "majority" and a "minority" had precisely the same effect. Regardless of how the question of "numerical division" is brought up, its effect is to inject "an improper influence" upon the jury's deliberations. Moreover, as with an inquiry into the jury's numerical division, the trial court's instruction to the jury here "served no useful purpose" that could not be obtained by instructions that made no reference to how the jury might be divided. Thus, if the trial court's intent was merely to encourage the jurors to listen to each other, to reweigh their positions in light of the views expressed by other jurors, and to continue their deliberations in good faith, the court could have instructed the jury to that effect without making any statements or assumptions about how the possible numerical division of the jury.

Although the People may argue that the charge was proper because the judge never singled out either the minority or the majority, it is from the position of a minority juror that a suspect charge is analyzed. (See *United States v. Burgos* (4th Cir. 1995) 55 F.3d 933, 940 ["[Minority jurors] always know their minority status, and if fearfully inclined, may presumably

suspect a disgruntled judge can find them out." (citation and internal quotation marks omitted).].) Moreover, the trial court's instructions addressed to the "minority" and the "majority" were different in a significant way. The trial court instructed the jurors "in the minority" to "listen to the arguments of those in the majority" and to "reweigh [their] positions." (33 RT 3798.) However, with respect to the jurors "in the majority" the judge instructed them only to "reweigh your positions in the light of all the arguments to see whether or not you in the majority still feel the way that you have voted." (33 RT 3798.) In other words, the "minority" jurors were explicitly instructed to listen to the majority jurors and reweigh their positions in light of the majority jurors' views; the "majority" jurors were only instructed to reweigh their positions in "light of all the arguments" to confirm whether they would adhere to their positions.

F. Reversal of the Entire Judgment is Required

The trial court's order to the jury to deliberate further, in the face of the jurors' unanimous declaration of deadlock, simply put undue pressure on the jurors to return a unanimous verdict and undermined "the requirement of independently achieved jury unanimity." (*People v. Gainer*, *supra*, 19 Cal.3d at p. 849.) That pressure was undoubtedly experienced most directly by any "holdout" juror. In light of the nature of the crimes with which appellant was charged, the views of the jurors voting for conviction were undoubtedly emotionally charged. Under such circumstances, a "holdout" juror is likely to have faced extreme pressure, even open hostility, from other jurors. The pressure exerted upon such a juror to change his or her view would likely become unbearable under the added weight of the trial judge's order that the jury continue to deliberate despite its declaration that it had reached an impasse after 16 hours of good-

faith deliberations. A minority juror "could hardly escape reasoning that the Judge was not likely to believe that [s]he could persuade the opposing eleven to adopt [her] position . . . and that [s]he, individually, was being urged by the judge to reconsider [her] vote." (*United States v. Sae-Chua* (9th Cir. 1984) 725 F.2d 530, 532.)

Here, after the trial court ordered the jury to continue deliberating, the jury deliberated for an additional day before Juror No. 128 wrote to the trial judge indicating that she was "struggling" with the question of whether she could be "totally objective" in her assessment of the evidence. (34 RT 3819-3820.) Thus, it is apparent that the trial court's order directing the jurors to continue their deliberations, even though they had reached an impasse after 16½ hours of "good faith" deliberations, prompted Juror No. 128 to question her own objectivity. In short, while the court's order did not have the effect of coercing Juror No. 128 to change her vote, it did effectively compel her to take steps that led to her disqualification as a juror. The practical consequence to appellant, however, was the same as if Juror No. 128 had been compelled to change her vote. Thus, reversal of the entire judgment is required because of the risk that appellant was deprived of "the requirement of independently achieved jury unanimity." (*People v. Gainer*, *supra*, 19 Cal.3d at p. 849.)

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THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND VIOLATED APPELLANT'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY, RELIABLE PENALTY DETERMINATION AND DUE PROCESS, BY PROHIBITING ANY MENTION DURING VOIR DIRE OF THE NUMBER OF VICTIMS OR THE FACT THAT THERE WERE CHILD VICTIMS

The trial court refused to question prospective jurors, or to allow defense counsel to question them, concerning their views about the fact that the case involved multiple victims, two of whom were children, even though the court recognized that these two circumstances of the offense were likely to be the most salient and potentially dispositive considerations in the jury's determination of penalty. By foreclosing the defense from probing into the prospective jurors' attitudes about whether the age and number of victims would prevent or substantially impair them in performing their duties as jurors, the court violated appellant's state and federal constitutional rights to a fair and impartial jury, a reliable penalty determination, and due process of law, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and article 1, sections 7, 15, 16, and 17 of the California Constitution.

A. Proceedings Below

On several occasions prior to the commencement of trial, the trial court and the parties discussed whether the prospective jurors would be informed that the case involved the murder of five victims, including two young children. On each occasion, the trial court made clear that it disapproved of letting the jurors know anything about the case other than

the fact that it was a capital murder, and involved a special-circumstance allegation of "multiple murder."

The first time the subject arose, the judge advised the attorneys that he disapproved of questioning prospective jurors during the death-qualification process about whether they would or would not be inclined to impose the death penalty if certain facts were established. As the judge explained:

> [O]ne of the problems I have is in trying to death qualify a jury is that the lawyers on both sides of the issue want to try to get a juror to commit themselves that they would or they would not impose the death penalty on a certain set of hypothetical facts. And usually try to bring them to where they have meaning because they're a part of the case and, therefore, you're getting a prejudging of what a juror would do. I think that's improper.
>
> To that extent, I – my inclination . . . is to not actually other than telling the jury that it is a, quote, murder case, whatever that means, and that the – tell them what the [special] circumstance is, multiple murder, I assume that's the only one. . . .
>
> [And] to not get into the specifics at all. I've had multiple murders before and one of the things, of course, the lawyers want to see if where – there's a dividing line at some point where even the most hardened juror who disfavors the death penalty is going to say there comes a point where factually they would not vote the death penalty but, otherwise, they wouldn't.
>
> It seems to me that telling the jury that there are five charges when we're death qualifying really gets them into applying those charges as to whether or not they would in this case. I mean, it's one thing in my mind to have two murders. It's another thing to have five. . . .

> My inclination is to not let the jury know how many murder charges there are until we actually have a jury picked.
>
> And the same being with respect to I think most jurors would view, shouldn't, but they would view the killing of an adult a lot differently than they would the killing of a child. Even in this case I think we have a six-month-old or nine-month-old baby. . . .
>
> I don't think that that's something the jurors should be told with respect to the factual background in this case.

(3 RT 691-693.)

At the next pretrial proceeding, appellant's counsel asked the trial court to reconsider its stance against informing the prospective jurors about the number of victims and the fact that two of the victims were young children. (4 RT 749.) Counsel said he understood that the trial court had previously indicated that it would give the prospective jurors a "general factual overview" of the case, but intended to limit its overview to "just that this was a death penalty case." (4 RT 749.) However, counsel asked the court to also include in its "overview" of the case "a statement in there that the numbers of people who are dead, the sexes of the people who are dead and also the ages of them because I think the jury knowing that would have a substantial impact on how they answer those three questions." (4 RT 749.)

The judge responded:

> Oh, absolutely, I agree with you, and that's why unless the three of you agree, I would not allow that. The special circumstances [*sic*] here is multiple murder. In the instant case is of [*sic*] the defendant has been convicted of one count of first degree murder and a second count of either first or second degree murder. You go any further beyond that you are getting from the jury [--] you're asking them to prejudge the facts. Absolutely the fact that a six-month-old baby was

> executed, if that's what it was, I don't know. Maybe it got in the way of a bunch of wild shots, but that's a fact and you're starting to give them some of the factors in aggravation.

(4 RT 749-750.)

Thus, the trial court indicated that it would only grant appellant's request if the prosecutor concurred in that request. (4 RT 750-751.) Otherwise, the court said, "the default is it won't be done. I won't even read the charges. I [will] merely indicate that it is a charge in a case involving murder charges, period, and that's it." (4 RT 751.)

At the next court proceeding, the prospective jurors were summoned and hardship questioning commenced. Before *Hovey*[84] voir dire began, defense counsel for co-defendant Palma asked the trial court to explain to the prospective jurors that the case involved the deaths of children, because "that is substantially going to determine how the [prospective jurors] are going to answer the three [*Hovey* death qualification] questions." (5 RT 867.) Appellant's counsel joined the request. (5 RT 867.)

The trial court denied the defense request and further ruled that it would "prohibit counsel from going into the facts of the case" when they questioned the prospective jurors. (5 RT 867.) The trial court asserted that "the only thing that the jury is supposed to know at the beginning of the case are the charges and, for the purposes of the death penalty, the [special] circumstance is that in the same proceeding a defendant has been convicted of two or more counts of murder, whether it be of the first or second degree." (5 RT 867.)

While the trial court indicated that it would inform the prospective jurors that the case involved a special-circumstance allegation of "multiple

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[84] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

murders," the court refused to tell the jurors that there were five victims. (5 RT 867.) The trial court reasoned that when "you start adding in the numbers then you're starting to get a prejudgment on the facts and that's not right." (5 RT 867.)

Similarly, the trial court refused to advise the prospective jurors that two of the victims were children. While the trial court acknowledged that "certainly, absolutely, children are going to play a big factor" in the jury's sentencing decision, the court ruled that to question prospective jurors about that would "supply[] to the jurors facts that are part of the factors in aggravation and I don't think it's right to do that." (5 RT 867.)

Before the attorneys began to voir dire the prospective jurors for the first time, the trial court reiterated its pretrial ruling prohibiting defense counsel from conducting voir dire in a way that disclosed the specific facts of the case to prospective jurors: "I don't want indoctrination, I don't want any prejudgment of the evidence. . . ." (8 RT 1115.)

During voir dire, the trial court adhered to its pretrial ruling prohibiting defense counsel from asking questions of prospective jurors involving the facts of the case. Thus, during the judge's "*Hovey*" questioning of Juror 99, the prospective juror said that she would "tend to lean more . . . towards the death penalty" in a multiple-murder case. (9 RT 1280.) The judge followed up by asking Juror 99 if she would "automatically vote to impose the death penalty where there was *more than one murder*?" (9 RT 1280, italics added.) Juror 99 responded: "Not automatically but I would lean toward that side." (9 RT 1280.) The judge then gave Juror 99 a lengthy explanation of California's law regarding special circumstances (9 RT 1281-1283), and concluded his explanation with the following question:

THE COURT: What I am now asking you is whether or not in your mind do you view – are you starting off just knowing that this is a multiple – more than one murder, that there's a possibility coming to a conclusion that a defendant has committed more than one murder of either the first or second degree are you starting off you're going to *just because two people are dead* regardless of how it happened that you're going to impose the death penalty, automatically?

PROSPECTIVE JUROR: No, not necessarily.

(9 RT 1284, italics added.)

When counsel for co-defendant Palma attempted to "follow up" with Juror 99 about her inclinations in a multiple-murder case, the judge immediately interrupted and cut off further questioning:

MR. UHALLEY: [. . .] Now, Juror 99, you've indicated that you have some concern about the fact of multiple murder and that you would lean more toward the death penalty as a result of multiple murder. Multiple murder is sort of a generic term. We are talking about five murders here. Is that going to change on that –

THE COURT: That you are asking about prejudgment. A special circumstance is not five murders. The special circumstance is more than one murder. You're referring to the facts in this case, that's improper.

MR. UHALLEY: Well, your Honor, may we be heard on that?

THE COURT: No. We have hashed this out before we even got into jury selection. You may not derive her opinion with respect to five murders.

MR UHALLEY: Your Honor, I respectfully ask the Court to be heard on this issue.

THE COURT: You may not. I will hear you at recess. You may make your record then.

(9 RT 1286-1287.)

During the recess and outside the presence of the jurors, Uhalley moved for a mistrial, arguing that the court had been "overly restrictive in [not] allowing us to voir dire the jury on the issue of multiple murder as well as the ages of the children or that there were children involved in this – victims in this case." (9 RT 1310.) As Mr. Uhalley argued:

> I think it was illustrated by the questioning of Juror Number 66,[85] I believe it was, who indicated that a multiple murder would weigh more on her mind and she would be more inclined to administer the death penalty in a case of multiple murder, and I believe that that illustrates that not being allowed to voir dire on the number of murders as well as that there were children involved in the case skews the jury selection process in terms of the pool that we are going to get who would more than likely, I believe, answer the question "Would you always under certain circumstances give the death penalty where there are children involved?" and I just don't think that we are getting a fair representation of a jury panel as to that question.
>
> I think that if they were to know the number of people and the ages of the people that they would answer that question differently, the majority of them would answer that question, maybe not the majority but at least some of them would answer that question differently; and, therefore, I believe under those circumstances those people are being – could be excused for cause and they're being excluded from it because they don't have sufficient information to answer that question.

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[85] Mr. Uhalley's reference to "Juror Number 66" here is clearly mistaken, because Juror Number 66 had not yet been "*Hovey* voir dired" at this point in the proceedings. (See 9 RT 1329 [*Hovey* questioning of Juror Number 66].) Instead, it is clear that Mr. Uhalley is referring to the preceding questioning of Juror Number 99, the juror who had indicated that she would "lean more . . . towards the death penalty" in a multiple-murder case. (9 RT 1280.)

I don't believe that it is a prejudging of the facts in the case by allowing that bit of information, and I would submit it, your Honor.

(9 RT 1310-1311.)

The trial court denied the motion for mistrial. The court reasoned that because there was no special circumstance pertaining to child victims, its preclusion of voir dire on that subject was appropriate:

I don't think you have to be a rocket scientist to know that if you compare somebody that kills an adult with somebody that kills a six-month-old child and say which are you more inclined, everything being equal, to give the death penalty, it will be with respect to the child. I don't think it takes a rocket scientist that if somebody personally kills three instead of two that anybody's going to look at that as being – everything else being equal, being worse. And those are factors in aggravation the District Attorney is going to argue I'm sure.

There is no special circumstance of murdering six month olds, there is no special circumstance of murdering children, there is no special circumstance of murdering three people. The special circumstance here is more than one murder. And by going into the number, going into the ages, or the sexes you are starting to go into the facts of the case that in going into factors that the jury can take into consideration to get the jury to prejudge the evidence and that's just not proper. The special circumstance is more than one and that's as far as it goes.

Well, I have done this so many times where I have had multiple murders that I am totally confident that that's a valid ruling. You can't go into the facts of the case.

I had ruled on that I think twice before we got in here and I now order all parties to stay away from that issue.

(9 RT 1311-1312, italics added.)

B. Applicable Legal Standards

In *Wainwright v. Witt* (1985) 469 U.S. 412, 424, the Supreme Court held that prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. This qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty. (*Morgan v. Illinois* (1992) 504 U.S. 719, 738.)

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." (*Rosalez-Lopez v. United States* (1981) 451 U.S. 182, 188 (plur. opn. of White, J.) In order to determine whether prospective jurors harbor views about the death penalty that would prevent or substantially impair the performance of their duties as jurors, a criminal defendant has the right to voir dire examination sufficient to reasonably ensure an impartial jury. (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 735-736; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *Aldridge v. United States* (1931) 283 U.S. 308, 313.) General fairness and "follow the law" questions, without more, are constitutionally inadequate. (*Morgan*, at pp. 734-36.)

