SUPREME COURT COPY

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No. S065573

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FRANK KALIL BECERRA, Defendant and Appellant.	Los Angeles County (Sup. Ct. No. BA 106878

APPELLANT'S OPENING BRIEF

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

HONORABLE J.D. SMITH, JUDGE

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TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

CONSTITUTIONS

STATE STATUTES

TABLE OF AUTHORITIES

COURT RULES

JURY INSTRUCTIONS

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FRANK KALIL BECERRA, Defendant and Appellant.	)	No. S065573 Los Angeles County Superior Court No BA106878-01

APPELLANT'S OPENING BRIEF

INTRODUCTION

"I don't want to hear from you anymore."

• • •

(Hon. David M. Horwitz, Los Angeles Municipal Court, to appellant Frank Becerra, 1 CT Supp. III 87.)

Central to the constitutional right of self-representation in a criminal trial is the right of the defendant "to have his voice heard."[1] This right stands regardless of how confused, annoying or inadequate that voice may be. In this case the trial court properly granted, but then abruptly and arbitrarily revoked, appellant's self-representation. Its unjustified action

[1] *McKaskle v. Wiggins* (1984) 465 U.S. 168, 174.

rendered meaningless appellant's Sixth Amendment right to defend himself in his own voice.

After revoking appellant's self-representation, the trial court's repeated errors damaged appellant's ability to fairly present his case to the jury. In a prosecution that was long on motive and innuendo and short on other evidence, credibility was critical. Appellant, whom the court knew had a serious heart condition, was forced to testify while wearing a stun belt, which had a significant and deleterious effect on appellant's ability to present his case to the jury. The trial court precluded appellant from presenting crucial evidence pointing to a third party's culpability for the charged murders and impeaching the prosecution's case against him. And the trial court erroneously allowed the prosecution to paint appellant with the sins of the Mexican Mafia – a gang to which all agreed he did not belong. In a ploy to artificially inflate the evidence against appellant, the prosecutor repeatedly introduced speculative, irrelevant and inflammatory expert testimony.

Despite these repeated errors, which manifestly impaired appellant's ability to present his defense, the case against him was not overwhelming. The jury deliberated appellant's culpability for the two first degree murders over the course of four days before convicting him and announced a deadlock during penalty phase deliberations before returning a death sentence.

As shown in this appeal, the trial court's repeated state law and federal constitutional errors prejudiced appellant and require reversal of the judgment.

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a verdict of

death. (Pen. Code, § 1239, subd. (b),[2] Cal. Rules of Court, rule 13.)

STATEMENT OF THE CASE

On December 30, 1994, a complaint was filed in the Municipal Court of Los Angeles County charging appellant, Frank Kalil Becerra, in Count 1 with the murder (§ 187) of James Harding, also known as James Fontaine, on or about December 26, 1994; in count 2 with the murder (§ 187) of Herman Jackson on or about the same date, and also with the special circumstance of multiple murder (§ 190.2, subd. (a)(3)); and in Count 3, with an assault with a deadly weapon (§ 245, subd. (a)(1)) upon George McPherson on or about December 24, 1994. The complaint further alleged that each of the offenses charged in counts 1, 2 and 3 was a serious felony (§§ 1192.7, subd. (c)(1) and 1192.7, subd. (c)(23)). (I CT 6 – 8.)[3]

On January 5, 1995, appellant entered pleas of not guilty and denied all special allegations, enhancements and priors. (1 CT Supp III 6.) On May 19, 1995, the court granted appellant's motion to represent himself (1

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

[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; "Supp CT" 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 designation, 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 six sets of materials, one of which is contained in two separate volumes; these are referenced by the volume of the supplemental transcript, followed by the supplemental clerk's transcript number and page citation, e.g., "1 Supp CT 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.

CT Supp III 38; I CT 13), and on September 28, 1995, the court revoked defendant's pro per status (I CT 16).

On February 13, 1996, the preliminary hearing was held, and appellant was held to answer on all the counts and the special circumstance allegation. (I CT 28-159.)

On February 27, 1996, an information was filed in Los Angeles County Superior Court charging appellant as follows: in count 1 with the murder (§ 187) of James Harding on or about December 26, 1994; in count 2 with the murder (§ 187) of Herman Jackson on or about the same date; in count 3 with first degree residential burglary (§ 459) of the dwelling inhabited by George McPherson on or about December 24, 1994, and with personal use of a deadly and dangerous weapon, a hunting knife, in the commission of the burglary (§ 12022(b)); and in count 4 with assault with a deadly weapon, a hunting knife, (§ 245(a)(1)) upon George McPherson on or about the same date. The information further alleged that each of the offenses charged in counts 1, 2, and 3 was a serious felony (§§ 1192.7 (c)(1) and 1192.7 (c)(23)) and alleged the multiple-murder special circumstance with regard to counts 1 and 2. (I CT 280-282.)

The same day, appellant was arraigned on this information, entered pleas of not guilty and denied the special circumstance allegation. (II CT 311.) On June 30, 1997, the trial began with jury selection (III CT 659), and on July 10, 1997, the jurors and one alternate were selected and sworn to try the case (IX CT 2807).

On July 14, 1997, the trial court considered and in part granted a motion by the prosecutor for the admission of the testimony of a gang expert. (X CT 2819.)

The same day, the guilt phase of the trial began with the prosecution's presentation of its case-in-chief. (X CT 2819.) On July 22,

1997, the prosecution rested, and the defense began its case-in-chief. (X CT 2856.) On July 23, 1997, the defense rested, and the prosecution presented a brief rebuttal. (X CT 2858.)

On July 24, 1997, both parties presented their arguments to the jury, and the jury was instructed and began its deliberations. (X CT 2863.) The jury continued to deliberate over the course of four days, deliberating for the mornings of Friday, July 25 (X CT 2867), Monday, July 28 (X CT 2868) and the full day on Tuesday, July 29. (X CT 2869.) On the morning of July 30, 1997, the jury rendered its verdicts, finding appellant guilty of two counts of first degree murder, first degree burglary, and assault with a deadly weapon, and finding the multiple murder special circumstance to be true. (X CT 3052.)

On July 31, 1997, the penalty phase began with the prosecution's presentation of its case-in-chief. (X CT 3055.) On August 6, 1997, the prosecution rested, and the defense began its case-in-chief. (X CT 3062.) On August 7, 1997, both sides rested without any presentation of rebuttal evidence; both parties presented their arguments to the jury, and the jury was instructed. (X CT 3063.) On Friday, August 8, the jury began its deliberations. (X CT 3065.) On Monday morning, August 11, the jury sent a note to the court that they were deadlocked. (X CT 3081, 3069.) At the trial court's direction, the jury continued deliberating, and later that same day returned a verdict of death. (X CT 3081-3082.)

On October 31, 1997, the trial court denied the appellant's motion for a new trial, denied the automatic motion for modification of the sentence (§190.4, subd. (e)), and entered the judgment of death. (X CT 3092, 3101.)

STATEMENT OF FACTS

A. Guilt Phase

In December of 1994, the Pacific Grand Hotel, with its formerly dignified but now decaying facade, had become a refuge to the denizens of downtown – crack users and dealers, whores and hoods. The Pacific Grand provided a twisted community of sorts, run by drugs, greed and violence. (6 RT 758, 777; 8 RT 899.) Narcotics of all kinds were readily sold and used at all hours of the day and night. (8 RT 899.) The Pacific Grand was a place of chaos and violence.

On December 23, 1994, appellant Frank Becerra registered at the Pacific Grand Hotel. (9 RT 1106.) He came to the Pacific Grand to rock and sell cocaine (9 RT 1105, 1111) and arrived with over six ounces of cocaine (9 RT 1137).[4] At that time, appellant had been using crack cocaine steadily for six weeks. (9 RT 1103.)

In the late night hours of December 27, 1994, Donte Vashaun came upon the bodies of two men – James Harding, known only as "Fontain" to the Pacific Grand community, and Herman Jackson, known as "JJ." The men were found in room 416, Harding's hotel room, bound back to back on chairs that were toppled over. (6 RT 898, 902-904.) The men were both bound with electrical cords wrapped in sheeting and a leather belt. (8 RT 898, 904, 907.) Both men's pants were pulled down below their waists, and one of the men's pants was around his knees with his buttocks and genitals exposed. (5 RT 552; 7 RT 886; 16 RT 1963.)

Both James Harding and Herman Jackson died of strangulation by ligature. (7 RT 841, 844.) In addition, both men suffered blunt force

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[4] To rock cocaine is to turn powder cocaine into rock cocaine which is done by cooking the cocaine with baking powder. (8 RT 971.)

injuries from a beating – Harding's to the head and Jackson's to the chest. (7 RT 842, 845.) Harding's injury was in a distinctive rectangular shape, which would have allowed the police or pathologist to determine what particular blunt object caused the injury. (7 RT 845.) Both men also had cocaine in their systems. (7 RT 842, 847-848.) Both men apparently died at the same time, which was approximately 20 to 30 hours before their bodies were found. (7 RT 860.)

Vashaun was a hotel fixture, "a connection" – someone who sold crack cocaine. (5 RT 627.) Vashaun and Harding were closely connected by their common pursuit of crack cocaine. According to Vashaun, he and Harding smoked crack cocaine together every day (6 RT 788), and when he came to the Pacific Grand, Harding's room was where he went to get drugs and party. (6 RT 778.) Vashaun described himself as an omnivore of illegal substances, saying that he and Harding would get high with "heroin, cocaine, pills, alcohol, marijuana. We did everything in that room." (*Ibid.*) Others in the Pacific Grand community also identified Vashaun as one of Fontain's connections for buying crack. (5 RT 627.) Although Jackson was also a long time resident of the hotel and an associate of Fontain's, Vashaun did not know Jackson. (6 RT 768.)