In *People v. Cash* (2002) 28 Cal.4th 703, this Court observed that "'[t]he 'real question' is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole *in the case before the juror.*'" (*Id.* at pp. 719-720, quoting *People v. Ochoa* (2001) 26 Cal.4th 398, 431, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1318, quoting *People v. Hill* (1992) 3 Cal.4th 959, 1003; italics in original.) To ensure a proper resolution of this question, "[a] challenge for cause may be based on the juror's response when informed of facts or circumstances likely to be present in the case being tried." (*Ibid.*)

In *Cash*, the defendant was charged with capital murder. During individual and sequestered death-qualification voir dire, defense counsel attempted to ask a prospective juror "whether there were 'any particular crimes' or 'any facts' that would cause that juror 'automatically to vote for the death penalty.'" (*People v. Cash, supra,* 28 Cal.4th at p. 719.) The trial court ruled that the question was improper "because 'we're restricted to this case.'" (*Ibid.*) Outside the presence of any prospective jurors, defense counsel argued for reconsideration of the ruling, explaining that he wished to inquire whether "prospective jurors could return a verdict of life without parole for a defendant who had killed more than one person." (*Ibid.*)[86] As evidence of the prior murders was sure to be presented at a penalty phase, defense counsel was concerned whether prospective jurors could return a verdict of life imprisonment without possibility of parole upon learning that defendant had committed prior murders. The trial court did not waver from its prior ruling, explaining its reasoning as follows:

> You cannot ask anything about the facts that are not charged in the Information [*sic*], period. You can't raise one mitigating factor, nor can [the prosecutor] raise one aggravating [factor] that is not charged in the Information [*sic*]. . . . You cannot go past the Information [*sic*].

(*Ibid.*)

In light of the trial court's ruling, the defense took another tack. The defense filed a written motion seeking permission to ask prospective jurors "whether there are any aggravating circumstances which would cause a prospective juror to automatically vote for the death penalty, without

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[86] Cash had previously been tried and committed as a juvenile for the murders of his elderly grandparents. (*People v. Cash*, *supra*, 28 Cal.4th at p. 717.)

considering the alternative of life imprisonment without possibility of parole." The trial court refused to budge, commenting: "I am not permitting you to ask them about any specific acts of mitigation or aggravation, as that would in my opinion have them prejudge the evidence." (*People v. Cash*, *supra*, 28 Cal.4th at p. 719.) That ruling was enforced throughout all remaining voir dire. (*Ibid.*)

This Court reversed the death judgment in *Cash*, holding that the trial court's ruling preventing all voir dire on the issue of the aggravating evidence of the two prior murders denied the defendant his federal and state constitutional rights to an impartial penalty jury. (*People v. Cash*, *supra*, 28 Cal.4th at p. 719.) This Court took care to emphasize that even within the specialized realm of death-qualification voir dire, a trial court cannot categorically restrict voir dire to preclude "mention of any general fact or circumstance not expressly pleaded in the information [citations]." (*Id.* at p. 722.)

In recognizing *Witt*'s holding that prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors, this Court in *Cash* discerned that the truly relevant question is whether the juror's views about capital punishment would prevent or impair his or her ability to return a verdict of death *in the case before the juror*. (*People v. Cash*, *supra*, 28 Cal.4th at pp. 719-720; see also *People v. Ochoa*, *supra*, 26 Cal.4th at p. 431; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318; *People v. Hill*, *supra*, 3 Cal.4th at p. 1003.) Noting that the death-qualification standard operates in the same fashion regardless of whether the prospective juror favors or opposes the death penalty, this Court observed that "it is equally true that the 'real question' is whether the juror's views about capital

punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror." (*People v. Cash*, *supra*, 28 Cal.4th at p. 720)

In *Cash*, this Court acknowledged that a challenge for cause is justifiably based upon a prospective juror's response upon being informed of the facts or circumstances that are likely to be adduced at trial. (*Ibid.*) Thus this Court recognized that it has "endorsed such particularized death-qualifying voir dire in a variety of situations," including the following:

> A prosecutor may properly inquire whether a prospective juror could impose the death penalty on a defendant in a felony-murder case (*People v. Pinholster* (1992) 1 Cal.4th 865, 916-917 . . . , on a defendant who did not personally kill the victim (*People v. Ochoa*, [(2001)] 26 Cal.4th [398,] 431; *People v. Ervin* (2000) 22 Cal.4th 48, 70-71), on a young defendant or one who lacked a prior murder conviction (*People v. Livaditis* (1992) 2 Cal.4th 759, 772-773 . . . , or only in particularly extreme cases unlike the case being tried (*People v. Bradford*, [(1997)] 15 Cal.4th [1229,] 1320).

(*People v. Cash*, *supra*, 28 Cal.4th at p. 721.)[87]

Because the fact of the defendant's guilt for the prior murder of his grandparents in *Cash* (1) was a general fact or circumstance present in the case, and (2) could cause some jurors "invariably to vote for the death

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[87] The Court has found these principles equally applicable to voir dire by defense counsel. (See *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005 [error to restrict defendant's case-specific voir dire on likely aggravating evidence as a basis for peremptory challenges only]; *People v. Earp* (1999) 20 Cal.4th 826, 853 [defense counsel's question as to whether prospective juror had personal experiences with child molestation, while relevant to death qualification, was adequately addressed by trial court's voir dire question whether "'the charges against defendant relating to allegations of sexual misconduct involving the death of child' would have any effect on the juror's sentencing decision"].)

penalty, regardless of the strength of the mitigating circumstances" (*ibid.*), the defense was entitled to probe the prospective jurors' attitudes on those circumstances. As the prior murder was "a fact likely to be of *great significance*" (*People v. Cash*, *supra*, 28 Cal.4th at p. 721.; italics added), the restriction of voir dire was error.

Thus, this Court concluded in *Cash* that it was error to preclude questions "specific enough to determine if those jurors harbored bias, as to some fact or circumstance shown by the trial evidence" that would substantially impair their penalty deliberation. (*People v. Cash*, *supra*, 28 Cal.4th. at p. 720) This Court noted that the trial court had to strike a balance between generic voir dire that was incapable of eliciting bias, and providing prospective jurors with such a "detailed account of the facts" that the jurors "would prejudge the penalty issue based on a summary of the aggravating and mitigating evidence likely to be presented." (*Id.* at pp. 721-722, citing *People v. Jenkins* (2000) 22 Cal.4th 900, 990-991.) This Court concluded that whatever discretion reposed in the trial courts, "[t]hey may not, however, as the trial court did here, strike the balance by precluding mention of any general fact or circumstances not expressly pleaded in the information." (*Id.* at p. 722.)

C. The Trial Court Erred by Precluding Any Inquiry Into the Prospective Jurors' Views about the Death Penalty and Their Ability to Consider a Life Sentence in a Case in Which There Were Five Victims, Two of Whom Were Children

In this case, the trial court repeatedly did precisely what this Court emphatically forbade in *Cash*: "[p]reclud[ed] mention of any general fact or circumstances not expressly pleaded in the information." (*People v. Cash*, *supra*, 28 Cal.4th at p. 722.) Indeed, the trial court asserted that "the

only thing that the jury is supposed to know at the beginning of the case are the charges and . . . the [special] circumstance" (5 RT 867) – in other words, the facts and circumstances expressly pleaded in the Information. Thus, in the trial court's view, the parties were limited to questioning the prospective jurors about their views about the death penalty in cases involving "multiple murder." The trial court expressly forbade asking the prospective jurors whether they would be able to consider a life sentence in a case in which five people were murdered, or in which a child was killed, because neither "the murder of five people" nor "the murder of children" was alleged as a special circumstance. (9 RT 1311-1312.)

As the trial court acknowledged, these were the very facts about this case that were likely to weigh most heavily in the jury's determination of sentence. With respect to the fact that two of the victims were a five-year-old girl and a six-month-old infant, the trial court acknowledged that "most jurors would view, shouldn't, but they would, view the killing of an adult a lot differently than they would the killing of a child" (3 RT 692), and that the fact that there were child victims in this case was "certainly, absolutely [. . .] going to play a big factor" in the jurors' decision as to whether to impose the death penalty (5 RT 867). With respect to the number of victims, the judge acknowledged "it's one thing in my mind to have two murders[,] [i]t's another thing to have five." (3 RT 692.)

Recently, in *People v. Roldan*, *supra*, 35 Cal.4th 646, 694, this Court implicitly recognized that the fact that a capital case presents the murder of child victims is a fact or circumstance "comparable in relevance to the prior murders in *People v. Cash*. . . ." In rejecting the defendant's claim that the trial court had improperly restricted voir dire, the *Roldan* Court contrasted the case with *Cash*, reasoning that the defendant had failed to identify any

"fact about his case that is comparable in relevance to the prior murders in *People v. Cash* [citation], facts that could potentially have prejudiced even a reasonable juror. There were in this case no prior murders, no sensational sex crimes, no *child victims*, no torture." (*Ibid.*) Similarly, this Court has observed that "[m]ultiple murder falls into the category of aggravating or mitigating circumstances 'likely to be of great significance to prospective jurors.'" (*People v. Vieira* (2005) 35 Cal.4th 264, 286, quoting *People v. Cash*, *supra*, 28 Cal.4th at p. 721.)

Thus, inquiry into these two areas was entirely proper, and the defense was entitled to inquire about them – or to have the court do so – in order to ensure that the jury could fairly and impartially determine appellant's penalty according to law.

In *People v. Noguera* (1992) 4 Cal.4th 599, 646, the defendant complained that the prosecutor was permitted to voir dire jurors whether they would "consider" imposing the death penalty on a defendant who was 18 or 19 years old at the time of the killing of a single victim. This Court held that the prosecutor's questioning was entirely proper because he "simply inquired whether a jury would *consider* imposing the death penalty" in a case involving those facts, and "[i]f a juror would not even consider the death penalty in such a case, he or she properly would be subject to challenge for cause." (*Ibid*; italics in original.)

That reasoning applies with equal force here. Appellant had a right to ask each juror whether he or she could vote for life in the face of evidence that there were five victims, including two young children. There may well have been some prospective jurors who would not have been unable to consider a life sentence in a case in which "more than one" person was killed, but would have been unable to consider a life sentence in a case

in which five people were murdered. Similarly, there may well have been prospective jurors who would have been unable to do so in a case in which young children, including a six-month-old baby, were killed. Because the law governing death-qualification of jurors in capital cases (*Wainwright v. Witt*, *supra*, 469 U.S. 412; *Witherspoon v. Illinois* (1968) 391 U.S. 510) is equally applicable to challenges to jurors favoring and opposing the death penalty (*Morgan v. Illinois, supra,* 504 U.S. at p. 738), a prospective juror who cannot "even consider" a life sentence in such a case "properly would be subject to challenge for cause" (*People v. Noguera*, *supra*, 4 Cal.4th at p. 646).

The trial court's restriction of appellant's voir dire of prospective jurors deprived him of his rights to exercise both cause challenges and peremptory challenges, his right to a fair and impartial jury, his due process right to a trial conforming with the rules of the jurisdiction in which he was tried, and his right to a reliable penalty determination.

D. Because the Trial Court's Ruling Was Categorical, the Error Must Be Deemed Prejudicial Per Se

Although there are cases in which error in the restriction of death-qualification voir dire does not inexorably lead to reversal (see, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 974), this is not such a case.

This Court has identified two often interrelated situations in which such error might be deemed harmless. The first is where a defendant was given the opportunity to probe into prospective jurors' attitudes about case-specific facts during the general voir dire. The second scenario is where it is possible to determine from the record "that none of the jurors had a view about the circumstances of the case that would disqualify that juror." (*Ibid.*) In the case at bar, appellant was categorically precluded from exploring, in

general voir dire, the prospective jurors' attitudes about the aggravating circumstances of the charged crime. That categorical denial resulted in a record from which it is impossible for appellant to point to a particular biased or unbiased juror.

Thus, this case is squarely controlled by *People v. Cash*, where this Court reversed the penalty judgment for the identical error in restricting death-qualification voir dire. Here, as in *Cash*, the general voir dire of each individual and sequestered prospective juror took place immediately following death-qualification voir dire, and, also as in *Cash*, the restriction on voir dire was clearly understood by all to extend into general voir dire. (*People v. Cash*, *supra*, 28 Cal.4th at p. 722.) Indeed, when the subject arose during individual voir dire, the trial court "ordered" the attorneys to refrain from asking any questions of the prospective jurors that touched on these forbidden subjects. (9 RT 1312.)

As this Court has observed:

> A defendant who establishes that "any juror who eventually served was biased against him" is entitled to reversal. (Citations.) Here, defendant cannot identify a particular biased juror, but that is because he was denied an adequate voir dire about prior murder, a possibly determinative fact for a juror. By absolutely barring any voir dire beyond facts alleged on the face of the charging document, the trial court created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed murder was empanelled and acted on those views, thereby violating defendant's due process right to an impartial jury. (Citation.)

(*People v. Cash*, *supra*, 28 Cal.4th at p. 722.) Just as in *Cash*, the trial court's error in precluding any mention of the number of victims, or the fact that two of the victims were young children, cannot be regarded as harmless here.

Reversal of the penalty is required because "the trial court's error makes it impossible for us to determine from the record whether any of the individuals who [were] ultimately seated as jurors held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had committed one or more murders other than the murder charged in this case." (*People v. Cash*, *supra*, 28 Cal.4th at p. 723.) Consequently, the trial court's error denied appellant his due process right to an impartial jury and a reliable penalty determination, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739.)

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THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF THREATS ALLEGEDLY MADE BY APPELLANT AS REBUTTAL AT THE PENALTY PHASE, REQUIRING REVERSAL OF THE DEATH JUDGMENT

At the penalty phase, the trial court committed reversible error by admitting improper, irrelevant and highly prejudicial rebuttal testimony by Anthony France, a school counselor at San Gabriel High School, about threats appellant made as an 18-year-old high school student in connection with a fight on school grounds. France's testimony did not in fact rebut any mitigating evidence offered by the defense, and nothing presented by the defense "opened the door" to that evidence. The improper admission of this evidence violated appellant's Sixth, Eighth and Fourteenth Amendment rights and requires reversal of the death judgment. (See *Saffle v. Parks* (1990) 494 U.S. 484, 493.)

A. Proceedings Below

At the penalty phase, the defense presented testimony from appellant's father, Migel Valdez ("Valdez"), about appellant's childhood upbringing and educational history. Valdez testified about the various schools that appellant attended and the grades he received at each school. In addition, the defense introduced appellant's school records from the West Covina Unified School District, reflecting his grades from 9th grade through the first semester of 12th grade. (Exh. Nos. 105,106, 107, 108, 109, 110, 111, 112-A, 112-B, 113; ; 1 SuppCT IV 236-255; 39 RT 4057-4059, 4064-4067.)

Valdez testified that appellant attended Granada Elementary School, Charles D. Jones Junior High School, and then Baldwin Park High School

while living in Baldwin Park. (39 RT 4056.) In 1988, appellant moved in with his father and stepmother in West Covina, and began attending West Covina High School. (39 RT 4056, 4058, 4095.) During his junior year, appellant moved in with his grandparents in Alhambra, where he attended Century High School in his senior year. (39 RT 4061, 4067.)

Valdez said that appellant had "some good grades and some bad grades" at West Covina High School. (39 RT 4057.) Appellant's report cards generally confirmed that he received "some good grades and some bad grades" throughout his high school education.[88]

On cross-examination, the prosecutor asked Valdez if he was aware of an incident that occurred when appellant was in high school. The questioning proceeded as follows:

Q. And as I understood your testimony this morning . . . at some point after [appellant] went to or was – went to Century High School it was at that point in time he left living with you?

A. Yes.

Q. Was [appellant] with you or are you aware of the situation where he threatened to shoot a school official in the head?

A. No, I was not aware of that.

Q. And where he indicated that a male school official was his bitch and that this male school official's ass was his?

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[88] Appellant's report cards indicated that in 9th grade at Baldwin Park High School, he received a B in Elementary Electronics in the first semester and an A in that class in the second semester, but received Fs in all of his other classes that year. (1 SuppCT IV 237; 39 RT 4058.) In 10th grade at West Covina High School, he received two Bs, four Cs, and six Ds. (1 SuppCT IV 237.) In his junior year at West Covina High School, he received one A, four Cs, and four Fs. (1 SuppCT IV 237; 39 RT 4059.) In his senior year at Century High School, he received an A in U.S. History, a B in American Government, and "Ps" in all of his other classes. (1 SuppCT IV 237.)

A. I was not aware of that.

Q. Was that the reason that [appellant] was expelled from one high school and sent to Century?

A. I'm not aware of any of this.

(39 RT 4096-4097.)

The defense also presented testimony from Dr. Ronald Fairbanks, a licensed school psychologist. (39 RT 4104.) Dr. Fairbanks testified that appellant's intellectual ability was "above average" and that he could be productive in prison if the institution provided him with the opportunity to work in a library setting. (39 RT 4104, 4109.) Dr. Fairbanks testified about his clinical evaluation of appellant's personality, based upon a battery of psychodiagnostic tests Dr. Fairbanks administered as well as an interview he conducted with appellant. (39 RT 4105, 4107-4108, 4118-4129.) Those test results indicated that appellant had "virtually sabotag[ed]" the psychological evaluation. (39 RT 4119.) Dr. Fairbanks concluded that appellant's "destruction of the results was consistent with other trends" that he observed from his interview with appellant, such as "his suicidal tendencies in the past." (39 RT 4120.) Dr. Fairbanks testified that a person with suicidal tendencies would "have very low self-worth, would try to put himself in dangerous situations, [would] take risks that other people wouldn't normally take, [would be] generally depressed." (39 RT 4123.) Dr. Fairbanks observed that appellant "was negative regarding his childhood," but he was unable to obtain much information from appellant about it. (39 RT 4126.) Appellant spoke only "very brief[ly]" about his educational background. (39 RT 4123.) Accordingly, Dr. Fairbanks had not previously been aware that appellant had attended several high schools. (39 RT 4123.) Nonetheless, he said that appellant's sporadic educational

history was consistent with his characterization of appellant as a "self-defeating" person. (39 RT 4124, 4128.)

After the defense rested, the prosecutor asked for permission to call Anthony France in rebuttal, even though he had previously advised defense counsel that he did not intend to call France as a witness at the penalty phase. (40 RT 4227.) The prosecutor proffered that France would testify about the incident – about which the prosecutor had questioned Valdez during cross-examination – in which appellant allegedly threatened to shoot a school official in the head. (40 RT 4233.)

The prosecutor contended that he first learned about the incident when defense counsel provided him with appellant's school records between the guilt and penalty phases of trial. (40 RT 4233.) According to the prosecutor, those records included a report about an incident that occurred at San Gabriel High School in 1991, in which appellant was detained by school officials for his involvement in "some type of gang fight." (40 RT 4234.) After he was detained, appellant supposedly "told the security counselor he should quit his job so that [appellant] could kick his ass, that the security counselor was [appellant's] bitch, . . . and that the security counselor's ass was [appellant's]." (40 RT 4234.) The records also indicated that appellant threatened to shoot France. (40 RT 4234.) As a result of the incident, appellant was suspended from San Gabriel High School. (40 RT 4233.)

The prosecutor argued that he was "not going to go into it and make a big deal of" the incident; however,

> because [defense counsel] put on [Dr. Fairbanks], he put on yesterday extensive testimony regarding [appellant's] background and opportunities that he had to serve our country in the Navy, to go to I.T.T. and become a productive citizen,

> Little League, the fact that his mother was a team mother and so forth and even had the doctor testify that [the] reasons for a lot of schools was perhaps moving around a lot, the parents moving around, [but] there was never any talk about possible reason is [*sic*] suspension and so forth.

(40 RT 4234-4235.)

The prosecutor argued that France's proffered testimony was proper rebuttal evidence for two reasons. First, because it served to impeach defense witnesses who had testified the day before, "particularly [appellant's] father [who] said he didn't know about this." (40 RT 4236.) Second, because the "defense ha[d] put on a great deal of evidence regarding school records, [and] had [Dr. Fairbanks] testify that reasons for moving – the reasons he gave did not include anything that might look the negative fashion [*sic*] upon [appellant]." (40 RT 4236.)

The prosecutor further argued that the proffered evidence was admissible not as rebuttal, but also as "direct evidence" of "factor b, the presence or absence of criminal activity." (40 RT 4237.) He argued that under that section the defendant does not need to have been convicted of the crime in which he is alleged to have used force or violence. (40 RT 4237.)

Defense counsel objected that France's testimony was not properly admitted in rebuttal. (40 RT 4231.) Counsel argued that appellant was not living with his father at the time of the incident and therefore it was improper to ask Valdez whether he knew the circumstances of appellant's expulsion when he had no reason to know. (40 RT 4232.)

Moreover, defense counsel argued that France's proferred testimony failed to rebut any evidence presented by the defense. (40 RT 4237.) Counsel argued that it did not rebut Dr. Fairbanks's testimony about the fact that appellant attended several high schools because Dr. Fairbanks did not

profess to know the reasons for that. (40 RT 4238.) Counsel argued that the evidence might be admissible if the defense had suggested a contrary reason why appellant moved from one school to another, but that it did not rebut any evidence that the defense actually presented. (40 RT 4238.)

The trial court stated that there was no question that the evidence was admissible as aggravation, but questioned whether it was appropriate rebuttal evidence. (40 RT 4239.) Ultimately, the court found that it was appropriate rebuttal, and overruled the defense objection. (40 RT 4239.)

On rebuttal, the prosecutor called France, a campus supervisor at San Gabriel High School, who testified that he broke up a fight there on December 18, 1991. (40 RT 4253.) France testified that he did not recall the fight, other than that there were a number of people involved and that he detained appellant afterwards. (40 RT 4254.) Over the defense's hearsay objection, the prosecutor asked France whether appellant said something to another campus supervisor. (40 RT 4254.) France testified that appellant told another supervisor that he was going to kick his ass and that he was his "bitch." (40 RT 4255.) France also testified appellant later said that "he was going to put a bullet in my head." (40 RT 4255.)

On cross-examination, France acknowledged that he did not take appellant's threat seriously, that it was not the first time someone had made that threat to him at the high school, and that such a threat was a "standard phrase" that was said to security officers when they broke up a fight. (40 RT 4256.)

Before the prosecutor mentioned France's testimony in his closing argument, defense counsel moved to strike that testimony. (40 RT 4274-4281.) Counsel argued that the testimony "had nothing to do with rebutting the case that [the defense] put forward." (40 RT 4274.) Counsel also

argued that the prosecution failed to "follow through" and establish that the incident led to appellant's suspension from school or to criminal proceedings. (40 RT 4275.) In response, the prosecutor argued that he had made an offer of proof prior to the court's ruling and that, in any event, France's testimony was "clearly admissible as to the one subsection, the presence or absence." (40 RT 4275.) The trial court responded: "It is factor b." (40 RT 4275.)

The trial court agreed that the testimony would have been admissible in the prosecution's case-in-chief, but asked the prosecutor to respond to the defense argument "that it was not in rebuttal to anything that they put in." (40 RT 4275.) The prosecutor responded:

> Well, then, I think the court clearly could in its discretion allow me to re-open and put it in. This is not evidence that I knew about until right at the start of the penalty phase where the defense gave me confidential school documents that I otherwise would not be entitled to without showing. . . . I did not know of this information until right at the start of the penalty phase when [defense counsel] told me about it. So this is certainly not a situation where the prosecution sandbagged the defense. This is a situation where when the prosecution found out about something at the last moment, and one might even say that the defense had been under an obligation long before that to provide this in discovery, but I also understand the constraints under which [appellant's] lawyer has been working; but I think clearly the court can allow it in as direct evidence under re-opening and, in addition, I do believe that in some degree this testimony is proper rebuttal because the defense put on a number of witnesses to testify that [appellant's] conduct in school, especially from the last witness that the jury heard this morning, was exemplary and clearly that's not the case. We're talking about things that happened in the school setting.

(40 RT 4275-4276.)

Defense counsel responded that the evidence was "still not for rebuttal," and that the prosecution had appellant's school records prior to the beginning of the penalty phase. (40 RT 4278.) The court asked defense counsel how appellant was prejudiced if the evidence was admitted "at the end" of the case instead of in the prosecution's case-in-chief. (40 RT 4278.) Defense counsel responded:

> [H]e's prejudiced in the fact that this doesn't even indicate criminal activity. . . . [France] said he didn't take this [seriously] and there was no demonstration that this is criminal activity. This was a hot-headed student after a fight making idle threats and that's the most that it had arisen to. No arrests resulted from that. There was no demonstration of an arrest . . . resulting [from] that. There was no demonstration of a [prosecution] that resulted from that, and there was no demonstration the victim took it serious[ly] in any manner, shape, or form and he did this only as part of his duties as a security guard.

(40 RT 4278-4279.) Defense counsel further argued that the prosecutor had the opportunity to introduce France's testimony as "factor b" evidence in the People's case-in-chief but failed to do so, and that, as a result, defense counsel intentionally decided not to present testimony in the defense case from other Alhambra School District employees, including two witnesses that the defense had under subpoena. (40 RT 4279-4280.)

The court overruled the defense objection, reasoning that the evidence would have been admissible in the prosecution's case-in-chief and that, accordingly, appellant was not "prejudiced" by its admission in rebuttal. (40 RT 4280-4281.)

In his penalty phase closing argument, the prosecutor told the jurors that they would be instructed that (1) they could "consider, take into account, and be guided by" the factors under section 190.3 in determining

the proper penalty; and (2) with respect to factor (b), they could consider "the testimony this morning of France regarding . . . what happened at the San Gabriel High School." (40 RT 4285.) The prosecutor argued that France's testimony showed appellant "in his element, and his element is an element that he chose willingly and knowingly. It's an element where he is a member of a gang and will carry out whatever benefits that gang." (40 RT 4288.)

B. The Testimony Was Improper Rebuttal

It was reversible error to admit France's testimony about the incident at San Gabriel High School because it exceeded the proper scope of rebuttal. Admission of this improper rebuttal testimony violated appellant's rights to have reasonable limits placed on the admission of aggravating evidence (U.S. Const., 6th, 8th and 14th Amends.; *Lockett v. Ohio* (1978) 438 U.S. 586; Cal. Const., art. I, §§ 7, 15, 27), to receive due process and a fair trial (U.S. Const., 6th and 14th Amends.; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; Cal. Const., art. I, §§ 7, 15]), and to a reliable penalty determination (U.S. Const., 8th and 14th Amends.; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; see also *Gardner v. Florida* (1977) 430 U.S. 349; Cal. Const., art. I, §§ 7, 27). Reversal of the death judgment is thus required both under California law and the federal and state constitutions.

1. Rebuttal Evidence Must Relate to an Issue Raised by the Defense

Proper prosecution rebuttal evidence " 'is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence. . . ." (*People v. Daniels* (1991) 52 Cal.3d 815, 859, quoting *People v. Carter* (1957) 48 Cal.2d 737, 753-754.) "[T]he usual rule [on

rebuttal evidence] will exclude *all evidence which has not been made necessary by the opponent's case in reply*." (6 Wigmore, Evidence (Chadbourne ed. 1976) §1873, p. 672, italics in original.)

In determining whether evidence falls within the "proper scope of rebuttal," the relevant question is "whether two statements 'cannot at the same time be true. . . . Thus, it is not a mere difference of statement that suffices; . . . an inconsistency [] is required.'" (*James v. Illinois* (1990) 493 U.S. 307, 325, fn.1 (dis. opn. of Kennedy, J.), quoting 3 Wigmore, Evidence (Chadbourne ed. 1970) § 1040.) Thus, in discussing whether previously-excluded evidence should be admitted to rebut a defendant's false testimony, Justice Kennedy said trial courts should have no difficulty "[d]efining the proper scope of rebuttal" because the rule requires a "direct conflict" between the two versions of the facts. (*James,* at p. 325, fn. 1 (dis. opn. of Kennedy, J.).)

With respect to the penalty phase of a capital trial, this Court has held that once the defendant has presented evidence of circumstances in mitigation, the prosecution may present rebuttal evidence "tending to 'disprove any disputed fact that is of consequence to the determination of the action.' " (*People v. Boyd* (1985) 38 Cal.3d 762, 776, quoting Evid. Code, § 210.) However, "[t]he scope of [penalty phase] rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 792, fn. 24; accord *People v. Jones* (1998) 17 Cal.4th 279, 307; *People v. Carpenter* (1997) 15 Cal.4th 312, 408-409.)

Accordingly, a defendant who places his character in issue by presenting mitigating evidence opens the door only to "prosecution

evidence tending to rebut that 'specific asserted aspect' of [his] character." (*People v. Mitcham* (1990) 1 Cal.4th 1027, 1072; *People v. Hart* (1999) 20 Cal.4th 546, 653.) That rule is based on the principle that "[g]enerally, the scope of bad character evidence must relate directly to the particular character trait concerning which the defendant has presented evidence." (*People v. Mitcham, supra,* 1 Cal.4th at p. 1072; *People v. Rodriquez, supra,* 42 Cal.3d at pp. 791-792; see also *In re Jackson* (1992) 3 Cal.4th 578, 613, disapproved on another point by *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6 [penalty phase rebuttal cannot "go beyond the aspects of the defendant's background on which the defendant has introduced evidence"]; *United States v. Winston* (D.C. Cir 1991) 447 F.2d 1236, 1240 [the "opening the door" rule "is designed to prevent prejudice and is not to be subverted into a rule for the injection of prejudice"].)[89]

2. France's Testimony Was Improper Rebuttal Because It Did Not Disprove any Disputed Fact of Consequence to the Action, and Appellant Did Not "Open the Door" to Its Admission

France's testimony about the incident at San Gabriel High School was improper rebuttal because it did not "disprove any disputed fact that was of consequence to the determination of the action" (*People v. Boyd, supra,* 38 Cal.3d at p. 776), and was not a response to any "particular

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[89] This rule that rebuttal evidence must actually respond to the defendant's case also applies in prosecutions under the federal death penalty statute. Thus, *United States v. Stitt* (4th Cir. 2001) 250 F.3d 878, 896-896, held that it was error to admit victim-impact evidence to rebut evidence about the defendant's troubled background and good qualities, because it was not "reasonably tailored" to meet the defendant's evidence. *Stitt* points out that there must be a "reasonable nexus between the purported rebuttal evidence and the evidence it seeks to rebut." (*Id.* at p. 897, citing *United States v. Curry* (4th Cir. 1975) 512 F.2d 1299, 1305.)

incident or character trait" that appellant offered in mitigation (*People v. Mitcham, supra,* 1 Cal.4th at p. 1072).

In support of his proffer of the testimony, the prosecutor contended that evidence about the incident at San Gabriel High School was relevant as rebuttal on two bases: (1) to "impeach" Valdez's testimony that he was unaware of the incident (40 RT 4236); (2) to rebut Dr. Fairbanks's testimony that the reason appellant attended a number of different high schools was "perhaps" that his parents were "moving around a lot." (40 RT 4236). Neither of these reasons provided a basis for admission of the testimony in rebuttal.

France's testimony was not admissible to "impeach" Valdez's testimony. While evidence tending to prove or disprove "the existence or nonexistence of any fact" to which a witness has testified is admissible to impeach that witness's credibility (Evid. Code, § 780, subd. (i)), France's testimony did not prove or disprove the existence or nonexistence of any fact to which Valdez testified. In response to the prosecutor's questions on cross-examination, Valdez did not deny or dispute that the incident at San Gabriel High School occurred; rather, he testified that he was not aware that it occurred.[90] (39 RT 4096-4097.) Thus, the prosecutor could only "impeach" Valdez's credibility with proof that he *was* aware that the incident occurred. France's testimony had no tendency to establish that Valdez knew, or had any reason to know, that the incident occurred. (40 RT 4253-4257.) Because France did not testify either that he informed Valdez about the incident or that Valdez made any prior statement that was

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[90] In fact, as defense counsel pointed out, appellant was not living with his father when he attended San Gabriel High School, and thus Valdez had no reason to know about the incident. (40 RT 4232.)

inconsistent with his testimony that he did not know about the incident, his testimony was inadmissible to "impeach" either Valdez's testimony or his credibility.

Moreover, the admission of France's testimony to impeach Valdez's testimony was improper because it violated the rule against impeachment on collateral matters, which has been "most positively declared when the cross-examiner sought to bring in rebuttal witnesses to contradict an answer elicited on cross-examination." (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation At Trial, § 347, p. 433.) It is improper for a party to cross-examine a witness about a collateral matter for the purpose of contradicting the witness's testimony about it. (*People v. Mayfield* (1997) 14 Cal.4th 668, 748; *People v. Price* (1991) 1 Cal.4th 324, 436; *People v. Thompson* (1988) 45 Cal.3d 86, 110; *People v. Lavergne* (1971) 4 Cal.3d 735, 744.)