There was conflicting testimony as to how Vashaun discovered the victims – whether he forced the door open or found the door already busted open (6 RT 602, 804, 828), whether he saw appellant leave the room just prior to his own entry (5 RT 602; 6 RT 828), and whether he was alone or with others (5 RT 602; 6 RT 823, 828). But the evidence is undisputed that upon finding the men, Vashaun did not call the police. (6 RT 753, 828.) Instead, he went to get two other locals, a security guard named "Terry" and another resident named "Red." (6 RT 802, 829.) Terry and Red entered the room, examined and moved the bodies, and decided that both men were

dead. (6 RT 829.) Sometime later, Vashaun called the police. (6 RT 754, 830.)

When the Los Angeles Police Department ("LAPD") arrived at the Pacific Grand, homicide detectives found that the door jam to room 416 had been broken. (8 RT 900.) They identified "JJ" as Herman Jackson and "Fontain" as James Harding. (8 RT 898.)

The crime scene was chaotic with items strewn on the floor and the room generally disheveled. (8 RT 899.) An interior door connected room 416, in which the bodies were found, to room 415, so both rooms were considered to be the crime scene. (8 RT 898, 908.) Although the police department requested DNA testing of blood found at the crime scene, at the time of trial no report from the DNA test was available. (8 RT 951.)

Room 415 alone contained over 2,000 items. (8 RT 934.) Detective Russell Long, the lead LAPD detective assigned to the case, decided not to document every item at the crime scene, because it would have been impossible to document so many items of evidence. (8 RT 934.) Detective Long also determined that it was necessary to rearrange the crime scene in order to photograph and catalogue the evidence (8 RT 903, 912.) A number of items in the room were not mentioned in any police investigation reports, nor booked as crime scene evidence. (8 RT 938-939.) The overlooked items included a "dildo" located next to the bodies (7 RT 880; 8 RT 938-939); a pair of sunglasses on the floor less than two feet from the bodies (8 RT 939-940); and a pair of pliers on the table in the room (8 RT 945, 946). Most of these items were not dusted for prints. (8 RT 955.)

Some parts of rooms 415 and 416 at the Pacific Grand were

dustedfor fingerprints.[5] Eleven latent prints were recovered. (6 RT 726.) Of these prints, some were positive matches to James Harding. Two were positive matches to appellant: a print taken from a lamp on a glass table, identified as People's Exhibit 6-A, and a print taken from an empty 12-ounce Pepsi can recovered from the trash, identified as People's Exhibit 6-B. (6 RT 729-730.) Appellant admitted that he had been in Harding's room, room 415, for an extended period of time, hanging out, partying and eating. (9 RT 1138-1139) The fingerprint technician also testified she could not rule out three other latent prints from room 416 as belonging to appellant. (6 RT 730-732.)

After arriving at the Pacific Grand on December 23, appellant sold and used cocaine. (9 RT 1109.) Throughout the early morning hours of December 24, appellant smoked crack cocaine with a group of girls in his room. (9 RT 1110.) Around 7:00 a.m. appellant asked the girls to leave, and sometime later he resumed selling whatever drugs remained after his three-day binge. (9 RT 1111.)

Meanwhile, in the early morning hours of December 24, Darlene Miller was with James Harding. (5 RT 581.) Miller was another Pacific Grand resident (5 RT 580), and she also was a heavy user of crack cocaine (5 RT 580, 613, 637). Miller was known to the residents of the hotel as "Butt Naked" – a nickname acquired from her habit of taking off her clothes in a drug-induced paranoid delusion that she smelled. (5 RT 580.) In late December 1994, Miller frequently experienced paranoid delusions resulting from her crack cocaine use. As she explained, "it had messed my

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[5] The extent of the printing was unclear because the fingerprint technician who took the prints did not testify (6 RT 725), and the testifying fingerprint technician had never been to the crime scene, so she did not know what areas were or were not dusted for prints. (6 RT 738.)

brain up because I had been on it so long. It just makes me leery and paranoid." (5 RT 636.)

Early on December 24, Miller and Harding went through the Pacific Grand trying to find someone to sell them some crack cocaine. (5 RT 581.) They unsuccessfully tried numerous dealers in the hotel, including Tony the security guard. (5 RT 582, 584.) While they were waiting to talk to Tony, Darlene and Harding saw a black plastic bag, which looked like the bag they had seen appellant using to sell his drugs, on the floor under Tony's table. (5 RT 585.) Harding and Miller picked up the bag and immediately returned to Harding's room, where they began smoking and dividing up the large quantity of cocaine they had taken. (5 RT 588.)

Sometime during the morning of December 24, appellant spoke with Wilson Berry, who helped appellant rock his cocaine at the Pacific Grand. (8 RT 973; 9 RT 1135.) During this conversation, appellant realized that he had lost his remaining six ounces of crack cocaine while on his way from the elevator to Berry's room. (8 RT 974; 9 RT 1115, 1136-1137.) At this point, appellant was already nine hours into a crack cocaine binge. (9 RT 1109-1116.) He began searching everywhere for the missing drugs. (9 RT 1116.) Appellant remembered that he briefly had been with Miller and Harding and went to room 421, where he believed Miller lived, to search for his drugs. (9 RT 1129.) Appellant was with two friends, one of whom was identified as "Lefty." (9 RT 1129.)

George McPherson, Darlene Miller's "husband," was in room 421 when he heard a knock on the door. (5 RT 558.) Earlier that morning, McPherson had smoked some crack that Miller had given him. (5 RT 568.) When McPherson opened the door, appellant and his two friends entered his room. (5 RT 558.) Immediately upon entering, appellant pushed McPherson against the wall, held a knife against his neck, and demanded to

know where his missing drugs were. (9 RT 1130.) During this encounter, appellant threatened to kill McPherson. (5 RT 563; 9 RT 1158.)

Appellant and the two other men began to ransack the room. (5 RT 561.) The three men told McPherson to lie on the floor. (5 RT 561.) When McPherson attempted to get up, one of the men kicked him in the chest and threatened to kill him. (5 RT 561, 563.) According to McPherson, after the initial assault, appellant had no further physical contact with McPherson, and did not strike or tie him up, despite Vashaun's and Miller's testimony to the contrary. (5 RT 566.) McPherson did not require medical attention as a result of this assault. (*Ibid.*) After about five minutes, one of the men found a black bag which they believed had held appellant's crack. (5 RT 569). Shortly after finding the black bag, the three men left McPherson's room. (*Ibid.*)

After leaving McPherson's room, appellant went to room 302, where, based on information from McPherson, he believed he might find Miller. (11 RT 1133.) Appellant and the other two men began to search that room. A man, who may have been Herman Jackson, was in room 302 during the search. (*Ibid.*) Neither appellant nor the other two men made any physical contact with him. (11 RT 1134.) Finding no drugs in room 302, the three men left. (*Ibid.*)

After searching rooms 421 and 302, appellant returned to Wilson Berry's room. (8 RT 973; 9 RT 1136.) Berry agreed that, in exchange for some drugs, he would help appellant recover his crack cocaine. (8 RT 975; 9 RT 1136.) Berry called Harding on the phone. (8 RT 974; 9 RT 1136.) Harding and appellant spoke, and Harding agreed to bring appellant the remaining drugs. (8 RT 976.) Harding returned between one and a half and three ounces of crack, about half of what had been taken. (8 RT 976; 9 RT 1136.)

Donna Meekey was a visitor at the Pacific Grand on December 23 and December 24. Meekey was known by the nickname, "Soul Train," because she had once danced on the popular TV show. (5 RT 658.) On the night of December 23, she stayed with Harding. (5 RT 659.) On December 24, Harding showed Meekey a large quantity of drugs that Harding said he had found. (5 RT 661.) Harding told Meekey he was going to sell the drugs and make a lot of money. (5 RT 663.) But, later that evening, Tony, the security guard, and an unidentified man told Harding that he had to return the cocaine to its owner. (5 RT 666.) Apparently convinced by this advice, Harding left room 416 with the drugs he had taken. (5 RT 667.) When Harding returned later, appellant accompanied him. (*Ibid.*)

Appellant, Harding and Meekey then began to hang out in Harding's room (room 416), playing cards, drinking and smoking crack cocaine. (5 RT 669; 9 RT 1139.) At this point, appellant still had not found Miller, who according to Harding, had the other half of appellant's drugs. (9 RT 1139.) Appellant told Harding that he would have to repay appellant for the drugs that were missing, and Harding left the room and began selling drugs for appellant to make up the money that he owed. (5 RT 669; 9 RT 1139.) Meekey and appellant remained in rooms 415 and 416, smoking crack, drinking and playing cards. At some point Vashaun, as well as other residents and guests at the hotel, joined them. Everyone in the room was smoking crack cocaine. (9 RT 1141.)

Meekey spent a portion of the night of December 24 with appellant smoking crack. (6 RT 684-685.) According to Meekey, appellant initially seemed to be happy with the return of his cocaine. (5 RT 669.) But at times appellant became angry with Harding. (6 RT 694.) Appellant's interactions with Harding that day varied from joking around to speaking angrily to and repeatedly threatening Harding. (6 RT 698, 703.) Meekey

never saw appellant physically attempt to intimidate or abuse Harding. (6 RT 698.)