It is also well established that the prosecutor cannot manufacture a basis for admitting rebuttal evidence by first eliciting testimony on cross-examination of a defense witness, and then seeking to admit contrary evidence in rebuttal. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1192-1193; *People v. Wagner* (1975) 13 Cal.3d 612, 619; *People v. St. Andrew* (1980) 101 Cal.App.3d 450, 461.) In *People v. Daniels*, *supra*, this Court explained that "proper rebuttal evidence [] is *restricted to evidence made necessary by the defendant's case* in the sense that [the defendant] has introduced new evidence or made assertions that were not implicit in his denial of guilt." (52 Cal.3d at p. 859, italics added). Testimony elicited by the prosecutor on cross-examination of a defense witness is not evidence "introduced" by the defense, and rebuttal evidence cannot be made "necessary" when the prosecutor elicited the new evidence or assertions himself. (6 Wigmore, Evidence (Chadbourne ed. 1976), § 1873; *People v.*

Thompson (1980) 27 Cal.3d 303, 330; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1302.)

Here, the prosecutor sought to admit France's testimony for the ostensible purpose of rebutting testimony that he himself elicited while cross-examining Valdez. That rebuttal testimony was thus improper because it was not "made necessary" by appellant's case.

Further, as stated above, rebuttal evidence is only admissible if it has a tendency to "disprove any disputed fact that [is] of consequence to the determination of the action." (*People v. Boyd, supra,* 38 Cal.3d at p. 776) Because whether Valdez was aware of the incident at San Gabriel High School was not a material fact "of consequence to the determination of" this case France's testimony was not admissible to rebut Valdez's testimony. (*James v. Illinois, supra*, 493 U.S. at p. 325, fn. 1 (dis. opn. of Kennedy, J.) [admission of rebuttal evidence requires a "direct conflict" between the two versions of the facts]; *Boyd, supra*, 38 Cal.3d at p. 776 [rebuttal evidence must tend to "disprove [some] disputed fact that is of consequence to the determination of the action"].)

The prosecutor also argued that France's testimony was admissible in rebuttal because Dr. Fairbanks testified to the "reasons for moving [and] the reasons he gave did not include anything that might look the negative fashion [*sic*] upon [appellant]." (40 RT 4236.) But in fact Dr. Fairbanks never professed to know why appellant attended several high schools. Dr. Fairbanks testified that he did not know why appellant had changed schools, and did not even know that appellant *had* attended four different high schools prior to his testimony. (39 RT 4123.) While Dr. Fairbanks observed that "frequently children go from school to school because [their]

parents are moving," he made it clear that he did not know whether that was the situation in this case or not. (39 RT 4124.)

In any event, as defense counsel pointed out to the trial court, the prosecutor "didn't follow through" to show that appellant was suspended because of this incident and thus France's testimony did not accomplish the ostensible purpose for which it was offered:

> Mr. France's testimony was [admitted] to show that [appellant] was thrown out of . . . one of the high schools. [But] [a]ll that was presented was that he was in a fight and he made these words to Mr. France. It had nothing to do with rebutting the case that I put forward. . . . [The prosecutor] didn't follow through [and show] whether this was used in expulsion proceedings or used in a proceeding[] to arrest him or whether it was used in any other type of proceeding. . . .

(40 RT 4275.) The prosecutor's failure to establish that the incident led to appellant's suspension and forced him to change schools demonstrates that his proffered reasons for offering evidence about that incident in rebuttal were mere pretexts, and that his real purpose was to get this highly prejudicial incident before the jury as impermissible aggravating evidence.

Finally, the evidence was not admissible to rebut "any particular incident or character trait" that appellant offered in mitigation. (*People v. People v. Mitcham, supra,* 1 Cal.4th at p. 1072.) This issue is controlled by the general rule that penalty phase rebuttal is restricted to "aspects of the defendant's background on which [he or she] introduced evidence." (*People v. Ramirez, supra,* 50 Cal.3d at pp. 1191-1193; *In re Jackson, supra,* 3 Cal.4th at p. 613.) In *Ramirez*, the trial court permitted the prosecution to introduce evidence of the defendant's prior misconduct in response to testimony by the defendant's mother disclosing the adverse circumstances experienced by the defendant in his early childhood. (*Id.* at

pp. 1191-1192.) This Court held that a defendant does not "open the door" by presenting mitigating evidence relating to a defendant's background or character, and that the admission of such evidence does not provide the prosecutor with a broad license to present other evidence of the defendant's background to give the jury "a more balanced picture of his personality." (*Id.* at p. 1192.) "Because the defense had presented no evidence to suggest that defendant had not engaged in any such misconduct in his childhood, this evidence was not proper rebuttal evidence and went beyond the scope of permissible cross-examination." (*Id.* at p. 1193.)

As in *Ramirez*, the defense presented no evidence in this case to suggest that appellant had not engaged in misconduct in high school. Quite the contrary, in fact. Valdez testified on direct examination that he and appellant "were in constant conflict" while appellant was in the 10th and 11th grades over his demands that appellant get good grades and follow his father's rules. (39 RT 4059-4060.) Appellant also began to get involved with street gangs in San Gabriel during that period. (39 RT 4060.) Valdez also testified that appellant moved out of his home during his junior year because "I was unhappy with his performance and he was unhappy with my rules." (39 RT 4067.)

In addition, the defense presented Valdez's testimony about the grades that appellant received while attending West Covina High School. (39 RT 4057-4067.) Appellant's report cards – which were introduced into evidence by the defense – included numerous negative comments from appellant's teachers about his school performance, including the following: "neglects homework and/or class work"; "class projects not completed"; "low test scores"; "homework unsatisfactory"; "uses inappropriate language in class"; "inattentive in class"; "excessive talking in class"; "poor attitude

toward learning"; "disruptive in class/violates rules"; "poor class participation"; and "does not appear to be working to capacity." (Exh. Nos. 107, 108, 109, 110, 111, 112-A, 112-B, 113; 1 SuppCT IV 241-253.)

Clearly, none of this defense evidence about appellant's behavior and performance in high school opened the door to France's testimony about the assault at San Gabriel High School.

While this Court has on several occasions upheld the admissibility of various types of penalty phase rebuttal evidence, those cases are clearly distinguishable from appellant's, because they all involved evidence that responded *directly* to mitigating evidence offered by the defense. Thus, in *People v. Carpenter, supra,* because the defendant "placed his general character in issue" by offering evidence that he was respectful to women and "good with his children," it was proper to rebut that testimony with evidence that he encouraged a 14-year-old girl to engage in prostitution. (15 Cal.4th at pp. 408-409.) By contrast, France's testimony related to an issue *raised by the prosecutor* in cross-examining Valdez about the alleged school incident. (39 RT 4096-4097.)

People v. Mitcham, supra, 1 Cal.4th at pp. 1071-1072, is also inapposite, because the rebuttal evidence at issue in that case directly contradicted proffered mitigation. Thus, evidence about the defendant's "calculated and purposeful" behavior while committing an uncharged robbery, and about his involvement in juvenile misconduct, was admitted to counter assertions that he "act[ed] out of character and under the influence of PCP" in committing the charged crimes, and was "general[ly] a well-behaved youth." (*Id.* at pp. 1071-1072.)

Carpenter and *Mitcham* involved reasonable applications of the *Ramirez* standard, because in those cases the defendants "open[ed] the door

to prosecution evidence tending to rebut" their good character evidence. (*Mitcham, supra*, 1 Cal.4th at p. 1072; see *People v. Siripongs* (1988) 45 Cal.3d 548, 576-578 [proper to rebut evidence of defendant's truthfulness and honesty with evidence of prior convictions involving dishonesty].)

Because the defense presented no evidence to suggest that appellant had not engaged in any such misconduct in high school, France's testimony was improper rebuttal because it went "beyond the aspects of [appellant's] background on which [he] introduced evidence." (*In re Jackson, supra,* 3 Cal.4th at p. 613.)

C. It Was Prejudicial Error to Admit the Improper Rebuttal Testimony, and Reversal of the Death Judgment Is Required

The admission of France's testimony requires reversal of the death judgment. In his closing argument at the penalty phase, the prosecutor made extensive reference to that testimony, but did not argue that it rebutted anything presented by the defense, but rather that it was evidence the jury could consider as an aggravating factor under section 190.3, factor (b). Because the prosecution did not present any other evidence related to that aggravating factor, the improper admission of France's testimony necessarily skewed the jury's consideration of aggravating and mitigating factors in violation of the Eighth Amendment.

The significance of France's testimony is illustrated by the extensive reference made to it by the prosecutor in his penalty phase closing argument:

> As to that particular factor [factor (b)], there was also the testimony this morning of Mr. France regarding [appellant] and what happened at the San Gabriel High School.

And I am well aware, ladies and gentlemen, that Mr. France is honest with you, as well he has an obligation to be that he didn't take that seriously. That's not the point. The point is there's two sides to [appellant]. The side when he wants to manipulate or get what he wants to get and the side that is the Sangra gang member who carries on activities on behalf of his gang and at the behest of the Mexican Mafia.

And when he got involved in this one incident in San Gabriel High School, the true Richard Valdez came out with the language, and I will not repeat the language that he used to the one security counselor in telling the other security counselor who's merely doing his job, breaking up a fight. That's all he's doing, he's doing his job, "I'll put a bullet in your head."

I know Mr. France didn't take that seriously but after looking at some of the things that were done on Maxson Road that night you may realize that when [appellant] makes that kind of statement he means business.

I'm sure the defense will say that that was the actions of a young man that was made because he was in a fight. Ladies and gentlemen, I want you to think about this reasonably when you're in a fight that's – you may well assume the result of some type of gang dispute and it's broken up –

MR. BESTARD: Objection, your honor, there's no testimony that was a gang dispute.

THE COURT: Sustained. The jury's admonished to disregard that remarks.

MR. MONAGHAN: I'll rephrase it.

When you're involved in a fight, with a man that has death heads on his body during the fight.

MR. BESTARD: Objection. No testimony that he had Sangra or death heads on his body during the fight.

THE COURT: Sustained.

> MR. MONAGHAN: We know now [appellant] had tattoos on his back. You saw the tattoo. The death head is holding what appears to be a sawed-off type of shotgun on his back. That's the real Richard Valdez who tells a security counselor who's merely doing his job, "You're my bitch." That's the real [appellant], the manipulative [appellant] that wants to intimidate. That statement that day, whether Mr. France took it seriously or not, tells you, ladies and gentlemen, quite a bit about [appellant].
>
> How many times have you been in a dispute or a fight even as children where you make that kind of statement to a security counselor and then tell another security counselor you are going to put a bullet in his head? No, ladies and gentlemen, the actions that day clearly show [appellant]. They show him in his element, and his element is an element that he chose willingly and knowingly. It's an element where he is a member of a gang and will carry out whatever benefits that gang.

(40 RT 4285-4288.) Thus, the prosecutor's own argument demonstrates the importance of this erroneously-admitted evidence to his case. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 444.)

Admission of this improper rebuttal testimony was certainly not harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The jury's weighing of aggravating and mitigating factors in determining death or life imprisonment is subject to Eighth Amendment scrutiny. (See, e.g., *Sochor v. Florida* (1992) 504 U.S. 527 [Eighth Amendment violation occurred where sentencer weighed invalid aggravating factor].) Similarly, jury consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process" (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885), undermine the heightened need for reliability in the penalty phase sentencing determination (*Johnson v. Mississippi, supra,* 486 U.S. at p. 585). Here, because there was no other evidence related to aggravating factor (b), the

improper admission of France's testimony allowed the jury to consider an invalid aggravating factor in its sentencing determination, in violation of the Eighth Amendment. Reversal of the death judgment is required.

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THE TRIAL COURT FAILED TO INSTRUCT THE JURORS WITH CALJIC NO. 8.87 AFTER THE PROSECUTOR URGED THE JURY TO CONSIDER EVIDENCE OF THREATS AS FACTOR (B) EVIDENCE

As set forth in the preceding argument (Argmt. 13, *supra*), the trial court admitted testimony from Anthony France, a school counselor at San Gabriel High School, about threats appellant made as an 18-year-old high school student in connection with a fight on school grounds. During his closing argument at the penalty phase, the prosecutor argued to the jury that it could consider evidence of the incident admitted in rebuttal as an aggravating factor under section 190.3, factor (b). This Court has consistently held that jurors must be instructed that before prosecution evidence may be considered in aggravation under "factor (b)," they must find beyond a reasonable doubt that the defendant's conduct constituted commission of an actual crime, and that the trial court must so instruct the jury sua sponte.

Here, notwithstanding the prosecutor's explicit argument to the jury that it could use evidence of appellant's threats against France as a basis to impose death, the trial court failed to instruct the jury that it could only consider such evidence in aggravation if the jurors found, beyond a reasonable doubt, that the defendant's conduct constituted commission of a crime involving "the express or implied threat to use force or violence." Consequently, the jury was allowed to consider evidence of the incident at San Gabriel High School as an aggravating factor, even though it did not amount to a violation of any penal statute. Because the prosecution presented no other evidence related to "factor (b)," and because the

prosecution failed to present proof beyond a reasonable doubt that the threats appellant allegedly made during the incident at San Gabriel High School amounted to "criminal activity" in violation of a penal statute, the trial court's failure to appropriately instruct the jury necessarily skewed the jury's weighing of aggravating and mitigating factors. Reversal of the death judgment is required.

A. Proceedings Below

The procedural background set forth in Argument 13, *supra*, is herein incorporated in its entirety by reference.

During his closing argument at the penalty phase, the prosecutor told the jurors that the trial court would instruct them that in determining penalty they "shall consider all of the evidence which has been received during any part of the trial," and that they "shall consider, take into account, and be guided by" the factors under section 190.3, including so-called "factor (b)." (40 RT 4284-4285.) With respect to factor (b), the prosecutor argued that the jury had heard "the testimony this morning of France regarding [appellant] and what happened at the San Gabriel High School." (40 RT 4285.)

The trial court instructed the jury that in determining which penalty should be imposed, it "shall consider *all* of the evidence which has been received during *any* part of the trial" and "shall consider, take into account, and be guided by the following factors," including " the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (41 RT 4346; VII CT 1850; CALJIC No. 8.85, italics

added.) The trial court did not include CALJIC No. 8.87 as part of its penalty-phase jury instructions.[91]

B. Evidence of Appellant's Threats to School Officials Was Not Admissible as Factor (b) Evidence Because Appellant's Conduct Did Not Constitute Criminal Activity in Violation of any Penal Statute

At the penalty phase of a capital case, the jury is directed to consider evidence "of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (§ 190.3, factor (b).) This Court has consistently held "that evidence of other criminal activity" under factor (b) "must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." (*People v. Phillips* (1985) 41 Cal.3d 29, 72; accord, e.g., *People v. Wright* (1990) 52 Cal.3d

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[91] CALJIC No. 8.87 (Penalty Trial – Other Criminal Activity – Proof Beyond a Reasonable Doubt) reads as follows:

> Evidence has been introduced for the purpose of showing that the defendant _____ has committed the following criminal [act[s]] [activity]: _____ which involved [the express or implied use of force or violence] [or] [the threat of force or violence]. Before a jury may consider any criminal [act[s]] [activity] as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant _____ did in fact commit the criminal [act[s]] [activity]. A juror may not consider any evidence of any criminal [act[s]] [activity] as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

367, 426.) Because of the requirement of reasonable-doubt instructions for proof of uncharged charges at the penalty phase (see *People v. Robertson* (1982) 33 Cal.3d 21, 53-55), the trial court may "not permit the penalty jury to consider an uncharged crime as an aggravating factor unless a """rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."""" (*People v. Boyd, supra*, 38 Cal.3d at p. 778, quoting *Jackson v. Virginia, supra*, 443 U.S. at pp. 318-319, and *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

Under these standards, the prosecution's evidence of appellant's threats during the incident at San Gabriel High School was not admissible under factor (b) as a matter of law because appellant's conduct did not constitute "criminal activity" in violation of any penal statute. In order to demonstrate this, it is necessary to consider whether the prosecution's evidence established that appellant violated one of two Penal Code statutes: Section 422, penalizing "criminal threats," and section 71, penalizing threats against public officers, employees, and school officials.