In the early morning hours of December 25, appellant and Meekey went to appellant's hotel room. (5 RT 670.) Meekey was explicit with appellant that she was not interested in being sexual with him, and appellant abided by her wishes. (5 RT 668, 671). While in appellant's room, appellant showed Meekey a knife he kept for protection. (6 RT 707.) According to Meekey, appellant said that his drugs were from a big organization that was "mafia associated." (5 RT 672.) However, nothing about appellant's links to gangs or the mafia was mentioned in Meekey's statement to the police. (6 RT 720-721.) Appellant denied talking with Meekey about where he got his drugs, and denied ever mentioning the Mexican Mafia in his conversations with Meekey. (9 RT 1157.)

Eventually both Meekey and appellant fell asleep. (5 RT 673.) When they awoke on December 25, appellant again became angry at Harding. (5 RT 674.) Meekey and appellant went downstairs so that Meekey could say goodby to Harding. (*Ibid.*) Appellant then walked Meekey to the bus stop, and she returned to her mother's house. (5 RT 675.)

Meanwhile, Vashaun helped Darlene Miller broker the return of the drugs that she had taken from appellant. (6 RT 791.) At some point on December 24, Miller called Fontain's room at the Pacific Grand, where Vashaun was staying, and asked him what to do with the stolen drugs. (6 RT 810; 9 RT 1142.) Vashaun told her she should return whatever of appellant's crack she had in her possession. (9 RT 1142, 1156.)

Miller arranged to meet appellant on the night of December 24, to return the remaining crack to appellant. (5 RT 599.) Appellant met Miller outside the Pacific Grand. (*Ibid.*) Two other men, one of whom had "18th

Street" tattooed on his arm, were with him. (5 RT 599.) Appellant was neither threatening nor angry with Miller when she returned the crack, and he invited her to his room to party. (5 RT 595, 600.)

Miller gave varying accounts of having seen appellant after she returned his drugs. First, she testified that she saw appellant the following day, i.e., December 25, and that he had threatened that his gang, 18th Street, would "fuck her up" if she did not return all his dope. (5 RT 598.) She responded that she did not have anymore of his dope and that if she did, she would be high on it. (*Ibid.*) Later, Miller testified that after she returned the crack to appellant and left him at the Pacific Grand, she did not see him until the following day, December 25, when she was in her room with Vashaun. (5 RT 601.) In this version, Miller did not speak to appellant, but only observed him walking in and out of Fontain's room. (5 RT 601-602.) In her final version, Miller testified that she saw appellant in the lobby of the Pacific Grand the night the bodies were found. (5 RT 608.) When the police arrived, appellant briskly walked away from the hotel. (5 RT 609.) One of the officers asked Miller to assist them in locating appellant. (*Ibid.*) Miller rode around with the officers until they found and apprehended appellant. (*Ibid.*) No police report was written, nor did any officer testify, regarding these facts. Other than Miller's conflicting accounts, after the morning of December 25, no one saw appellant, Jackson or Harding again at the Pacific Grand until the first hours of December 28, 1994.

In December 1994, appellant worked as a glass installer for his cousin, Sal Kalil, in his business, Sal's Screen and Glass. (9 RT 1050-1051.) The tools appellant used as a glass installer included snips, which could be used to cut wires. (9 RT 1060.) Appellant may have worked on installing a fire release escape, which requires that a wire be cut at the end of the job. (9 RT 1069-1070.) Each employee was provided his own tools

in a tool box, and although against company rules, an employee could take home a pair of snips from the toolbox, and return it the following day. (9 RT 1062, 1067.)

Two experts testified for the prosecution. Wilson Berry, the Pacific Grand resident and drug dealer (8 RT 969, 985), was allowed to testify as an expert, although the area of his purported expertise was not defined. (8 RT 986.) Berry opined that if a drug dealer has drugs taken from him, he is almost "duty bound" to "do something physical" to whoever took the drugs. (8 RT 975, 986.) Berry further claimed that if someone has received drugs from a gang and the drugs go missing, the gang will want either to see the person who is suspected of taking the dope punished or to punish the person who allowed the dope to be stolen. (8 RT 987.)

Sergeant Richard Valdemar, a member of the Los Angeles County Sheriff's Department testified as a gang expert. (8 RT 1001.) According to Valdemar, if a gang member who was selling drugs lost or had stolen from him a kilo or a half a kilo of drugs, the seller would have to retaliate to save face. Saving face primarily would mean killing someone. (8 RT 1009, 1010.) Moreover, the manner in which the person was killed would be significant. The seller would want to kill the person in a heinous fashion in order to terrorize other street gang members and to appease the other members of his own gang. (8 RT 1011, 1021.) In Valdemar's opinion, strangulation and exposing the victims' buttocks would be consistent with the type of gruesome killing that would likely satisfy the members of the gang. (8 RT 1022.)

Valdemar knew appellant to be a member of the 18th Street gang based on appellant's own statements and his tattoos. (8 RT 1015.) According to Valdemar, the "SUR" tattoo on appellant's right leg showed his affiliation and alliance with the Mexican Mafia, which he described as a

very violent gang. (8 RT 1017-1019.) For an affiliate to lose drugs that belonged to the Mexican Mafia would be a sign of disrespect and a potential death sentence. (8 RT 1018.) In Valdemar's opinion, retribution by a gang, especially the Mexican Mafia, often has a sexualized aspect, as exemplified in the movie American Me. (8 RT 1019.)

Appellant testified on his own behalf. He admitted being a member of the 18th Street gang (9 RT 1099), stealing between a quarter and a half of a kilo of cocaine from his drug "connection" (9 RT 1102), selling those drugs in the Pacific Grand Hotel (9 RT 1111), losing between five and six ounces of those drugs (9 RT 1128), threatening and assaulting George McPherson (9 RT 1130), and threatening Harding and Miller when he realized they had taken his drugs (9 RT 1173). However, appellant unequivocally denied having anything to do with the murders of Harding and Jackson. (9 RT 1175.)

B. Penalty Phase

The prosecution's case in aggravation consisted of appellant's two prior convictions, 30 incidents of alleged unadjudicated offenses and victim impact evidence. The prosecution introduced the records of two prior felony convictions, one for violation of Vehicle Code section 10851 (unlawful driving or taking of a vehicle) and the other for violation of Health and Safety Code section 11350 (possession of controlled substance). (14 RT 1636.) These convictions resulted in a state prison sentence. (14 RT 1638.)

None of the unadjudicated incidents introduced by the prosecution resulted in criminal charges, but in each appellant allegedly committed a criminal offense involving the use or threat of force or violence. (§ 190.3, subd. (b).) The following offenses were introduced:

- On April 22, 1990, appellant with a group of fifteen others

assaulted Scott Knapp. (12 RT 1500-1501.) Knapp suffered a welt on his neck and a small laceration on his head. (12 RT 1504.)

- On August 1, 1992, appellant chased fellow Los Angeles County Jail Inmate Darryl Starks down a hall and struck him with the handle of a broom. (14 RT 1677.) During a scuffle that followed, appellant bit Starks on his back. (14 RT 1678.)
- On October 11, 1992, during a detention by two Los Angeles Police Department officers, appellant was involved in a physical altercation with the officers. (14 RT 1653.)
- On January 19, 1993, Los Angeles County Sheriff's deputies searched appellant's cell and found five pieces of unsharpened metal, which could have been turned into shanks. (12 RT 1511, 1512.)
- On April 14, 1993, appellant had a fist fight with inmate Mora at the Mule Creek State Prison. (13 RT 1574.)
- On June 26, 1993, appellant was in a large fight involving fifty inmates at Mule Creek State Prison. (13 RT 1586.)
- In June, 1993, during his disciplinary hearing on the rule violation for his participation in the June 26, 1993, prison fight at Mule Creek State Prison, appellant told the hearing officer that he was not going to comply with the rules and regulations of the department and the institution. (13 RT 1606.)
- On July 7, 1993, appellant had a fight with inmate Bermudez, his cell mate at Mule Creek State Prison. (13 RT 1617.)
- On July 25, 1993, appellant threw urine underneath the door of his prison cell at Mule Creek State Prison, dirtying the

pants, shoes and socks of Correctional Officer Merritt. (13 RT 1622.) Sometime later, appellant shouted to Merritt that he had AIDS and hoped that Merritt would die and give it to his wife and kids. (13 RT 1624.)

- On August 19, 1993, appellant had a fight with inmate Romero at Mule Creek State Prison. (13 RT 1630.)
- On August 20, 1993, appellant threw urine underneath the door of his prison cell at Mule Creek Sate Prison, dirtying the shoes and jumpsuit of Correctional Officer Ximenez. (13 RT 1632.)
- On July 22, 1994, appellant had a fight with inmate Vargas at Pelican Bay State Prison. (15 RT 1772.)
- On August 27, 1994, appellant had a fight with inmate Esperanza at Pelican Bay State Prison. (15 RT 1781.)
- On January 10, 1995, Los Angeles County Sheriff's deputies searched appellant's cell and found a metal jailhouse shank. (14 RT 1660, 1661.)
- On March 2, 1995, appellant threw a mixture of urine and bleach at a deputy sheriff in the Los Angeles County Jail. (12 RT 1520.)
- On April 20, 1995, Los Angeles County Sheriff's deputies searched appellant's cell and found excess linen, excess clothing, 20 capsules of aspirin and a container of bleach. (14 RT 1666.)
- On July 23, 1995, appellant threatened to assault Los Angeles County Deputy Sheriff Dombrowski and threatened to put the deputy in a body bag. (14 RT 1672.) Although appellant did not, in fact, physically assault Deputy Dombrowski during

any of their numerous subsequent contacts (14 RT 1673), Dombrowski took the threats seriously because of appellant's history and background. (14 RT 1674.)

- On September 28, 1995, in open court, appellant yelled at the Judge "if you fuck with me I will fuck with you." Appellant then threw a bundle of pencils that were sharpened at one end at his public defender. (14 RT 1684.)
- On November 25, 1995, appellant told Los Angeles County Deputy Sheriff Mendoza that he was going to assault his public defender at his next court date, and that he would "take out who he had to." (14 RT 1689, 1693.)
- On January 26, 1996, appellant received three pieces of metal from another inmate which he then attempted to break into smaller pieces. (12 RT 1523.) Appellant then returned the pieces of metal to the other inmate. (12 RT 1525.)
- On February 16, 1996, Los Angeles County Sheriff's deputies searched appellant while en route to the shower and found a razor blade. (12 RT 1533.)
- On October 28, 1996, Los Angeles County Sheriff's deputies searched appellant's cell and found a "jail club" made of paper and a razor blade. (14 RT 1642, 1645.)
- On December 5, 1996, appellant pushed the door of an isolation room at the Los Angeles County Jail against Los Angeles County Sheriff Sergeant Steele as he attempted to lock the door, catching Steele on the right side of his cheek. (15 RT 1756.)
- On January 2, 1997, Los Angeles County Sheriff deputies searched appellant's cell and found a jail made handcuff key.

(14 RT 1729.)

- On February 5, 1997, as Los Angeles County Sheriff's Deputy Crane walked by appellant's jail cell, he was stabbed in his right side. (14 RT 1713.) Deputy Crane was not hurt by the stabbing. (14 RT 1722.)
- In February, 1997, appellant reached through the bars of his cell at the Los Angeles County Jail and cut the arm of fellow inmate Derek Brown with a razor blade. (15 RT 1738-1739.)
- In February, 1997, appellant repeatedly threw human excrement into the cell of fellow Los Angeles County Jail inmate Derek Brown. (15 RT 1741.) Appellant also made threats against inmate Brown and his family. (15 RT 1744.)
- On May 12, 1997, appellant, upset over a property dispute, broke the plexiglass in front of his cell at the Los Angeles County Jail. (12 RT 1538.)
- On May 12, 1997, appellant broke off his handcuffs and his leg cuffs by rubbing them against a steel table while alone in a jail cell at the Los Angeles County Jail. (12 RT 1542.) After appellant was re-handcuffed, he attempted to punch a deputy sheriff through the bars of his cell. (12 RT 1545, 1549.)
- On May 13, 1997, appellant beat on the light fixture in his Los Angeles County Jail cell until he broke the light bulb. (12 RT 1561.) Later, a deputy sheriff observed that the toilet in appellant's cell has been ripped from the wall. (12 RT 1562.)

Finally, the prosecution introduced the victim impact testimony of three of Harding's relatives – his mother, his brother and his aunt. Although the witnesses had not seen Harding in a number of years, they still

felt a great sense of loss at Harding's death. (15 RT 1789, 1796, 1799, 1803, 1807, 1809.)

In mitigation the defense presented evidence of appellant's abusive early childhood, primarily from when he was three to five years old. Three neighbors testified to the violence they witnessed being perpetrated against appellant, his brother, and his mother by appellant's father. The Gamboas, mother and son, would hear screams from appellant's household. (15 RT 1815, 1829.) They also saw appellant's father beat him and his brother, both with his hands and with objects. (15 RT 1828, 1816.) The Gamboas further testified that appellant's father made appellant and his brother dig a deep pit and then would put the boys into the pit to punish them. (15 RT 1816, 1828.) Another neighbor, Rosanna Yniguez, testified to hearing screams from the house, witnessing neglect and cruel treatment from the father, and seeing the boys being put into the pit in the backyard and then hearing them scream and cry to be let out. (15 RT 1833-1835). Appellant's mother also testified to the violence perpetrated by appellant's father against appellant and his brother as well as herself. (16 RT 1852-1858.)

The defense also introduced appellant's file from the Los Angeles Department of Children and Family Services (DCFS) through the custodian of records, Vicky Turner-Ezell. (16 RT 1843). Turner-Ezell explained that DCFS works with families where there is child abuse. (16 RT 1842.) There was no testimony in specific regarding appellant's records; however, Turner-Ezell did testify that generally the DCFS file would contain placement records, notes, and interviews conducted by the assigned caseworkers. (16 RT 1844-1845.) The defense also introduced appellant's records from a psychiatric institution, Gateways Hospital, where appellant was committed from February 5, 1987 through July 6, 1987. (16 RT 1847.) There was no testimony received by the jury regarding the contents of these records.

I

THE TRIAL COURT ARBITRARILY REVOKED APPELLANT'S SELF-REPRESENTATION FOR IMPERMISSIBLE REASONS AND WITHOUT WARNING IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

The Sixth Amendment guarantees a criminal defendant the right to represent himself. (*Faretta v. California* (1975) 422 U.S. 806, 834.) Frustrated by what it perceived to be appellant's delay and less-than-adequate lawyering in a capital case, the trial court revoked appellant's self-representation. The trial court's frustration, however, cannot trump appellant's constitutional right to speak for himself. Appellant did not deliberately engage in obstructionist misconduct which threatened to subvert the core concept of the trial – the only permissible grounds for withdrawing a defendant's self-representation. Nevertheless, the trial court abruptly terminated appellant's pro se status without any warning whatsoever. As shown below, the trial court erroneously revoked appellant's self-representation in violation of the Sixth and Fourteenth Amendments to the federal Constitution. Reversal of the judgment is required.

A. Proceedings Below

On May 17, 1995, approximately four and a half months after arraignment, appellant sought to exercise his Sixth Amendment right to self-representation. (1 CT Supp III 26.) The trial court initially was unwilling to even consider a grant of pro se status because this was a special circumstances case. (*Ibid.*) After being reminded by the public defender of the appellant's constitutional right to self-representation, the court relented and agreed to consider his request. (1 CT Supp III 29-30).

On May 19, 1995, after appellant complied with the trial court's

requests that he complete a *Faretta* waiver form and submit an ex-parte letter describing how he would proceed were pro se status granted, the court granted appellant's motion to represent himself. (1 CT Supp III 38). The court also granted appellant's motion for appointment of John Jensen as an investigator. (1 CT Supp III 39-40.) In addition, the court set a hearing on June 2, 1995, for the discovery motion that appellant had just filed. (1 CT Supp III 42; see I CT 174-195 [appellant's discovery motion].) To accommodate that hearing, appellant waived his right to a speedy preliminary hearing. (1 CT Supp III 42.)

At the June 2 hearing, the prosecutor, Assistant District Attorney Allan Walsh ("ADA Walsh") acknowledged that the prosecution had not yet produced 10 items the defense had requested in discovery. (1 CT Supp III 48-51, 56-57, 62, 64.) At appellant's request, the matter was set over until July 10, 1995, for discovery compliance and setting. (1 CT Supp III 65.) At the suggestion of ADA Walsh, the court agreed that this date would begin a new 30- day period for setting of the preliminary hearing. (1 CT Supp III 65.)

At the July 10 hearing, appellant filed a motion for discovery compliance, which identified all the discovery that was still outstanding. (I CT 235-256.) At the hearing, appellant explained that in addition to the items identified at the June 2 hearing, numerous other items were missing from the discovery initially provided. (1 CT Supp III 70.) The court ordered that appellant meet with investigator Jensen about the missing discovery and that Jensen then communicate with ADA Walsh about "all the matters" that appellant requested. (1 CT Supp III 71.) The court stated that if the district attorney was not willing to turn over the requested items, the court would set another discovery hearing. (*Ibid.*) The court urged the parties to "work together to try and get all these items to Mr. Becerra so that

on August 30th I can ask Mr. Becerra if he's ready for prelim, and he will indicate in the affirmative." (1 CT Supp III 72.) The court continued the informal discovery compliance to August 30, 1995. (1 CT Supp III 75.)

At the August 30 hearing, ADA Walsh explained that he had provided the defense with some of the missing documents (1 CT Supp III 79), but had not yet been able to fully comply with the prior discovery order, because his office was waiting for the production of some items. (1 CT Supp III 79-80.) Appellant identified additional items of discovery that were still outstanding. (1 CT Supp III 82-83.) The trial court agreed that appellant needed to have this additional discovery before proceeding to the preliminary hearing. (1 CT Supp III 83.) The court set September 28, 1995, for another discovery hearing and for setting a date for the preliminary hearing. (1 CT Supp III 83-84.)

Appellant had issued numerous subpoena duces tecum to be returned to court for the August 30 hearing. The court refused appellant's request to issue body attachment for those parties who had not complied with these subpoenas, and instead asked appellant to serve the subpoenas again for September 28 hearing. (1 CT Supp III 82.)

At the August 30 hearing, appellant asked to address the trial court ex parte on a motion for advisory counsel that he filed that same day. (1 CT Supp III 84; see Sealed CT 284-298.) The court stated that it would hear the motion on September 28. (1 CT Supp III 84). Appellant requested advisory counsel because he was provided only two hours a day for both telephone and law library access and, therefore, was unable to adequately prepare his defense. (Sealed CT 284, 287-288.) Appellant explicitly sought the appointment of advisory counsel to allow him the necessary access to legal information to present his defense both at the guilt and penalty phases of the trial. (Sealed CT 289-293.)