Penal Code section 422 defines the making of "criminal threats" as a crime, and provides in pertinent part:

> Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety,

> shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

(§ 422.)

Thus, to sustain a conviction for making a criminal threat pursuant to section 422, the prosecution must establish five elements:

> (1) [T]hat the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat-which may be "made verbally . . . [,]" was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.

(*People v. Toledo* (2001) 26 Cal.4th 221, 227-228, citing *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 & fn. 13; see also *People v. Butler* (2002) 85 Cal.App.4th 745, 753; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536; *People v. Garrett* (1994) 30 Cal.App.4th 962, 966.)

Section 422 requires the threat be such as to cause a reasonable person to be in "sustained fear" for his or her personal safety or for that of his or her family. "The phrase to 'cause[ ] that person reasonably to be in sustained fear for his or her own safety' has a subjective and an objective component. A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139-1140.) A fear is sustained when it

"extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

Section 422 "was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others." (*People v. Felix* (2001) 92 Cal.App.4th 905, 913.) In other words, the statute does not punish such conduct as "mere angry utterances or ranting soliloquies, however violent." (*People v. Teal* (1998) 61 Cal.App.4th 277, 281.)

The case of in *In re Ricky T., supra*, 87 Cal.App.4th at pp. 1135-1138, is instructive. In that case, the 16-year-old defendant left his classroom to use the restroom and found the classroom door locked when he returned. (*Id.* at p. 1135.) The defendant began pounding on the door. (*Ibid.*) When a teacher opened it, the defendant was struck by the door. (*Ibid.*) The defendant became angry, cursed the teacher, and said "I'm going to get you" or "I'm going to kick your ass." (*Id.* at pp. 1135-1136.) The teacher felt physically threatened and sent the student to the school office. (*Id.* at p. 1135.) The following day, the student was interviewed by the police and admitted speaking angrily and "getting in [the teacher's] face." (*Ibid.*) There was no evidence that the defendant had previously quarreled with or showed physical violence toward the teacher (*id.* at p. 1138), or that he did anything to "further the act of aggression." (*Id.* at p. 1135.) The student received a five-day suspension for the threat. (*Ibid.*)

The Court of Appeal concluded that the record was insufficient to support the trial court's finding that the defendant's conduct violated section 422 because, judged in context, the defendant's threats "lack[ed] credibility as indications of serious, deliberate statements of purpose." (*Id.* at p. 1137.) The Court of Appeal noted that the nature of each threat cannot be "determined only at face value" but must be examined " 'on its face and

under the circumstances in which it was made." (*Ibid.*) With respect to the defendant's threat against the teacher, the Court of Appeal observed: (1) the threat was made in the context of the student becoming angry after he was struck by the door, and the student's "intemperate, rude, and insolent remarks hardly suggest any gravity of purpose" (*id.* at p. 1138); (2) there was no evidence "that appellant's angry words were accompanied by any show of physical violence – nothing indicating any pushing or shoving or other close-up physical confrontation" (*id.* at p. 1138); and (3) the juvenile court acquitted the student of the section 71 (threat against public official) charge, also a specific intent crime proscribing "threats the recipient reasonably believes could be accomplished." (*Id.* at p. 1139.) The Court of Appeal concluded that the defendant's statement was no more than a vague threat of retaliation without prospect of actual execution, and thus that there was insufficient evidence of a genuine threat punishable under section 422. (*Ibid.*)

Finally, the Court of Appeal found that, notwithstanding the fact that the teacher claimed that he felt physically threatened, there was insufficient evidence that the victim was in "sustained fear." (*Id.* at p. 1140.) The Court of Appeal observed that the police were not called until the following day, and thus any fear that the teacher felt "[a]pparently . . . did not exist beyond the moments of the encounter." (*Ibid.*)

Here, as in *Ricky T.*, the prosecution presented insufficient evidence to establish that appellant's statements had "credibility as indications of serious, deliberate statements of purpose." As in *Ricky T.*, appellant's statements were made in the heat of the moment, in response to perceived provocation, and were "no more than a vague threat of retaliation without prospect of execution." There was no evidence to suggest that appellant

and the school counselors had any prior history of conflict, and appellant's angry words were not accompanied by any show of physical violence. In addition, as in *Ricky T.*, there was no evidence that appellant did anything subsequently to "further the act of aggression." Finally, France testified that he did not take appellant's threat seriously (40 RT 4256), and thus there was even less evidence in this case of the requisite "sustained fear" than was present in *Ricky T.*, where the teacher testified that he felt physically threatened.

The other Penal Code section that must be considered in this context is section 71, which provides that certain threats against public officers, employees, and school officials are punishable as misdemeanors. The pertinent parts of that section provide:

> Every person who, with intent to cause, attempts to cause, or causes, any officer or employee of any public or private educational institution or any public officer or employee to do, or refrain from doing, any act in the performance of his duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out, is guilty of a public offense. . . .

(§ 422.)

The elements of a violation of section 71 are as follows: " ' "(1) A threat to inflict an unlawful injury upon any person or property; (2) direct communication of the threat to a public officer or employee; (3) the intent to influence the performance of the officer or employee's official duties; and (4) the apparent ability to carry out the threat." ' [Citations.]" (*In re Ernesto H.* (2004) 125 Cal.App.4th 298, 308.) The purpose of section 71 is to prevent threatening communications to public officers or employees

designed to extort their action or inaction. (*In re Ernesto H., supra*, 125 Cal.App.4th at p. 308.) As with section 422, a "true threat" under section 71 is one " 'where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals .' " (*In re Ernesto H.*, at p. 310, quoting *Virginia v. Black* (2003) 538 U.S. 343, 359.)

In a series of decisions this Court has found that evidence of verbal threats by the defendant – made under circumstances indistinguishable from this case – was not properly admitted in aggravation under factor (b) because the defendant's conduct did not constitute a violation of section 71. For example, in *People v. Wright, supra*, 52 Cal.3d at pp. 425-429, this Court held that a series of threats that the defendant made while in prison – including one in which he threatened a correctional officer that the officer's "body" would be the next one found in an area where an inmate's dead body had been found 15 minutes earlier – were inadmissible under *People v. Boyd, supra*. This Court held that such purported factor (b) evidence, though involving the express or implied threats to use force or violence, "was nevertheless excludable because the violent acts or threats of violence did not amount to 'criminal activity' in violation of a penal statute." (*Id.* at p. 426.)

Similarly, in *People v. Rodrigues* (1994) 8 Cal.4th 1060, a correctional officer testified that when he sought to have the defendant removed from his food-serving assignment, the defendant verbally abused him and threatened to "kick [his] ass." (*Id.* at p. 1169.) This Court did not directly decide the admissibility issue, instead concluding that "any erroneous admission of the evidence was harmless." (*Id.* at p. 1170.) It is revealing, however, that, while not conceding that the threat evidence was

inadmissible, "the Attorney General [made] no attempt to argue that the . . . incident constituted conduct properly falling under section 190.3, factor (b), or that there was substantial evidence in the record of a Penal Code violation." (*Ibid.*)

Finally, in *People v. Tuilaepa* (1992) 4 Cal.4th 569 – a case involving an incident that is factually and legally indistinguishable from the one at bar – the defendant made "several outbursts while in CYA custody," including "sexual taunts and death threats" against two female prison employees and threats to burn the face of a male employee who had reprimanded him. (*Id.* at p. 589-590.) This Court held that this evidence had been erroneously admitted because "[t]here was no substantial showing that defendant harbored the requisite intent – interfering with the performance of official duties – or that his statements had the requisite effect – creating a reliable belief the threat would be carried out." (*Id.* at p. 590.) In so ruling, this Court noted that the recipients of the threats "indicated that they did not actually fear for their safety," that the defendant "had no apparent history of attacking or injuring CYA officials," and that "his response to [the male employee's] criticism was obviously intended as an angry retort." (*Ibid.*)

In this case, as in *Tuilaepa*, the recipient of the threat did not take it seriously. (40 RT 4256.) Moreover, appellant had no history of violence or threats against school security officers (compare *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431), and his statements obviously were made in, and the product of, anger. As defense counsel cogently noted, France "said he didn't take this [seriously] and there was no demonstration that this is criminal activity. This was a hot-headed student after a fight making idle threats and that's the most that it had arisen to. . . . There was no

demonstration of an arrest . . . resulting [from] that. There was no demonstration of a [prosecution] that resulted from that, and there was no demonstration the victim took it serious[ly] in any manner, shape, or form and he did this only as part of his duties as a security guard." (40 RT 4278-4279.)

In short, the prosecution seized upon, and was unfairly allowed to use, evidence of conduct that was not admissible under any statutory aggravating factor to obtain a death verdict against appellant. This Court in *Boyd, supra*, could have been describing the case at bench when it warned: "When the prosecution is permitted to introduce such evidence the penalty trial can become a spectacle in which witnesses recount numerous trivial incidents of misconduct and ill temper." (*People v. Boyd, supra*, 38 Cal.3d at p. 774.) The jury's consideration of such non-statutory aggravation violated California law. (*Id.* at p. 777; *People v. Tuilaepa, supra*, 4 Cal.4th at p. 590.) Its use arbitrarily deprived appellant of his right to have his sentence determined without consideration of such evidence in violation of due process. (U.S. Const., 14th Amend.; see, e.g., *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) Moreover, the jury's consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process" (*Zant v. Stephens, supra*, 462 U.S. at p. 885) undermined the heightened need for reliability in the determination that death is the appropriate penalty (U.S. Const., 8th & 14th Amends.) and requires reversal of the death judgment (see, e.g., *Johnson v. Mississippi, supra*, 486 U.S. at p. 585).

C. The Trial Court Erroneously Failed to Instruct the Jury with CALJIC No. 8.87 After the Prosecutor Argued That the Jury Could Consider Appellant's Threats to School Officials as an Aggravating Factor Pursuant to Section 190.3, Factor (b)

This Court has consistently held that jurors must be instructed that before prosecution evidence of other criminal activity involving "the express or implied use of force or violence" may be considered in aggravation under section 190.3, factor (b), the jurors must first be satisfied beyond a reasonable doubt that the defendant committed such crimes. (*People v. Avena* (1996) 13 Cal.4th 394, 429.)

Such an instruction is "required by state law." (*People v. Avena, supra*, 13 Cal.4th at p. 429.) Consequently, this Court has held that the trial court should so instruct the jury sua sponte. (*People v. Robertson, supra,* 33 Cal.3d at pp., and fn. 19; *People v. Stanworth* (1969) 71 Cal.2d 820, 840; *People v. Polk* (1965) 63 Cal.2d 443, 452; Use Note to CALJIC No. 8.87 ["This instruction must be given sua sponte in all cases where the People claim any criminal activity and especially where CALJIC No. 8.85, subparagraph (c), is given."].)

Here, notwithstanding the fact that the prosecutor urged the jury to consider France's testimony about the incident at San Gabriel High School as aggravating evidence pursuant to section 190.3, factor (b), the trial court failed to instruct the jury sua sponte that a juror could not consider the evidence of such "criminal activity" unless he or she first concluded beyond a reasonable doubt that the defendant committed such crimes. The trial court's failure to give this "required" instruction was error.

The record in this case is similar to that in *People v. Robertson, supra*, 33 Cal.3d 21. In *Robertson*, the prosecution introduced evidence

during the guilt phase from which the jury could find that the defendant had committed other violent crimes in the past. (33 Cal.3d at p. 53.) While the prosecution did not introduce any additional "other crimes" evidence at the penalty phase, the trial court instructed the jury that it could consider evidence admitted "at all phases of the trial proceedings" in reaching its penalty determination. (*Ibid.*) In addition, the jury received an instruction that it should "take into account . . . the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (*Ibid.*)

This Court found that the trial court committed prejudicial error in failing to instruct the jury sua sponte that in determining penalty it could not properly consider the "other crimes" evidence as aggravating circumstances unless it first found that these crimes had been proven beyond a reasonable doubt. (*Ibid.*) The Court observed that more than a decade earlier it had held that " '[i]t is now settled that a defendant during the penalty phase of a trial is entitled to an instruction to the effect that the jury may consider evidence of other crimes only when the commission of such other crimes is proved beyond a reasonable doubt.' " (*Ibid.*, quoting *People v. Stanworth*, *supra*, 71 Cal.2d at p. 840.) The Court reaffirmed that "such an instruction is 'vital to a proper consideration of the evidence, and the court should so instruct sua sponte.' " (*Ibid.*, quoting *Stanworth*, at p. 841.)

As in *Robertson*, in this case the prosecution did not introduce evidence of other crimes in its case-in-chief at the penalty phase, yet the trial court's instructions directed the jury to "consider *all* of the evidence which has been received during *any* part of the trial" with respect to the aggravating factors set forth in section 190.3. (41 RT 4346; VII CT 1850; CALJIC No. 8.85, italics added.) Moreover, in his closing argument at the

penalty phase, the prosecutor explicitly urged the jury to consider "the testimony this morning of France regarding [appellant] and what happened at the San Gabriel High School" as it related to section 190.3, factor (b). (40 RT 4285.) *Robertson* makes clear that it is immaterial that the prosecution did not present France's testimony in its case-in-chief at the penalty phase. All that matters is that the "prosecution introduced evidence from which the jury could find" that appellant had engaged in other "criminal activity" that involved "the express or implied threat to use force or violence." (*People v. Robertson*, *supra*, 33 Cal.3d at p. 53.) Because such evidence was presented to the jury, and because the trial court instructed the jury that it "shall consider all of the evidence which has been received during any part of the trial" with respect to the statutory aggravating factors, the trial court was required to instruct the jury sua sponte that a juror could not properly consider the "other crimes" evidence as an aggravating factor unless he or she first found beyond a reasonable doubt that the defendant's conduct constituted commission of an actual crime. (*Ibid.*) Consequently, the trial court's failure to give the jury this "required" instruction was error. (*People v. Avena*, *supra*, 13 Cal.4th at p. 429.)

D. Reversal of the Death Judgment is Required

This Court has previously held that a trial court's failure to instruct the jury about "other crimes" evidence is subject to harmless error analysis (*People v. Avena*, *supra*, 13 Cal.4th at pp. 430-432; *People v. Pinholster* (1992) 1 Cal.4th 865, 965; *People v. Hardy, supra,* 2 Cal.4th at p. 205), specifically, whether it is "reasonably possible" the failure to instruct affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-449;

People v. Wright, *supra*, 52 Cal.3d at p. 438 (applying the *Brown* "reasonable possibility" standard).

In *People v. Robertson*, *supra*, this Court concluded that, on the facts of that case, the failure to provide the jury with appropriate instruction as to its consideration of "other crimes" evidence "must be considered prejudicial." As this Court reasoned:

> In light of the broad discretion exercised by the jury at the penalty phase of a capital case the difficulty in ascertaining "[t]he precise point which prompts the [death] penalty in the mind of any one juror" (*People v. Hines* (1964) 61 Cal.2d 164, 169 [. . .]), past decisions establish that "any substantial error occurring during the penalty phase of the trial . . . must be deemed to have been prejudicial." (*People v. Hamilton* (1963) 60 Cal.2d 105, 135-137 [. . .]; *People v. Hines*, *supra*, 61 Cal.2d at pp. 168-170.) Here, the potential for prejudice was particularly serious because the error in question significantly affected the jury's consideration of "other crimes" evidence, a type of evidence which this court long ago recognized "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*People v. Polk*, *supra*, 63 Cal.2d at p. 450.)

(*Robertson*, *supra*, 33 Cal.3d at p. 54 [parallel citations omitted].)