On September 28, 1995, the trial court "relieved" appellant. (1 CT Supp III 87.) The hearing began as follows:

> THE COURT: All right. Mr. Becerra, the court is going to make the following finding: I gave you pro per privileges a little over four months ago and you continued this case on at least six occasions. The court finds that everything you've done is dilatory; that this case is never going to get off the ground; that the prelim will never occur; and that all you're doing is stalling. Eventually it's going to have to happen.
>
> I don't want to hear from you anymore.
>
> THE DEFENDANT: Your Honor?
>
> THE COURT: I'm telling you to be quiet. I'm releaving [*sic*] you I'm reappointing the public defender's office . . ..

(1 CT Supp III 87.) The court permitted appellant to lodge his objection to the ruling on the record. (1 CT Supp III 87-89.) The trial court cited no legal authority in support of its ruling.

After the trial court revoked appellant's pro se status, appellant expressed his upset with the court's ruling. Deputy District Attorney Lentz, described what occurred: "at the conclusion of the hearing, as Mr. Becerra stood near the door, adjacent to the bailiff, he took a packet of what appeared to me to be four or five sharpened pencils and, in a fit of rage, threw them some 35 feet across the courtroom, nearly missing [deputy public defender] Mr. Fisher." (1 CT Supp III 89-90.)

On November 9, 1995, appellant renewed his motion to represent himself. (1 CT Supp III 93-97.) The court denied appellant's motion for reinstatement of self-representation status. In doing so, the court explained its revocation of appellant's pro se status, finding that because "the case was put over an incredible amount of times[,]" appellant was "dilatory." (1 CT Supp III 97.) Relying on *People v. Lopez*, (1977) 71 Cal.App.3d 568, and its progeny (1 CT Supp III 97-98), the trial court reasoned that its

decision to revoke appellant's pro se status was proper because "after granting pro per status, that status can be revoked because the defendant is 'entitled to and will receive no special indulgence by the court, and the defendant must follow all the technical rules of substantive law, criminal procedure and evidence in the making of motions and objections, the presentation of evidence, voir dire and argument.'" (1 CT Supp III 97-98.)

The trial court went on to quote *Faretta v. California*, *supra*, 422 U.S. at p. 834, fn. 46, asserting that "'the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.'" (1 CT Supp III 99.) The trial court reiterated its prior finding that its revocation of appellant's pro se status was based on the finding that "this case hasn't even gotten to prelim, because it has been put over and over and over and over by you and this court, if it was reviewing your quality of representation by you, would find that the quality of representation was not adequate. For that reason, the court's ruling will stand." (1 CT Supp III 99.) The trial court also denied appellant's request for appointment of advisory counsel. (1 CT Supp III 98.)

B. A Defendant's Self-Representation May Be Terminated Only For Deliberate, Serious And Obstructionist Misconduct And Only After He Has Been Warned That His Misconduct May Result In Revocation Of His Pro Se Status

Thirty years ago the Supreme Court established that "[t]he Sixth Amendment grants to the accused personally the right to make his own defense." (*Faretta v. California*, *supra*, 422 U.S. 806, 819.) The Sixth Amendment "right to dispense with a lawyer's help" is not a legal formalism[]." (*Adams v. U.S ex. Rel. McCann* (1942) 317 U.S. 269, 279.) On the contrary, the right to self-representation is the very personal right to control one's own fate. "The right to appear pro se exists to affirm the

dignity and autonomy of the accused . . ." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 178.) "The primary motivation for the *Faretta* rule is respect for the accused's freedom of choice personally to conduct his own defense." (*People v. Joseph* (1983) 34 Cal.3d 936, 946.)

Consistent with the reason for the *Faretta* right, the permissible bases for revocation or termination of the fundamental right to self-representation are narrowly drawn. From the outset, the United States Supreme Court recognized that this "unconditional right" to self representation could be subject to termination in only a limited set of circumstances. (*Faretta v. California*, *supra*, 422 U.S. at p. 820.) In *Faretta*, the Court stated that "a trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Id.* at p. 834, fn. 46.)

Faretta makes clear that only extreme misconduct can justify revocation of a defendant's right to represent himself. In setting forth the deliberate, serious and obstructionist misconduct standard, the High Court cited *Illinois v. Allen* (1970) 397 U.S. 337, in which a pro se defendant was properly removed from the courtroom, and *United States v. Dougherty*, (D.C. Cir. 1972) 473 F.2d 1113, in which defendants were improperly denied their statutory right to represent themselves. (*Faretta v. California*, *supra*, 422 U.S. at p. 834, fn. 46.) These cases give definition to *Faretta*'s revocation standard.

In *Allen*, the defendant deliberately engaged in serious and obstructionist misconduct. He displayed a pattern of disrespectful, abusive and disruptive behavior which included threatening to kill the trial judge and declaring his intent to prevent the trial from occurring, even after repeated warnings that such conduct could result in termination of his pro se status and removal from the courtroom. (*Illinois v. Allen*, *supra*, 397 U.S.

at pp. 339-340.) The Supreme Court resolved that a Sixth Amendment right may only be terminated because of the defendant's misconduct if, after a warning by the court, the defendant continues to engage in conduct that is "so disorderly, disruptive or disrespectful of this court that his trial cannot be carried in the courtroom." (*Ibid.*) In *Dougherty*, a highly-publicized trial relating to Vietnam War protests, the Court of Appeal ruled that only misconduct which subverts the core concept of a trial will justify termination and that the risk of possible disruption was insufficient to sustain the denial of a timely request for self-representation. (*United States v. Dougherty*, *supra*, 473 F.2d at pp. 1125-1126.) As *Faretta*'s footnote 46 teaches, the right to self-representation may only be revoked if the defendant engages in conduct which is intended to, and in fact does, threaten to undermine the ability of the court to conduct the trial.

This Court has emphasized the strictness of the *Faretta* standard that must govern a trial court's exercise in the termination of pro se status. In *People v. Carson* (2005) 35 Cal.4th 1, the Court asserted that "[t]ermination of the right of self-representation is a severe sanction and must not be imposed lightly." (*Id.* at p. 7.) The Court acknowledged that *Faretta*'s footnote 46 "intended to embrace *Dougherty*'s standard for termination of the right to self-representation: does the defendant's misconduct seriously threaten the core integrity of the trial." (*Ibid.*) As *Carson* explains, the totality of the circumstances must inform the trial court's exercise of its discretion. (*Id.* at p. 12.) However, in evaluating the impact of misconduct "[u]ltimately the relevance inheres in the effect of the misconduct on the trial proceedings, not the defendant's purpose." (*Id.* at p. 11).

Moreover, consistent with the respect for a defendant's dignity and autonomy that underlies the *Faretta* right, a trial court, whenever possible, must warn a pro se defendant that his misconduct may result in the

revocation of his right of self-representation. (*Illinois v. Allen*, *supra*, 397 U.S. at p. 343 [the trial court must first provide some warning before a defendant's conduct can be taken by the court as an implied waiver of a Sixth Amendment right]; *United States v. Dougherty*, *supra*, 473 F.3d at p. 1125 [a pro se defendant should be forewarned of conduct that may operate as a waiver of his pro se right].) This Court similarly requires that a pro se defendant must be warned before his self-representation is terminated due to his misbehavior. (*People v. Carson*, *supra*, 35 Cal.4th at p. 10 [a trial court must consider "whether the defendant has been warned that particular misconduct will result in termination of in propria persona" status].)

Finally, this Court reviews the revocation of a *Faretta* right for an abuse of discretion. A trial court's assessment of the defendant's motives and sincerity as well as the nature and context of his misconduct and its impact on the integrity of the trial are accorded deference. (*People v. Carson*, *supra*, 35 Cal.4th at p. 12.) However, no such deference is required when the trial court's denial of the right to self-representation is based on an erroneous understanding of the applicable law. (*People v. Dent* (2003) 30 Cal.4th 213, 222.)

C. Appellant's Conduct Did Not Even Begin To Approach The Type Of Misconduct That Would Justify Terminating His Self-Representation

The trial court terminated appellant's self-representation based on its findings that appellant was delaying the proceedings through his self-representation, was not conducting himself in the manner in which an attorney would conduct himself, and was not adequately representing himself. (1 CT Supp III 97- 99.) The revocation was erroneous. As a preliminary matter, the finding that appellant engaged in dilatory conduct is unsupported by the record. But even if deliberate delay were proven, it

would not provide a constitutionally permissible basis for terminating appellant's self-representation. Similarly, the alleged – but unproven – inadequacy of appellant's self-representation was not grounds for revoking his pro se status. Although the trial court noted the governing misconduct standard from *Faretta* (1 CT Supp III 98-99), it never found that appellant's conduct met that standard.[6] Nor could it. Appellant's conduct did not compromise the ability of the trial court to conduct the trial, and did not justify the termination of his pro se status. (*People v. Carson, supra*, 35 Cal.4th at p.10.) In addition, the trial court did not, as required, warn appellant that his conduct risked termination of his self-representation. Moreover, appellant's conduct in response to the improper revocation, which was not relied upon by the trial court in explaining his decision, cannot be used on appeal to justify the termination of appellant's pro se status. Viewed in the totality of the circumstances, the trial court's revocation deprived appellant of his right to represent himself in violation of the Sixth and Fourteenth Amendments.

1. The Trial Court Erroneously Terminated Appellant's Self-Representation on the Unsubstantiated Finding That Appellant Had Been Dilatory in Preparing for the Preliminary Hearing

In terminating appellant's *Faretta* right, the trial court found that appellant was dilatory in representing himself. (1 CT Supp III 87.) The trial court stated that appellant had continued the case "on at least six

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[6] Indeed, it appears that the trial court may have been confused about the governing standard for revocation of pro se status. Although the trial court correctly cited footnote 46 of the *Faretta* decision limiting termination of pro se status to a defendant who deliberately engages in serious and obstructionist misconduct, it incorrectly attributed this language to the dissent. (1 CT Supp III 98-99.)

occasions." (1 CT Supp. III 87.)[7] The record proves otherwise. There were four hearings – May 19, June 2, July 10, and August 30, 1995 – between the grant and revocation of appellant's self-representation. (1 CT Supp III 36, 45, 69, 77.) After being granted pro se status, appellant did not once seek a continuance pursuant to Penal Code section 1050, or even informally request that a date be postponed. At each hearing, the trial court – not appellant – suggested a new hearing date after appellant showed that the district attorney had failed to comply with his obligation to produce discovery. (1 CT Supp III 39 [court states it will set a date for appellant and ADA Walsh to discuss discovery]; 1 CT Supp III 65 [clerk suggests the matter be put over for discovery compliance and appellant requests a setting date]; 1 CT Supp III 72 [court puts the matter over as zero of ten and tells the parties to work together to get necessary discovery to appellant]; 1 CT Supp III 84 [court sets the next date as zero of thirty court days for setting of preliminary hearing and wants to make sure appellant has all discovery before proceeding to preliminary hearing].)[8]

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[7] The trial court made no clear finding that appellant's conduct was intended to delay the proceedings. In its initial statement revoking pro se status the trial court used the word "dilatory" to describe appellant's conduct, and found that "all you are doing is stalling." (1 CT Supp. III 87.) In the court's longer, and more reasoned statement in response to appellant's motion for reconsideration, the court did not reiterate the term "dilatory," but found that appellant had put the case "over and over and over" and that his quality of representation was not adequate. (1 CT Supp. III 99). This record does not support that the trial court found that appellant intended to delay the proceedings by his conduct.

[8] Throughout the pre-preliminary hearing proceedings, the court used the terms "zero of ten" and "zero of thirty." Where, as here, the defendant at a pre-preliminary hearing gives a specific rather than general time waiver, the statutory period for hearing the preliminary hearing is

(continued...)

ADA Walsh repeatedly admitted he had not fully complied with discovery orders. (1 CT Supp III 48-51, 56-57, 62, 64 [June 2 hearing]; 1 CT Supp III 79-80 [August 30 hearing].) He never suggested that appellant's requests were unfounded, unnecessary or made for the purpose of delay, and he never opposed or complained that the matter had not yet been set for preliminary hearing.[9]

Furthermore, the trial court recognized the legitimacy of appellant's discovery requests. At the July 10 hearing, he ordered the district attorney to comply with the discovery requests. (1 CT Supp III 71, 72, 75.) And as late as the August 30 hearing, the trial court explicitly stated that appellant needed the outstanding discovery before the preliminary hearing could be held. (1 CT Supp III 83.) In this way, appellant conscientiously litigated

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[8](...continued)
waived only until the next court date. The designation of "zero of ten" or "zero of thirty" is essentially an agreement that if the defendant does not waive time at the next hearing, the preliminary hearing will occur within either ten or thirty days. By selecting the period of "zero of thirty" at the August 30, 1995 date, rather than "zero of ten" as he had at the prior court date, the trial court unilaterally chose to allow for the possibility of further delay before proceeding to preliminary hearing.

[9] The discovery problems also plagued Deputy Public Defender Fisher, who represented appellant before he asserted his *Faretta* rights. There were 132 days between the date that Deputy Public Defender Fisher first appeared as counsel in appellant's case and the date that appellant first announced his desire to proceed pro se. (1 CT Supp III 1, 38.) There were also 132 days between the date that appellant was appointed to represent himself and the date that the court relieved him. (1 CT Supp III 38, 87.) The matter was never set for preliminary hearing during Mr. Fisher's preliminary representation because of problems with obtaining discovery from the district attorney (1 CT Supp III 6, 14, 22), the very same problems that appellant encountered proceeding pro se and that prompted the trial court's revocation decision. These facts also negate any suggestion that appellant deliberately engaged in unnecessary delay.

compliance with the trial court's discovery orders, which the trial court explicitly and the prosecutor tacitly had acknowledged were appropriate.

The trial court's ultimate findings on September 28, 1995, that appellant was dilatory and that the "prelim will never occur" thus are surprising and unsupported. Appellant was diligent, not dilatory. Appellant's conduct throughout his period of self-representation establishes his strong interest in attacking the case against him. His persistent attempts to obtain discovery show his intent to investigate the case and prove that someone else was responsible for the crime, not an intent to postpone or obstruct the trial. Appellant filed several motions with the court, including two discovery motions that detailed outstanding discovery items (I CT 174, 235), issued numerous subpoenas duces tecum for the production of potentially exculpatory information in the possession of third parties (1 CT Supp III 82), met regularly with his investigator (1 CT Supp III 73), immediately identified a new investigator upon learning of the impending retirement of his original investigator (1 CT Supp III 78), and was fully prepared for every court appearance. Appellant also filed a motion for appointment of advisory counsel in which he emphasized he was having difficulty preparing both his guilt and penalty defense because of the limitation of the jail resources. (I CT 286-287.) Nothing in appellant's conduct reflects a desire to do anything other than defend himself against the charges. He engaged in aggressive litigation, not stalling tactics.

In sum, the trial court's finding that appellant was using his pro se status to stall and delay the proceedings is wholly unsupported by the record and cannot justify the termination of his self-representation.

2. Even Assuming That Appellant's Attempts to Enforce Discovery Compliance Did Delay the Case, His Actions Do Not Constitute Obstructionist Misconduct That Would Justify Terminating His Self-Representation

Even assuming, arguendo, that the record supported the trial court's finding that appellant did delay the proceedings, this conduct would not constitute "serious and obstructionist misconduct" that would threaten the core concept of the trial and thus would justify revocation of self-representation. (*Faretta v. California*, *supra*, 422 U.S. at p. 834, fn. 46, citing *United States v. Dougherty*, *supra*, 473 F.2d at p. 1125.) Simply put, delay by itself is insufficient grounds for terminating a defendant's pro se status.[10] Appellant is not aware of a single case that approves revoking self-representation for the ordinary delay necessary for pretrial preparation. Such a rule would be inconsistent with *Faretta*'s clear direction that self-representation may be denied only for serious misconduct that interferes with the court's ability to conduct the trial.

This point is at the heart of *United States v. Dougherty*, *supra,* 473 F.2d 1113, which, as previously noted, the High Court cites approvingly in *Faretta*, *supra*, 422 U.S. at p. 817, and on which this Court relies approvingly in *People v. Carson*, *supra*, 35 Cal.4th at pp. 7-10. In *Dougherty*, the federal court of appeals recognized that "a measure of unorthodoxy, confusion, and delay is likely, perhaps inevitable, in pro se cases." (*Id.* at p. 1124.) The court explicitly rejected the government's argument that a risk of "possible disruption" justified the denial of the

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[10] Delay in asserting the right to self-representation may, however, provide a basis to deny the request. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1219-1220.) However, that is not an issue here, where appellant timely asserted and the trial court granted the right to proceed pro se.

defendants' request to represent themselves. (*Id.* at pp. 1124-1125.) In discussing the conduct that could constitute a waiver of the statutory pro se right at issue in *Dougherty*, the court identified "deliberate dilatory or obstructive behavior" that results in "subversion of the core concept of a trial." (*Id.* at p. 1125.) Thus, as *Dougherty* recognizes, to justify terminating self-representation, the defendant's deliberate delay must not simply postpone the proceedings but must, in some way, obstruct or subvert them.

The Ninth Circuit Court of Appeals reached a similar conclusion in *United States v. Flewitt*, (9th Cir. 1989) 874 F.2d 669. There, the district court terminated the defendants' self-representation because they had not progressed in preparing their defense, had not availed themselves of discovery procedures, and had not properly utilized advisory counsel. (*Id.* at p. 675.) Similar to the trial court's finding in this case, the judge in *Flewitt* told the defendants, "for reasons known best to yourselves, you are not ready for trial and you will not get ready for trial nor will you do the necessary preparation in order to be ready for trial . . . . I am going to find that you are incapable of effectively representing yourselves." (*Ibid.*) Although the defendants in *Flewitt*, who had rejected the prosecution compromise offer for reviewing discovery, were far less diligent than appellant here, the majority squarely rejected the position, taken by the dissenting judge, that the revocation was proper because the defendants used their self-representation as a tactic to delay the trial. (*Id.* at p. 674.)