In contrast, in *People v. Avena*, *supra*, this Court found "*Robertson* error" harmless, but only because the prosecution proved beyond a reasonable doubt that the defendant committed each of the "other crimes" at issue. Significantly, in *Avena*, the People urged this Court to find the instructional error harmless because at least one of the incidents "was trivial when compared to the charged offenses and the other crimes," but this Court declined to find the error harmless for that reason. (*Avena*, *supra*, 13 Cal.4th at pp. 433-435.) Instead, the Court assessed the strength of the evidence presented by the prosecution to establish each of the other crimes

before the jury and concluded that the instructional error was harmless because it was "not reasonably possible [that] a properly instructed jury would have entertained a reasonable doubt" that the defendant committed each of the "other crimes" at issue. (*Id.* at pp. 434-435.)

In this case, there can be no question that a properly instructed jury would have entertained a reasonable doubt that appellant committed any crime because, as demonstrated above, appellant's conduct during the incident at San Gabriel High School did not constitute a violation of section 422, section 71, or any other penal statute.

Moreover, other than France's testimony about the incident at San Gabriel High School, the prosecution presented no evidence whatsoever that the jury could have deemed relevant to "factor (b)." Thus, the improperly-considered evidence was not cumulative of other properly-admitted factor (b) evidence, and the trial court's failure to appropriately instruct the jury necessarily skewed the jury's weighing of aggravating and mitigating factors. (Compare *People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 589 [error in allowing jury to consider threats as factor (b) evidence was harmless where the evidence was cumulative of other "evidence properly admitted in aggravation"].)

Under these circumstances, it is reasonably possible that appellant would have obtained a more favorable result had the jury been properly charged on consideration of evidence of other criminal activity involving "the express or implied threat to use force or violence," requiring reversal of the death judgment under state law. (See *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448 [penalty phase error is prejudicial where there is a "reasonable possibility" of a more favorable verdict absent the error].) The trial court's failure to give the necessary instruction allowed the jury to

consider evidence in aggravation even though appellant's conduct did not constitute a violation of a penal statute. Further, the evidence was not cumulative of any other properly-admitted factor (b) evidence. As in *Robertson*, "the potential for prejudice was particularly serious because the error in question significantly affected the jury's consideration of 'other crimes' evidence, a type of evidence which this court long ago recognized 'may have a particularly damaging impact on the jury's determination whether the defendant should be executed.'" (*People v.* Robertson, *supra*, 33 Cal.3d at p. 54.) This Court "cannot gamble a life on the possibility that the evidence" had no effect on the jury at the penalty phase. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54.) Reversal of the death judgment is required.

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THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND PREJUDICIALLY ERRED BY FAILING TO SPECIFICALLY REINSTRUCT THE JURY WITH GUILT-PHASE INSTRUCTIONS WHICH WERE RELEVANT TO THE EVALUATION OF THE EVIDENCE AT THE PENALTY PHASE AND BY INSTRUCTING THE JURY THAT THEY COULD APPLY THEIR "COMMON SENSE" TO IDENTIFY OTHER PREVIOUSLY GIVEN INSTRUCTIONS THAT THEY COULD DEEM INAPPLICABLE TO THE PENALTY PHASE

A. Introduction

A trial court has a sua sponte duty to instruct on the "general principles relating to the evaluation of evidence." (*People v. Daniels* (1991) 52 Cal.3d 815, 885; see also *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884 [credibility of witnesses]; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [circumstantial evidence]; *People v. Reeder* (1976) 65 Cal.App.3d 235, 241 [expert testimony].)) "An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. [Citations.]" (*People v. Putnam* (1942) 20 Cal.2d 885, 890.)

Adequate instructions are especially important at the penalty phase of a capital case, where a heightened degree of reliability is required. (*Walton v. Arizona* (1990) 497 U.S. 639, 653; *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.) It is essential that capital sentencing "be reliable, accurate, and nonarbitrary. [Citations.]" (*Saffle v. Parks* (1990) 494 U.S. 484, 493.)

In this case, the trial court did not reinstruct the jurors with any of the instructions that were previously given at the guilt phase that were needed to insure that the penalty jurors knew how they should evaluate the

evidence before them. Worse yet, the trial court prefaced its reading of the penalty phase jury instructions by telling the jurors that while "generally speaking" all but three of the instructions previously given at the guilt phase were applicable in the penalty phase, "there may be a couple of others that you'll find by just applying common sense . . . are just not applicable." (41 RT 4344-4345.)

Among the instructions which should have been – but were not – delivered at the penalty phase were CALJIC No. 1.02 (statements of counsel are not evidence); CALJIC No. 2.20 (evaluating the credibility of witnesses), CALJIC No. 2.27 (sufficiency of testimony of one witness); and CALJIC No. 2.60 (defendant not testifying – no inference of guilt may be drawn).

The trial court's failure to re-instruct the jury as to the applicable law at the penalty phase left the jury without essential guidance regarding the standards they should use in evaluating the evidence. Further, the trial court not only abdicated its duty to instruct the jurors but, by informing the jurors that they may find that "a couple of other[]" jury instructions were "just not applicable," improperly delegated to the jury the responsibility to divine the applicable law. Such a cavalier approach to jury instruction at the penalty phase of a capital trial cannot be squared with the Eighth Amendment. As a result, appellant was denied his right to an accurate and reliable jury determination of his punishment (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), his right to a fair and reliable penalty determination (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17), and his right to due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, § 15).

B. Proceedings Below

Prior to instructing the jury at the penalty phase, the trial court asked the parties if they agreed that all of the jury instructions that had been given at the guilt phase were applicable to the penalty phase, with the exception of the instructions that the jury may not consider sympathy toward the defendant,[92] and may not consider penalty or punishments.[93] As the court inquired of the parties:

> Am I correct that all of the jury instructions given in the first phase would apply to the second phase with two exceptions: one[,] that in the first phase they were instructed that sympathy could not be considered and that is something they may consider now and also they were instructed that in coming to [–] in determining the issues of guilt phase they could not consider penalty or punishment and that, obviously, is the whole purpose of this phase? My belief is that all of the other instructions [–] to the extent that they apply, there may be some that don't, but I don't think it's confusing to just tell the jury that all the previous instructions do apply with those two exceptions.

(41 RT 4330-4331.)

The prosecutor responded that he believed the reasonable doubt instruction also did not apply, and that "at least from the defense perspective the circumstantial evidence instruction" did not apply. (41 RT

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[92] At the guilt phase, the jury received CALJIC No. 1.00, which reads in relevant part: "You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (VI CT 1710; 27 RT 3350.)

[93] At the guilt phase, the jury received CALJIC No. 8.83.2, which reads: "In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict or affect your finding as to the special circumstances alleged in this case." (VI CT 1750; 27 RT 3377.)

4331.) He suggested that the court "simply tell[] them that they certainly can now consider sympathy and they certainly can consider penalty or punishment and that they can consider the rest of the instructions that have previously been given as they feel they apply." (41 RT 4331.) Both defense counsel indicated that they "agree[d] with that." (41 RT 4331.)

For reasons that are not apparent from the record, the trial court omitted from the penalty phase jury instructions CALJIC No. 8.84.1, which sets forth general instructions about the law applicable to the penalty phase of the trial and instructs the jury not to be "influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feeling."[94] In addition, the trial court prefaced its reading of the penalty phase jury instructions with the following apparently improvised oral statement to the jury:

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[94] CALJIC No. 8.84.1 (Duty of Jury – Penalty Proceeding) reads as follows:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial.
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> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.
>
> You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

Generally speaking, all of the instructions I gave you in the first phase you may consider to the extent that they're applicable in this phase and I am not going to re-read all of those instructions. There are several areas that don't apply. For instance, I told you in the first phase that you could not consider sympathy for a defendant in determining guilt. In this phase you may if you deem it to be appropriate, consider sympathy in selecting your verdict.

In the first phase I told you that you could not in determining guilt or innocence of a defendant consider or take in – any way take into consideration punishment. Obviously, that's the whole focus of your attention in this case.

And I also told you of the standard of proof in the first case was proof beyond a reasonable doubt. That instruction does not apply to this phase. And there may be a couple of others that you'll find by just applying common sense or are just not applicable.

(41 RT 4344-4345.) The court did not reinstruct the jury as to any of the instructions that had previously been given at the guilt phase.

C. The Trial Court Erred by Failing to Include CALJIC No. 8.84.1 in the Penalty Phase Jury Instructions, By Failing to Expressly Instruct the Jury Which of the Previously Given Instructions Continued to Apply at the Penalty Phase, and By Instructing the Jury That They Were Free to Use Their "Common Sense" to Identify Other Guilt-Phase Instructions That Were Inapplicable to the Penalty Phase

The trial court has a sua sponte duty to instruct on general concepts of law. (*People v. Babbitt* (1988) 45 Cal.3d 660, 718.) Because the introductory instructions for the guilt phase contain concepts that do not apply to the penalty phase, the court must clarify for the jury which instructions apply to the penalty phase. (*People v. Weaver* (2001) 26 Cal.4th 876, 982; *Babbitt*, at p. 718, fn. 26.)

In *People v. Babbitt*, *supra*, this Court admonished that "[t]o 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." (45 Cal.3d at p. 718, fn. 26.) CALJIC No. 8.84.1 was subsequently amended in 1989 to provide that the penalty jury should "[d]isregard all other instructions given to you in other phases of this trial." The Use Note to CALJIC No. 8.84.1 states: "[This instruction] should be followed by all appropriate instructions beginning with CALJIC [No.] 1.01, concluding with CALJIC [No.] 8.88. [¶] Our recommended procedure may be more cumbersome than the suggestion advanced in footnote number 26 [of *Babbitt, supra*, 45 Cal.3d at p. 718], but the Committee believes it is less likely to result in confusion to the jury." (See *People v. Weaver*, *supra*, 26 Cal.4th at p. 982; cf. *People v. Carter* (2003) 30 Cal.4th 1166, 1222 ["we strongly caution trial courts not to dispense with penalty phase evidentiary instructions in the future"].)

Here, the trial court not only failed to include CALJIC No. 8.84.1 in the penalty phase jury instructions but also failed to "expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." (*Babbitt*, *supra*, 45 Cal.3d at p. 718, fn. 26.) Instead, the trial court advised the jury that "[g]enerally speaking, all of the instructions I gave you in the first phase you may consider to the extent that they're applicable in this phase," with the specific exceptions of: (1) the "anti-sympathy" instruction; (2) the instruction not to consider penalty; and (3) the instruction concerning proof beyond a reasonable doubt. The court also told the jury that "there may be a couple of other" guilt-phase instructions that the jury would "find by just applying common sense" that "are just not applicable." (41 RT 4344-4345.)

The trial court's oral instruction clearly violated this Court's unequivocal admonition in *Babbitt* to *expressly* tell the jurors which of the previously-given instructions continue to apply, an omission which this Court has deemed "potentially misleading." (*People v. Weaver, supra*, 26 Cal.4th at p. 982.) Here, "the possibility of confusion" (*id.* at p. 983) became a reality, to appellant's substantial detriment.

The trial court's statement that "there may be a couple of other[]" guilt-phase jury instructions that were inapplicable to the penalty phase left the jurors to their own devices to determine the applicable law at the penalty phase. It cannot reasonably be concluded that the jurors could or did successfully engage in this inherently judicial task.

Moreover, there were instructions that were given at the guilt phase that were vital to the penalty determination which the jurors could reasonably have believed did *not* apply to the penalty phase. (*Babbitt, supra*, 45 Cal.3d at p. 718). For example, the jurors might reasonably have concluded that CALJIC No. 2.60 (Defendant Not Testifying – No Inference of Guilt May Be Drawn) did not apply to their penalty determination because, while it is commonly understood to be a rule of law applicable to a determination of guilt, it would not necessarily also be understood to be applicable to a determination of penalty.[95] In the event that appellant's

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[95] CALJIC No. 2.60, as given to the jury in the guilt phase, read as follows:

> "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way."

(continued...)

penalty jurors decided that CALJIC No. 2.60 did *not* apply to their penalty determination, they might then have felt at liberty to impermissibly draw an adverse inference from the fact that appellant did not testify at the penalty phase – for example, that he declined to testify because he had things to hide.

Finally, error was not waived by appellant. A trial court's obligation to instruct sua sponte on the general principles of law raised by the evidence and governing the case (see, e.g., *People v. St. Martin* (1970) 1 Cal.3d 524, 531) is not vitiated by defense counsel's simple failure to request such instructions (see §§ 1259, 1469; *People v. Breverman* (1998) 19 Cal.4th 142, 154-155; *People v. Wickersham* (1982) 32 Cal.3d 307, 330-333).

This case is similar in this regard to *People v. Moon* (2005) 37 Cal.4th 1, 36-39. As in this case, in *Moon* the trial court failed to re-instruct the jury generally regarding the consideration and evaluation of evidence at the penalty phase. On appeal, the People argued that the defendant invited the error because defense counsel "joined in the prosecutor's request to retrieve the copies of the guilt phase instructions from the jurors and even asked the trial court to follow up on that suggestion by directing the jurors." (*Id.* at pp. 36-37.) This Court rejected that argument, reasoning as follows:

> Counsel did not, however, request or invite the trial court to omit from the penalty instructions those instructions he now claims were important. Counsel merely joined in the prosecutor's request to retrieve the written copies of the guilt phase instructions from the jury. Under the circumstances, counsel may well have believed that the court would – consistent with CALJIC No. 8.84.1 – later reinstruct the jury with those guilt phase instructions that retained their

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[95] (...continued)
(VI CT 1760; 27 RT 3384-3385.)

> applicability in the penalty phase. Because counsel did not specifically ask the trial court to refrain from reinstructing the jury with the applicable guilt phase instructions, counsel's actions did not absolve the trial court of its obligation under the law to instruct the jury on the "general principles of law that [were] closely and openly connected to the facts and that [were] necessary for the jury's understanding of the case."

(*Moon*, *supra*, 37 Cal.4th at p. 37, quoting *People v. Carter*, *supra*, 30 Cal.4th at p. 1219.)

Here, while defense counsel agreed with the trial court that it had correctly identified several specific guilt-phase instructions which were not applicable to the penalty phase, defense counsel did not "request or invite the trial court to omit from the penalty instructions those instructions he now claims were important." (*People v. Moon*, *supra*, 37 Cal.4th at p. 37.) Consequently, counsel's actions did not absolve the trial court of its obligation to instruct the jury on the general principles of law applicable to the penalty phase and the error has not been waived in this case.

In conclusion, there was more than a "reasonable likelihood" that "the jury misunderstood the instructions" (*People v. Weaver, supra,* 26 Cal.4th at p. 984) because of the trial court's failure to specify which of the guilt-phase instructions applied at the penalty phase. The trial court's cavalier approach to jury instruction at the penalty phase rendered the death verdict inherently unreliable in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Eddings v. Oklahoma* (1982) 455 U.S. 104.) The death judgment must therefore be reversed. (*Chapman v. California* (1969) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 446-448.)

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APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HIS AUTOMATIC APPLICATION FOR MODIFICATION OF THE JURY'S DEATH VERDICT WAS DENIED BY A JUDGE WHO DID NOT PRESIDE OVER ANY PORTION OF APPELLANT'S TRIAL, AND WHO FAILED TO REVIEW THE GUILT PHASE TRANSCRIPTS AND ONLY PARTIALLY REVIEWED THE PENALTY PHASE TRANSCRIPTS OF THE TRIAL

A. Introduction

Section 190.4, subdivision (e), provides that following a death verdict the defendant is deemed to have applied for modification of that verdict. In ruling on the application, the judge is required to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." (§ 190.4, subd. (e).) Such an independent evaluation by the trial court is also required as a matter of federal constitutional law in order to make "rationally reviewable the process for imposing a sentence of death." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 303.) When the court does not adequately comply with this statutory mandate, a remand for reconsideration of the application is the appropriate remedy. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792.)

In appellant's case, Judge William Trammell, the judge who presided over the entirety of the guilt and penalty phases of appellant's trial, suddenly and unexpectedly retired shortly after the jury returned its penalty verdict, but before appellant's application for modification of verdict could

be heard. As a result, Judge Robert Armstrong was assigned to substitute for Judge Trammell and preside over proceedings related to motions for new trial and for automatic application for modification of the verdict. Despite the fact that Judge Armstrong had not presided over any of the prior proceedings of appellant's trial, he only reviewed the transcripts of the penalty phase – and, by his own admission, did not even review those "line by line" – before ruling on appellant's application for modification of the verdict.

Appellant submits that if the death judgment is not otherwise reversed, a remand for resentencing is required because Judge Armstrong's lack of familiarity with the full trial record rendered him incapable of fulfilling his statutory responsibility of providing an "independent evaluation" of the jury's verdict.

B. Proceedings Below

Judge Trammell was the presiding judge during the guilt and penalty phases of appellant's trial. After receiving the jury's penalty verdicts on December 13, 1996, Judge Trammell set sentencing proceedings for February 19, 1997. (VII CT 1883-1884; 42 RT 4377.)

However, before that hearing could take place, Judge Trammell abruptly retired from the Los Angeles County Superior Court bench.

On June 11, 1997, the parties appeared before Judge Armstrong for motion for new trial and sentencing proceedings, and for consideration of appellant's automatic motion for modification of the verdict under section 190.4, subdivision (e). (43 RT 4415-4420.)

Judge Armstrong first addressed the motion for new trial filed by co-defendant Palma. (43 RT 4403-4415.) Prior to hearing arguments, Judge Armstrong acknowledged that he had only read the reporter's transcripts

related to the penalty phase, though he had not even read those "line by line":

> MR. UHALLEY [counsel for co-defendant Palma]: Has the Court read the transcripts in this matter?
>
> THE COURT: I have reviewed them. *I haven't read them line by line.* I begged counsel since March to cite some lines of the transcript to me, because it is rather voluminous. But *I have read the parts that had to do with penalty, and I have read the parts that had to do with deliberation.* . . .

(43 RT 4408, italics added.)

After he denied Palma's motion for new trial, Judge Armstrong turned to the automatic motions to modify the penalty verdicts. (43 RT 4415.) The judge again stated for the record that he had only read the transcripts of the penalty phase in preparation for the hearing on the motion to modify the verdict: "The Court has read the transcript of the proceedings in which the – on the penalty phase of the trial, and I've also read the material that's been submitted by Mr. Uhalley." (43 RT 4416.) Counsel for co-defendant Palma submitted on his moving papers and asked Judge Armstrong to "make an independent judgment and weigh the evidence as it was presented in that penalty phase." (43 RT 4416.)

The prosecutor responded by providing Judge Armstrong with a brief summary of what he maintained were the circumstances of the offense. (43 RT 4416-4417.) He argued that the trial evidence showed that Palma and appellant entered a one-room house and that "[a]s they entered that house, [appellant] shot and killed one male adult, then shot another male adult and then literally hunted him down while he was cowering in a corner with no escape." (43 RT 4416.) The prosecutor stated that Palma then shot a woman twice in front of her four children; stood over a six-month-old baby

and shot him through the left eye; and shot a five-year-old girl in the back as she attempted to flee. (43 RT 4417.)

With respect to the aggravating evidence presented at the penalty phase, the prosecutor argued that the jury heard evidence that "during a gang fight at a high school [appellant] had used extremely derogatory language toward a counselor, indicated basically he was going to sodomize the counselor and that he was going to get a gun and shoot the counselor in the head and kill him." (43 RT 4418.)

Appellant's counsel responded by emphasizing that appellant had no prior felony convictions. (43 RT 4419.) Counsel also disputed the prosecutor's claim that appellant had threatened to sodomize the counselor, arguing that the prosecutor had misconstrued the meaning of appellant's statements to the counselor. (43 RT 4419.)

After hearing the arguments of counsel, Judge Armstrong denied the motion for modification of the verdict. The judge gave the following statement of reasons denying the motion:

> The principal thrust of Mr. Uhalley's argument seems to be that because the defendants were members of the Mexican Mafia, that they were acting under duress.
>
> But, of course, that contention would be better supported if there were people there so that if they didn't carry out this hit that they were supposed to, that they would immediately be executed themselves. And that simply isn't supported.
>
> They're obviously – this was a Mexican Mafia situation, but the defendants had free will. And particularly the killing of the baby just seems to be so outside of the pale of anything, that showed a wantonness, as far as these defendants were concerned, to wipe out a family. The baby

> and the child were certainly not the objects of the wrath of the Mexican Mafia people.
>
> So I think that reviewing all of the evidence that was taken at the hearing, it just seems to the Court that it would be almost impossible for any responsible jury in this situation to come to any other verdict other than the verdict of death.

(43 RT 4419-4420.) The court proceeded to sentence co-defendant Palma and appellant to death. (43 RT 4425-4431.)

C. Applicable Legal Standards

Section 190.4, subdivision (e), provides that every defendant sentenced to death "shall be deemed to have made" a motion for modification of that sentence, and further provides that:

> [i]n ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to the law and the evidence presented. The judge shall state on the record the reasons for his findings.

(§ 190.4, subd. (e).)

Thus, to comply with the requirements of section 190.4, subdivision (e), "the trial court must independently reweigh the evidence of aggravating and mitigating factors presented at trial and determine whether, in its independent judgment, the evidence supports the death judgment. The court must state the reasons for its ruling on the record." (*People v. Steele* (2002) 27 Cal.4th 1230, 1267.) Moreover, "in determining whether in his or her independent judgment the weight of the evidence supported the verdict, the judge [is] required to assess the credibility of the witnesses, determine the probative force of the testimony, and weigh the evidence."

(*People v. Lewis* (2004) 33 Cal.4th 214, 225 [quoting *People v. Rodriguez, supra*, 42 Cal.3d at p. 793].) "Obviously, the evidence that he considers is that which was properly presented to the jury [citations] – no more, no less [citation]." (*People v. Ashmus* (1991) 54 Cal.3d 932, 1006.)

In light of the specific responsibilities the trial court must exercise in reaching its "independent judgment" – "assess[ing] the credibility of the witnesses, determin[ing] the probative force of the testimony, and weigh[ing] the evidence" – this Court has said that "wherever possible" the judge who presided at trial "personally should consider the modification motion." (*People v. Brown* (1988) 45 Cal.3d 1247, 1264, fn. 7.) However, where the trial judge dies or becomes unavailable before the section 190.4, subdivision (e) motion can be heard, the modification motion may be heard and determined "by any other judge of the same court." (*Ibid;* see also *People v. Lewis* (2004) 33 Cal.4th 214, 224 [citing cases].)[96]

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[96] But see *People v. Allison* (1989) 48 Cal.3d 879, 917-918 (conc. & dis. opn. of Mosk, J.):

> On its face, section 190.4(e) plainly gives the determination of an application for modification of the verdict of death to the trial judge and the trial judge alone – not to any judge and certainly not to an appellate justice or an appellate court. The reason for this is evident: the Constitution imposes a requirement of heightened reliability for a verdict of death; only the trial judge has had the opportunity to observe the defendant and the demeanor of the witnesses; therefore, it is only that judge who can make a constitutionally adequate determination as to whether the defendant should be sentenced to death in accordance with the verdict.

Thus, Justice Mosk argued that where the trial judge is unable to make the determination under section 190.4, there were "only two valid alternatives"

(continued...)

In such cases the Court has consistently required that the substitute judge be fully familiar with the transcripts of the guilt and penalty phase proceedings over which he did not personally preside. Thus, this Court has said that "when the original trial judge is unavailable, necessity requires the replacement judge to evaluate the credibility of the witnesses as best he or she can from the written record." (*People v. Lewis*, *supra*, 33 Cal.4th at p. 226.) In *Lewis*, because the substitute judge had "*fully reviewed* the transcripts of *both the guilt and penalty* phases" (*ibid.*, italics added), this Court found no error in the procedure employed by the substitute judge to rule on the application for modification of penalty in that case.

Similarly, in *People v. Espinoza* (1992) 3 Cal.4th 806, a new judge was substituted to preside over the remainder of the guilt phase as well as the penalty phase after the original trial judge became ill as a result of chemotherapy treatments in the middle of trial. The replacement judge then ruled on the defendant's motion for modification of verdict. On appeal, the defendant argued that because the original trial judge heard (1) critical prosecution evidence about which there were numerous concerns, and (2) had resumed the bench in the intervening period, the matter should be remanded to allow that judge to rule on defendant's modification motion. This Court rejected that argument, reasoning that because the substitute judge had "reviewed the transcripts of the trial proceedings before his substitution and presided over the remainder of the guilt phase and the

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[96] (...continued)
for the reviewing court: either "to exercise our authority under Penal Code sections 1181, subdivision 7, and 1260, and reduce the sentence from death to life imprisonment without possibility of parole while at the same time affirming the judgment of guilt," or "to reverse the judgment as to penalty and to return the matter for a new penalty trial." (*Id.* at p. 918.)

entire penalty phase," he was able to make the necessary independent determination pursuant to section 190.4, subdivision (e). (*People v. Espinoza*, *supra*, 3 Cal.4th at p. 830.)

The trial court is required to "provide a ruling [on the modification motion] adequate 'to insure thoughtful and effective appellate review.'" (*People v. Arias* (1996) 13 Cal.4th 92, 191-192, quoting *People v. Rodriquez, supra,* 42 Cal.3d at p. 794.) As this Court said in *Arias*, *supra*, the trial court need not "recount every detail" of the matters it considers mitigating or aggravating, but must "indicate[] its clear understanding of its duty to weigh all the mitigating and aggravating evidence." (13 Cal.4th at p. 192.)

On appeal, this Court reviews the ruling of the trial court on a capital defendant's motion to modify the death sentence after independently considering the record. (*People v. Steele* (2002) 27 Cal.4th 1230, 1267; *People v. Mickey* (1991) 54 Cal.3d 612, 704.) When the trial court has failed to comply with the requirements that it (1) "make an independent determination whether imposition of the death sentence is proper in light of the relevant evidence and applicable law," and (2) state on the record its reasons for denying the modification motion, the proper remedy is to remand the matter for a new hearing on that motion. (*People v. Burgener* (2002) 29 Cal.4th 833, 891 [failure to make independent determination]; *People v. Sheldon* (1989) 48 Cal.3d 935, 962-963 [failure to state reasons].)

D. This Matter Must Be Remanded to the Trial Court for a New Hearing on Appellant's Motion to Modify the Verdict, Because Judge Armstrong Did Not Preside Over Any Portion of the Trial Proceedings and Did Not Fully Review the Transcripts of Both the Guilt and Penalty Phases of the Trial

Judge Armstrong erred in ruling on appellant's motion to modify the verdict, because he did not preside over any portion of appellant's trial and was unfamiliar with the record of the guilt phase proceedings.

By his own admission, Judge Armstrong had only reviewed Palma's motion for modification of the verdict and the transcripts of the penalty phase in preparation for the hearing, and had not reviewed even those "line by line." (43 RT 4408, 4416.) Indeed, Judge Armstrong's unfamiliarity with the complete record in this case is apparent from the few statements that he made during the course of the hearing.

For example, Judge Armstrong stated that he understood the "principal thrust of Mr. Uhalley's argument . . . to be that *because the defendants were members of the Mexican Mafia*, that they were acting under duress." (43 RT 4419, italics added.) In fact, neither defendant was a member of the Mexican Mafia – a basic and undisputed fact about this case that would have been readily apparent to Judge Armstrong if he had read the guilt phase transcripts of the trial.[97] But since the only materials

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[97] See, e.g., 12 RT 1597-1638 (prosecution's opening statement setting forth People's theory of the case that the Mexican Mafia put out a contract for the murder of one or more of the victims and used the Sangra street gang to carry them out); 13 RT 1662-1664 (testimony of Veronica Lopez that appellant was a Sangra member); 13 RT 1734 (testimony of Victor Jimenez that both defendants were Sangra members); 14 RT 1948-1952 (testimony of Renee Chavez that both defendants as well as others were Sangra members); 15 RT 2080-2084, 2099-2100 (testimony of

(continued...)

Judge Armstrong had reviewed were Palma's motion for modification of verdict and some of the penalty phase transcripts – as the judge acknowledged for the record – it is understandable that he misapprehended this fact. Thus, while Palma's motion for modification of verdict made repeated references to the Mexican Mafia, it did not mention the defendants' affiliation with the Sangra gang:

> A gang expert testified that when one receives an order from the Mexican Mafia, they must carry out the order or face death. This was an ordered hit. This should be considered a mitigating factor. . . .
>
> Under the argument that when one receives an order from the Mexican Mafia or face death, this should be considered a mitigating factor. . . .
>
> At the time of this incident, the [facts that the] defendant was in his early 20's and was under the substantial domination of the Mexican Mafia should be considered a mitigating factor.

(VII CT 1930-1931.) Similarly, in his closing argument at the penalty phase of the trial, Uhalley made repeated references to the Mexican Mafia, but none to the Sangra gang, in connection with his argument that the defendants had "acted under extreme duress or under the substantial domination of another person" (§ 190.3, factor (g)):

> Now, the persons that were involved in this particular crime, the persons who went in there and slaughtered these people, [the] People have proposed two different theories. One theory is that the person or persons who went in there went in there because they were to kill the residents in there because Dido had been once a member of the Mexican Mafia and that this was a retaliation against him and that he is – they're going to get him no matter what happens. And also the second part of the theory that sort of came out was that

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[97] (...continued)
Witness No. 13 about Sangra members).

> Tito was selling and ripping off the Mexican Mafia and they were going to teach him a lesson.
>
> Well, if you remember the testimony of Sergeant Valdemar, that was the Mexican Mafia expert, the guy who was doing undercover surveillance and was the expert on this. He was asked a series of questions concerning about, Well, what if somebody was ordered to do this? What if there were people who were ordered to do this, young gang members or something like that, and these people didn't do [. . .] what they were ordered to do to kill these people? What would happen to them? Well, they would be killed. I assume that [if] the theory that the People are operating under is correct[,] the people that went in there would certainly be [acting under the] substantial duress or domination of another person. Either you're going to do this or you're going to be killed.

(40 RT 4316-4317.) In short, Judge Armstrong's erroneous belief that the "defendants were members of the Mexican Mafia" apparently reflected the fact that he was only familiar with the penalty phase portion of the trial record.

Because Judge Armstrong did not review the guilt phase transcripts, he was unfamiliar with some of the most important evidence weighing in favor of a modification of appellant's penalty verdict. Most importantly, he was unaware that after a videotape of the January 1995 Mexican Mafia meeting with enhanced audio was played for the jury, prosecution expert Richard Valdemar changed his opinion that the Mexican Mafia intended for the children to be killed. As Valdemar acknowledged, the videotape with the enhanced audio made it clear that during the January 1995 meeting Raymond Shyrock stated that he wanted Dido Moreno killed, but "not the kids." (23 RT 3120.) Since the prosecution alleged that co-defendant Palma shot Maria Moreno, Laura Moreno, and Ambrose Padilla, Valdemar's changed opinion suggests that Palma's acts in killing the two

children were not in furtherance of the conspiracy but rather in contravention of it.[98]

Judge Trammell – who heard Valdemar's testimony and was familiar with the controversy over what Shyrock said during the January 1995 meeting – understood that whether the Mexican Mafia intended that the children be killed made "a big difference" in assessing appellant's culpability. (19 RT 2404.) In authorizing appellant's counsel to attempt to enhance the audio of that videotaped meeting, Judge Trammell reasoned:

> I think it is critical because I think it makes a big difference with respect to [appellant]. I am not sure with respect to Mr. Palma it makes any difference if the theory of the prosecution is that he is the one that killed the female and children. . . .
>
> Certainly as to [appellant] I think it makes a big difference. . . . I would say it's critical.

(19 RT 2404.)