The court reasoned that "[p]retrial activity is relevant only if it affords a strong indication that the defendants will disrupt the proceedings in the courtroom." (*United States v. Flewitt, supra*, 874 F.2d at p. 674.) Addressing *Faretta*'s footnote 46, the court explained, "[w]e do not construe the footnote to mean that a defendant's Sixth Amendment right to

self-representation – so vigorously upheld by the Supreme Court in *Faretta* – may be extinguished, as it was in this case, due to the defendant's lack of preparation prior to trial." (*Ibid.*) The court found that any failure to prepare diligently for trial – necessarily including any delay caused by such failure – did not establish that the defendants would obstruct or disrupt the trial. (*Ibid.*) Therefore, the court concluded that there were no grounds for retracting the defendants' pro se status: "The Supreme Court never suggested that the defendant's right to self-representation could be terminated for failure to prepare properly for trial." (*Ibid.*) The *Flewitt* rationale applies with even more force to this case where the delay cannot in any way be attributed to appellant who, in contrast to the defendants in *Flewitt*, used all available discovery procedures and unsuccessfully sought the assistance of advisory counsel to prepare for trial.[11]

This Court never has upheld a denial or revocation of the right of self-representation on the basis of ordinary delay alone. Rather, it fully recognizes that the right to self-representation may impede, but takes precedence over, the interest in judicial efficiency. (*People v. Blair* (2005) 36 Cal.4th 686, 740.) Thus, the Court's decisions withholding or withdrawing pro se status have involved conduct that obstructed or disrupted the proceedings rather than delayed them. (See, e.g. *People v. Clark* (1992) 3 Cal.4th at pp. 115-116 [revocation of pro se status upheld where defendant's threats to stand mute, viewed in the totality of the circumstances, were a deliberate course of misconduct designed to disrupt

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[11] The Ninth Circuit more recently has reaffirmed this basic point. In *U.S. v. Lopez-Osuna* (9th Cir. 2000) 232 F.3d 657, 665, the court held that granting pro se status to defendant who went to trial under the misguided belief that in doing so he could address his potential punishment was not improper since he did not exhibit obstructionist courtroom behavior that substantially disrupted the proceedings.

the trial proceedings]; *People v. Welch*, (1999) 20 Cal.4th 701,735 [denial of pro se status upheld after defendant belligerently denied awareness of a calendar date that was set in his presence, turned his back on the trial court when addressing it, interrupted the trial court several times to argue what the court had declared to be a nonmeritorious point, accused the court of misleading him, refused to allow the court to speak and repeatedly refused to follow the court's admonishments to be quiet].)

The same is true of the decisions of the lower California appellate courts. (See, e.g. *People v. Rudd* (1998) 63 Cal.App.4th 620, 632-633 [revocation of pro se status upheld after appellant engages in duplicitious and dishonest conduct by appearing at the first day of trial without any trial materials and announcing he was not ready to proceed, despite an explicit promise to the court prior to the granting of self-representation that he would be ready]; *People v. Davis* (1987) 189 Cal.App.3d 1177, 1200 [revocation of pro se status upheld after defendant continuously disparaged opposing counsel and the court in front of the jury, made accusations in front of the jury that evidence was being manufactured by the government and that the court was prejudiced against the defendant, and continued in this conduct even after being continually warned to desist]; see also *People v. Superior Court (George)* (1994) 24 Cal.App.4th 350, 354-355 [reinstating pro se status of appellant who had been denied self-representation based on finding that he sought self-representation in order to gain privileges to aid in his escape, since: "[t]here is simply no authority to deny a defendant the right of self-representation because the defendant poses a real or perceived threat or harbors an ulterior motive].)

Given the well-established law that only serious and deliberate misconduct that disrupts the trial may justify revoking a defendant's self-representation, it is hardly surprising that none of the cases cited by the trial

court supports its novel position that delay alone can result in a termination of a defendant's pro se status. *People v. Lopez* (1977) 71 Cal.App.3d 568, the lead case cited by the trial court, addresses the advisements required for a valid waiver of counsel when a defendant requests to represent himself under *Faretta*. It does not discuss the issue before the trial court in this case, i.e. the circumstances that may justify revocation of that right. Indeed, in dicta, the *Lopez* court specifically states that revocation of the right of self- representation is limited to those instances in which "there is misbehavior or trial disruption." (*Id.* at p. 575.) Indeed, all of the cases cited by the trial court in its ruling address whether the *Faretta* waiver obtained by the trial court was adequate and thus were irrelevant to its revocation decision. (1 CT Supp III 97-98, citing *People v. Teron* (1979) 23 Cal.3d 103, 113; *People v. McKenzie* (1983) 34 Cal.3d 616, 628; *People v. Clark, supra*, 3 Cal.4th 41, 106; *People v. Curry* (1977) 75 Cal.App.3d 221, 225; *People v. Salas* (1978) 77 Cal.App.3d 600, 604.)

There is no evidence whatsoever that appellant's actions, even if they caused delay, compromised the court's ability to conduct a fair trial. He did not attempt to manipulate the proceedings, and he broke no promises. Nor was appellant "disruptive, obstreperous, disobedient, disrespectful or obstructionist." (*People v. Welch* (1999) 20 Cal.4th 701, 735.) There is no evidence, or even any suggestion, that appellant's insistence that the prosecutor comply with the discovery orders was simply a ruse to delay the preliminary hearing. Far from depicting disruption or obstruction, the record portrays a hard-working pro se defendant doing everything he could to prepare for the preliminary hearing.

The record establishes that while proceeding pro se appellant consistently conducted himself in a manner that evinced his strong interest in advocating his innocence. Prior to being granted pro se status, appellant

filed an ex parte letter with the court outlining his defense strategy. (Sealed CT 3175-3178.) During the four and half months appellant was allowed to represent himself, he fully complied with the defense plan outlined in this letter and tacitly approved by the trial court. On the day that appellant was granted pro se status, he filed motions with the court for pro se funds, appointment of an investigator (with whom he had already met), and an order for discovery compliance. (1 CT Supp III 39-40; Sealed CT 3179-3185, 3162-3174.) Appellant consistently and persistently attempted to identify and obtain discovery to which the district attorney admitted appellant was entitled, and even indexed the documents he had received to help identify the missing discovery. (I CT 235-236, 1 CT Supp III 70-71, 82-83.) Appellant also sought to gather appropriate information from third parties through the issuance of subpoena duces tecum. (1 CT Supp III 82.)[12] Finally, appellant filed a motion seeking appointment of advisory counsel, in which he emphasized that because he was only provided two hours a day for access to the prison library, typewriter and telephone, he was having difficulty preparing both his guilt phase and penalty phase defenses, and required the assistance of standby counsel. (Sealed CT 284-298.)[13]

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[12] As noted previously, the court refused to issue body attachments on the returned subpoenas, and instead asked appellant and his investigator to reissue the subpoenas. (1 CT Supp III 82.)

[13] The trial court's cursory treatment of appellant's request for advisory counsel, and the concomitant abuse of discretion, is further indication of the trial court's arbitrary rejection of appellant's Sixth Amendment rights. A request for appointment of advisory counsel may only be denied after a court exercises its judicial discretion in carefully weighing the request. (*People v. Bigelow* (1985) 37 Cal.3d 731, 744-745.) In this case, the court failed to engage in the necessary analysis exercise of

(continued...)

Despite diligent, respectful work, appellant was penalized with revocation of self-representation for insisting that he be given discovery to which he not only was entitled but which the trial court itself had found he needed before the preliminary hearing. Any delay which may have occurred was benign and inevitable, and certainly not a proper basis for termination.

3. The Trial Court's Unsubstantiated Finding That Appellant Was Unable to Defend Himself Adequately Does Not Justify Terminating His Self-Representation

In revoking appellant's pro se status, the trial court also relied on appellant's alleged failure to provide adequate representation to himself. This was error. As a preliminary matter, the record does not support the finding that appellant was unable to defend himself. Indeed, as previously discussed, the record suggests otherwise. Appellant vigorously and persistently pressed his case, attempting to obtain the discovery he needed to refute the charges. (See *ante* pages 30-33.)

More significantly, *Faretta* itself holds a defendant's alleged inability to defend himself does not justify denying his right to self-representation. (*Faretta v. California*, *supra*, 422 U.S. at p. 834.) In *Godinez v. Moran* (1993) 509 U.S. 389, the High Court reiterated *Faretta*'s ruling that "the defendant's 'technical legal knowledge' is 'not relevant' to

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[13](...continued)
judicial discretion. The trial court did not take into account any of the appropriate factors in evaluating appellant's request, such as the nature of the case, the complications of the issues presented, or appellant's educational background and sophistication. (*People v. Crandell* (1988) 46 Cal.3d 833, 863). Instead, the court opined that the public defender's office would refuse the appointment, and the court itself was unwilling to have the county pay the cost. (1 CT Supp III 98.)

the determination whether he is competent to waive his right to counsel" (*Id.* at p. 400, citations omitted) and "*choose* self-representation." (*Ibid.*, original italics.) In taking this unequivocal position, the High Court fully realized that waiving the assistance of counsel almost always has a deleterious effect on the quality of the defense presented at trial. (See *Faretta v. California*, *supra*, 422 U.S. at p. 834 ["it is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts"]; *Godinez v. Moran*, *supra*, 509 U.S. at p. 399 ["[t]he competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself"]; see also *Martinez v. Court of Appeal of California, Fourth Appellate Dist.* (2000) 528 U.S. 152, 161 ["experience has taught us that a pro se defense is usually a bad defense, particularly compared to a defense provided by an experienced criminal defense attorney"].) Undoubtedly, the Sixth Amendment right to effective assistance of counsel and the Sixth Amendment right to self-representation may be at odds, but the federal Constitution guarantees a criminal defendant the right to waive the former in favor of the latter. The only limitation with respect to quality of representation is that a defendant who elects to represent himself may not later complain that he was ineffectively represented. (*Faretta v. California*, *supra*, 422 U.S. at p. 834, fn. 46.)

In applying *Faretta*, this Court has held that "the defendant's 'technical legal knowledge' is irrelevant to the court's assessment of the defendant's knowing exercise of the right to defend himself." (*People v. Windham* (1977) 19 Cal.3d 121, 128, quoting *Faretta v. California*, *supra* 422 U.S. at p. 836; see also *People v. Welch*, *supra*, 20 Cal.4th at p. 732 fn. 4 [adequacy of representation not a valid consideration in determining whether to grant Sixth Amendment right to self-representation].) As this

Court recently explained, "self-representation more often than not results in detriment to the defendant, if not outright unfairness. (*People v. Blair*, *supra*, 36 Cal.4th at p. 739.) Yet, "irrespective of how unwise such a choice might appear to be" (*People v. Dent*, *supra*, 30 Cal.4th at p. 218), self-representation cannot be terminated without deliberate misconduct.