Judge Armstrong's lack of familiarity with the trial record when he ruled on appellant's motion for modification of the verdict requires this Court to "vacate the judgment of death and remand [the case to the trial court] for a new hearing on the application for modification of the verdict." (*People v. Burgener*, *supra*, 29 Cal.4th at p. 891-892.) In *Burgener*, this Court found that the trial judge "failed to exercise his statutory duty to reweigh the evidence," and to determine whether that evidence "supported

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[98] "Where a conspirator commits an act or makes a declaration which is neither in furtherance of the object of the conspiracy nor the natural and probable consequence of an attempt to attain that object, he alone is responsible for and is bound by that act, and no responsibility therefor attaches to any of his confederates." (CALJIC No. 6.16; see *People v. Terry* (1970) 2 Cal.3d 362, 402, fn. 18.)

the judgment of death," because there was no "indication in the record" that the judge understood that duty, and the judge's statements "betray[ed his] reliance on a lesser standard of review." (*Id.* at pp. 890-891.) Thus, since the trial judge's statements did not "indicate that [he] had undertaken an independent review of the evidence or balancing of the aggravating and mitigating factors," this Court remanded the matter to the trial court for a rehearing on the motion. (*Ibid*; see also *People v. Bonillas* (1989) 48 Cal.3d 757, 801 [trial court's reference to incorrect standard of review in ruling on modification motion, and failure to indicate which aggravating or mitigating circumstances it considered and the relative weight it gave to them, required remand for rehearing].)

This case involves more compelling evidence than *Burgener* that the trial court failed to comply with its statutory duty to reweigh the evidence. The record here does not merely indicate that the trial judge failed to apply the correct legal standard in ruling on the motion, but rather that the judge lacked the necessary familiarity with the basic facts of the case.

E. The Trial Court's Failure to Make an Independent Determination under Section 190.4 Violated Appellant's Rights Under the State and Federal Constitutions

The trial court's conduct of the modification hearing violated appellant's rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, and the analogous provisions of the California Constitution (Art. I, §§ 1, 7, 15, 16, 17.) Because the death penalty is qualitatively different than any other sentence, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) The high court said in *Gregg v. Georgia* (1976) 428 U.S. 153, 204-206, that judicial review of the jury's findings "serves as

a check against the random or arbitrary imposition of the death penalty." In California, the trial court is charged with the initial judicial review of the verdict. By failing to conduct that judicial review as required by the statute, the trial court violated appellant's constitutional rights to be free from the arbitrary and capricious imposition of the death penalty.

Both this Court and the United States Supreme Court have consistently recognized the critical importance of compliance with the provisions of section 190.4, subdivision(e), "as an additional safeguard against arbitrary and capricious imposition of the death penalty in California." (*People v. Lewis*, *supra*, 33 Cal.4th at p. 226; see also *People v. Frierson* (1979) 25 Cal.3d 142, 179 [finding California's death penalty statute constitutional in part due to automatic modification procedure required under section 190.4, subd. (e)]; *People v. Diaz* (1992) 3 Cal.4th 495, 575, fn.34; *Pulley v. Harris* (1984) 465 U.S. 37, 51-53; *Proffitt v. Florida* (1976) 428 U.S. 242, 248-250 [Florida statute's provision requiring trial judge to consider jury's recommendation, independently weigh evidence in determining penalty, and provide statement of reasons in support of death judgment, protects against arbitrary and capricious imposition of death in violation of Eighth Amendment].) There was no such strict compliance with the requirements of section 190.4, subdivision (e), in this case.

Furthermore, the trial court's failure to independently reweigh the evidence deprived appellant of his constitutionally protected, legitimate expectation that he would be deprived of his liberty or life only by a court following state law in deciding his motion to modify the death sentence. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346 [statute entitling the defendant to have his punishment fixed by a jury created a

constitutionally-protected liberty interest; violation of the statute amounted to an arbitrary deprivation of his right to due process under the Fourteenth Amendment]; *Hewitt v. Helms* (1983) 459 U.S. 460, 471-472; *Vitek v. Jones* (1980) 445 U.S. 480, 488-491; *Wolff v. McDonnell* (1974) 418 U.S. 539, 557.) Thus, the trial court's violation of the statutory procedures set out in section 190.4, subdivision (e), also implicated appellant's federal procedural due process rights.

For instance, in *Walker v. Deeds* (9th Cir. 1994) 50 F.3d 670, 672-673, the Ninth Circuit held that a Nevada sentencing statute implicated a defendant's constitutional rights and created a constitutionally-protected liberty interest. Relying on *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346, the appellate court found that "when a state has provided a specific method for determining whether a certain sentence shall be imposed, "it is not correct to say that the defendant's interest" in having that method adhered to "is merely a matter of state procedural law." (*Ibid.* citing *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300, and *Hicks, supra.*) Every capital defendant in California has a substantial and legitimate expectation that he or she will not be deprived of life or liberty unless the trial court complies with the requirements of section 190.4, subdivision (e). The trial court's failure to do so here clearly implicated appellant's constitutionally-protected liberty interest.

Finally, the trial court's failure to comply with the requirements of section 190.4, subdivision (e), also implicated the defendant's rights under the Eighth Amendment. The automatic penalty review provided for under section 190.4 was clearly designed to ensure the reliability of the determination that death is an appropriate penalty. Because death is qualitatively different from any other punishment, the cruel and unusual

punishment clause of the Eighth Amendment, as applied to the states through the Fourteenth Amendment, requires a heightened standard of reliability in the determinations of both guilt and the penalty to be imposed. (*Gardner v. Florida* (1977) 430 U.S. 349, 357; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; see also *People v. Allison* (1989) 48 Cal.3d 879, 917-918 (dis. opn. of Mosk, J.); *People v. Heishman* (1988) 45 Cal.3d 147, 206 (dis. opn. of Mosk, J.).) Because Judge Armstrong did not preside at any phase of appellant's trial and was unfamiliar with the full record of the proceedings in this case, he could not have conducted a "constitutionally adequate determination" as to whether appellant should be sentenced to death in accordance with the jury's verdict.

Accordingly, appellant's death sentence must be vacated and the case remanded to the trial court for appropriate proceedings pursuant to Section 190.4, subdivision (e).

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

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

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

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

Section 190.3, subdivision (a), directs the jury to consider in aggravation the "circumstances of the crime." (CALJIC No. 8.85; VII CT 1850-1851.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts

which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. In the instant case, the prosecutor argued both the *nature of the motives* to kill Dido Moreno, Tito Aguirre, and Maria Moreno ("to teach a lesson to other people that might mess with the Mexican Mafia or to keep [Maria Moreno] from being a witness and identifying the people that went in there" (40 RT 4269)) *and* the *absence of a motive* to kill either Laura Moreno or Ambrose Padilla ("[b]ut this little girl, do you think she'd ever be able to identify anybody?" (40 RT 4272)) were aggravating factors.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["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 that 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 Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].) This 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.

B. 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. (*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 the aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (CALJIC 8.85; VII CT 1850-1851.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 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) ___ U.S. ___, 127 S.Ct. 856, 863-864, now require any fact used to support an increased sentence, other than a prior conviction, to 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; VII CT 1857-1858.) Because these additional findings were required before the jury could impose the death sentence, *Ring*, *Apprendi*, *Blakely* and *Cunningham* require each of them to be made beyond a reasonable doubt. The trial court failed to so instruct the jury, and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.)

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 in capital cases the sentencer 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 the claim that either the due process clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the

appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Either Some Burden of Proof Is Required, or the Jury Should Be Instructed That No Burden of Proof Applies

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Because Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant entitled under due process clause to procedural sentencing 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, both of which were given in this case (VII CT 1850-1851, 1857-1858), 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 assuming it is permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that principle to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

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

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 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*, 530 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided and that 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 the jury to unanimously find the aggravating factors true also violates the equal protection guaranty 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., § 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 providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.

To apply that requirement to an enhancement finding that carries 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 Fourteenth Amendment and by its irrationality violate both the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment to 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. (See Argmt. 14, *supra.*) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, subdivision (b), violates due process and the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].)

The United States Supreme Court's recent decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Cunningham v. California*, *supra*, 127 S.Ct. 856, 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 claim (*People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Anderson* (2001) 25 Cal.4th 543, 584-585), but asks the Court to reconsider its holdings in these cases.

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." (CALJIC 8.88; VII CT 1858.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14), but appellant asks the Court to 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 that they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (VII CT 1858.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. 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.

This Court previously has rejected this claim (*People v. Arias*, *supra*, 13 Cal.4th at p. 171), but appellant urges the 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

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 jurors of the circumstances that permit them to render a death verdict. By failing to conform to the mandate of 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 it can impose death only if it finds that the aggravation outweighs the mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be

warranted, but failing to explain when an life 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 Failed to Inform the Jurors That Even if They Determined That Aggravation Outweighed Mitigation, They Still Could Return a Sentence of Life Without the Possibility of Parole

Pursuant to CALJIC No. 8.88, the jury was directed that a death judgment cannot be returned unless the jury unanimously finds "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (VII CT 1858.) Although this finding is a prerequisite for a death sentence, it does not preclude a sentence of life without possibility of parole. Under *People v. Brown* (1985) 40 Cal.3d 512, 541, the jury retains the discretion to return a sentence of life without the possibility of parole even if it concludes that the aggravating circumstances are "so substantial" in comparison with the mitigating circumstances. Indeed, under California law, a jury may return a sentence of life without the possibility of parole even in the complete absence of mitigation. (*People v. Duncan* (1991) 53 Cal.3d 955, 979.) The instructions failed to inform the jury of this option and thereby arbitrarily deprived appellant of a state-created liberty and life interest in violation of the due process clause of the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346).

The decisions in *Boyde v. California*, *supra*, 494 U.S. at pp. 376-377, and *Blystone v. Pennsylvania*, *supra*, 494 U.S. at p. 307, do not foreclose this claim. In those cases, the high court upheld, over Eighth Amendment challenges, capital sentencing schemes that mandate death upon a finding

that the aggravating circumstances outweigh the mitigating circumstances. However, that is *not* the 1978 California capital sentencing standard under which appellant was condemned. Rather, in *People v. Brown*, *supra*, 40 Cal.3d at p. 541, this Court held that the ultimate standard in California is the appropriateness of the penalty. After *Boyde*, this Court has continued to apply, and has refused to revisit, the *Brown* capital sentencing standard. (See, e.g., *People v. Champion* (1995) 9 Cal.4th 879, 949, fn. 33; *People v. Hardy* (1992) 2 Cal.4th 86, 203; *People v. Sanders* (1990) 51 Cal.3d 471, 524, fn. 21.)

This Court has repeatedly rejected this claim (see *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Arias*, *supra*, 13 Cal.4th at p. 170), but appellant urges the Court to reconsider these rulings.

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

A similar problem is presented by the lack of an 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 to 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 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.

9. 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 argument 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.

C. Failing to Require the Jury to Make Written Findings Violated Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.)

This Court has rejected these contentions (*People v. Cook* (2006) 39 Cal.4th 566, 619), but appellant urges the Court to reconsider its decisions on the necessity of written findings.

D. 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, factors (d) and (g); VII CT 1850-1851) acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) The Court has previously rejected this argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but appellant urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Some of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. The trial court failed to omit those factors from the jury instructions (VII CT 1850), 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*, 39 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. (VII CT 1850-1851.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in 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* (1985) 41 Cal.3d 247, 288-289). Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

E. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary and Disproportionate Imposition 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 Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings that are 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.

F. 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 of the Fourteenth Amendment to the federal Constitution. 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, subds. (b), (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on which aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. This Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but appellant asks the Court to reconsider that ruling.

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

On numerous occasions, this Court has rejected the claim that the use of the death penalty at all, or, alternatively, the regular use of the death penalty, violates international law, the Eighth and Fourteenth Amendments to the federal Constitution, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101; *People v. Cook*, *supra*, 39 Cal.4th at pp. 619-620; *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 United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who commit their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

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

As this Court has stated, a series of errors that may individually be harmless may nevertheless "rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844; citing *People v. Purvis* (1963) 60 Cal.2d 323, 348, 353; see *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"].)[99] Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282 [combined effect of errors of federal constitutional magnitude and non-constitutional errors should be reviewed under federal harmless beyond a reasonable doubt standard]; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1394-1397; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].) Where "'the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors.' [Citation.]"

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[99] 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.)

(*Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883.) This is just such a case.

In this case, the trial court's failure to afford the defense notice and an opportunity to participate in proceedings in which the prosecution made its in camera showing of "good cause" in support of a pretrial protective order (Argmt. 2) resulted in an overbroad order that deprived the defense of an opportunity to conduct an independent investigation of the case and compelled the defense to conduct its interviews with prosecution witnesses under the supervision of the prosecution (Argmt. 1). These errors denied appellant his rights to due process, to confrontation, to present a defense, and to effective assistance of counsel.

During the guilt phase of trial, the combination of the trial court's errors in admitting grossly prejudicial and irrelevant gang evidence (Argmt. 3), evidence of threats and intimidation of witnesses unconnected to appellant (Argmt. 4), and inadmissible hearsay statements of Mexican Mafia member Raymond Shyrock (Argmt. 5) denied appellant his right to a fair trial on guilt by infusing the trial with inflammatory and inadmissible evidence related to gangs, much of which had nothing to do with appellant. Further, because the prosecution did not present overwhelming evidence of appellant's guilt of the charged crimes, the jury's verdict turned on Witness No. 16's credibility when he implicated appellant in the crimes. The trial court's errors in failing to instruct the jury that Witness No. 16 was an accomplice as a matter of law (Argmt. 6), combined with the court's error in giving the jury CALJIC No. 2.11.5 (Argmt. 7), allowed the jury to return a guilty verdict based solely on the uncorroborated testimony of Witness No. 16, notwithstanding his substantial credibility problems. Similarly, the trial court's error in allowing the prosecution to proceed on an uncharged

conspiracy theory (Argmt. 8) was compounded by the numerous instructional errors related to the trial court's jury instructions on conspiracy (Argmt. 9).

The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const., 14th Amend.; Cal. Const. art. I, §§ 7 & 15.) Therefore, appellant's convictions must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at pp. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

The death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing effect of penalty phase errors].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.) Reversal of the death judgment is mandated here because it cannot be shown that these errors had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v.*

South Carolina (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Moreover, even leaving aside the impact of the guilt phase errors enumerated above, the penalty verdict must be reversed in this case because: (1) the trial court erroneously precluded the defense from questioning the prospective jurors about their ability to consider a life sentence in a case involving the murder of multiple victims, including two young children (Argmt. 12); (2) the trial court erroneously admitted evidence of threats made by appellant as rebuttal evidence (Argmt. 13); (3) the trial court erroneously failed to sua sponte instruct the jurors with CALJIC No. 8.87 after the prosecutor urged the jury to consider the improperly admitted rebuttal evidence as factor (b) evidence (Argmt. 14); and the trial court failed to specifically re-instruct the jury with the applicable guilt-phase instructions, thereby depriving the jury of guidance as to how to consider the penalty phase evidence. (Argmt. 15.)

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

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CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

Dated: June 1, 2007.

Respectfully submitted,

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State Public Defender

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CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630(b)(2)

I, Raoul Schonemann, am the Deputy State Public Defender assigned to represent appellant Richard Valdez in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 85, 900 words in length.

RAOUL SCHONEMANN
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Richard Valdez* California Supreme Ct. No. S062180

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; and that on June 1, 2007, I served a true copy of the attached **APPELLANT'S OPENING BRIEF (not including ARGUMENTS 1 AND 2, FILED SEPARATELY UNDER SEAL PURSUANT TO COURT ORDER)** on the following, by placing same in an envelope addressed as follows:

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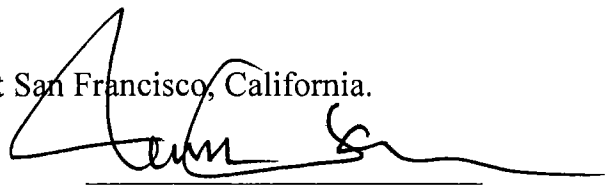
Each said envelope was then, on June 1, 2007, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 1, 2007, at San Francisco, California.



DECLARANT