Other courts agree. (See *Hirschfield v. Payne* (9th Cir. 2005) 420 F.3d 922, 928 [trial court's denial of request for self-representation on the grounds that defendant lacks sufficient legal knowledge is erroneous and directly contrary to Supreme Court precedent]; *United States v. Arlt* (9th Cir. 1994) 41 F.3d 516, 518 [trial court's denial of request to proceed pro se based on defendant's filing of meritless motions without a logical or legal foundation was improper, as there was no evidence defendant was incompetent to stand trial]; *Peters v. Gunn* (9th Cir. 1994) 33 F.3d 1190, 1192 [trial court's denial of appellant's *Faretta* rights based on finding that it was guaranteed appellant could not do a competent job in representing himself was improper]; *People v. Hightower* (1996) 41 Cal.App.4th 1108, 1116 [having found defendant competent to stand trial, it was improper for trial court to deny appellant's request for self-representation].)

The decision in *People v. Poplawski* (1994) 25 Cal.App.4th 881, is particularly instructive. The Court of Appeal reversed the trial court's decision to revoke the pro se status of a defendant whom the trial court found had limited English proficiency, did not understand courtroom terminology, and was unable to exactly grasp the proceedings. (*Id.* at p. 894). The *Poplawski* court first read the *Faretta* requirement that a pro se defendant must "comply with relevant rules of procedural and substantive law" (*Faretta v. California*, *supra*, 422 U.S. at p. 835, fn. 46) not as identifying a basis for revocation of pro se status but rather as precluding an appellate claim of ineffective assistance of counsel at trial. (*Poplawski*, at

p. 895.) The court next reasoned that absent some showing that a defendant's poor performance arises from more than mere ignorance, the right of self-representation cannot be denied based on his or her performance. (*Ibid.*) The court noted "were we to construe *Faretta* and its progeny as requiring the denial of pro se status merely on the basis of an accused's ignorance of the relevant rules of procedure, substantive law, and courtroom protocol, few requests for self-representation would ever be granted." (*Ibid.*) As *Papolowski* makes clear, inadequacies – even severe deficiencies – in a pro se defendant's ability to represent himself are not grounds for revoking his self-representation.

As in *Poplawski*, the only reasonable inference to be drawn from the record in this case is that any inadequacies on appellant's part arose from his ignorance, not from misconduct or attempts to manipulate the proceedings. Appellant filed timely and meritorious discovery motions and was consistently polite and respectful in his dealings with the court and opposing counsel during the pendency of his self-representation. Moreover, appellant's request for the appointment of advisory counsel indicates his awareness of his own limitations and his desire to utilize the appropriate resource to facilitate his self-representation.

In derogation of the incontrovertible rule that a defendant's ability to represent himself is irrelevant to his right to represent himself, the trial court revoked appellant's self-representation on its finding that "the quality of [his] representation was not adequate." (1 CT Supp. III 99.) This decision was Sixth Amendment error.

4. Appellant's Conduct, Viewed in the Totality of the Circumstances, Did Not Subvert the Trial, and Did Not Justify Terminating His Self-Representation Particularly in Light of the Trial Court's Complete Failure to Warn Appellant Prior to Revoking His Pro Se Status

As this Court noted in *Carson*, the totality of the circumstances must inform the trial court's exercise of its discretion in terminating a defendant's *Faretta* rights. (*People v. Carson*, *supra,* 35 Cal.4th at p. 12.) In evaluating a defendant's perceived misconduct, "[u]ltimately the relevance inheres in the effect of the misconduct on the trial proceedings, not the defendant's purpose." (*Id.* at p. 11.) Other significant factors to be considered are "the availability and suitability of alternative sanctions" (*id.* at p. 10); "whether the defendant has been warned that particular misconduct will result in termination of in propria persona" (*ibid.*); and the degree to which the alleged misconduct is removed from trial, and thus "more subject to rectification or correction." (*Ibid.*)

Even assuming, arguendo, that in some cases the delay caused by a pro se defendant's discovery litigation, without a showing of obstructionist misconduct, could justify terminating his self-representation, under the facts of this case, it cannot. The reason is threefold: (1) the trial court is at least partially responsible for the delay caused by the discovery problems; (2) the trial court did not consider, let alone attempt, less drastic sanctions; and (3) the trial court gave appellant no warning that his insistence on obtaining all discovery before the preliminary hearing would jeopardize his pro se status. As a result, the revocation order was as abrupt as it was arbitrary.

As the record clearly shows, this case was bogged down in a discovery dispute. Although at the July 10, 1995 hearing the trial court stated that it would set the matter for a formal discovery motion if the

district attorney refused to produce materials (1 CT Supp. III 71), the court never did. The trial court thus failed to perform its supervisory function and take charge of the production of discovery. Any resulting delay is the responsibility of the trial court for failing to exercise its authority to assure that both parties fully complied with their discovery obligations. (Pen. Code, § 1054.5.)

If the trial court believed that appellant was unnecessarily delaying the proceedings, the proper recourse was to set a firm date for the preliminary hearing. (*United States v. Flewitt, supra,* 874 F.2d at p. 675 ["Thus, if the district judge determines that the defendant's request is part of a pattern of dilatory activity, the court has the discretion to deny the continuance and require the defendant to proceed to trial on the scheduled date"].) That would be the appropriate remedy when a trial court perceives that an attorney is unreasonably delaying the orderly process of a criminal case. Appellant deserved no less. As the High Court has noted, a pro se defendant "is entitled to as much latitude in conducting his defense as we have held is enjoyed by counsel vigorously espousing a client's cause." (*In re Little* (1972) 404 U.S. 553, 555.) The trial court here did not pursue this option. In fact, the trial court did not consider any remedial action short of terminating appellant's *Faretta* right for the purported delay problem which it previously had not even bothered to mention.

This Court views revocation of pro se status as a measure of last resort. In *Carson*, the Court emphasized that before revoking pro se status, the trial court must not only warn the defendant but also must consider "the availability and suitability of alternative sanctions." (*People v. Carson, supra,* 35 Cal.4th at p. 10.) The Court specifically noted that "[m]isconduct that is more removed from the trial proceedings, more subject to rectification or correction, or otherwise less likely to affect the fairness of

the trial may not justify complete withdrawal of the defendant's right of self-representation." (*Ibid.*) Delay in getting to the preliminary hearing certainly comes within this category.

The trial court here utterly failed, as required by *Faretta* and *Carson,* to give appellant any warning that his discovery litigation or his inadequate lawyering risked revocation of his pro se status. There were four court hearings in the four-month period in which appellant represented himself before the trial court issued its revocation order on September 28, 1995. At none of those hearings did the trial court even hint that persisting in attempts to enforce discovery compliance would result in the withdrawal of appellant's self-representation. To the contrary, the trial court approved of appellant's discovery requests, agreed that appellant needed the discovery before the preliminary hearing could take place, and on his own motion, repeatedly continued the court hearings to permit the district attorney to produce the outstanding discovery. Given these unique facts, the trial court not only failed to give appellant the required warning but his comments and actions effectively, although most likely unintentionally, misled appellant into believing that his self-representation was secure and proceeding apace. Thus, the trial court's revocation order was completely unexpected.[14]

Viewing the totality of circumstances, it is evident that whatever

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[14] This case thus contrasts sharply with cases upholding revocation orders where the trial court first warned the defendant that continued misconduct would result in termination. (*People v. Clark*, *supra*, 3 Cal.4th 41, 114 [court twice warned appellant not to abuse his pro per status or it would be revoked]; *People v. Davis*, *supra*, 189 Cal.App.3d 1177, 1200 [trial court warned appellant that future statements by counsel during examination would result in termination of *Faretta* right]; *United States v. Brock* (7th Cir. 1998) 59 F.3d 1077, 1079 [trial court repeatedly attempted to secure cooperation of the defendant and twice held him in contempt prior to revoking pro se status].)

delay may have occurred as a result of appellant's self-representation, it was not deliberate, serious misconduct which threatened to subvert the core concept of the trial. (See *Faretta v. California*, *supra*, 422 U.S. at p. 834 fn. 46.) As such, the trial court's ruling was erroneous, particularly in light of its own failure to take control of the discovery dispute, explore alternative solutions to the delay problem, and give appellant any warning that he might lose his right to represent himself.

5. Appellant's Reaction to Termination of his Self-Representation Does Not Justify the Trial Court's Decision

The alleged misconduct by the appellant – his throwing pencils – when the trial court unexpectedly terminated his self-representation cannot be used to justify the revocation. Significantly, the trial court repudiated rather than relied on this incident to justify its decision. In rejecting appellant's motion to reinstate his pro se status, the trial court was explicit that the basis for the denial was not concern with potential disruptive conduct, but only concern with appellant's perceived dilatory conduct and ineffective legal representation. (1 CT Supp III. 98-99.) Appellant's frustrated outburst was not, as a matter of fact, the reason he lost his pro se status.[15]

Moreover, appellant's pencil-throwing could not, as a matter of law, justify the revocation order. Courts, with good reason, prohibit such post-hoc rationalizations. In the much-cited *United States v. Dougherty*, *supra*, 473 F.2d at p. 1126, the court rejected the government's argument that a

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[15] The trial court's denial of appellant's motion for reinstatement of his pro se status is not relevant to the issue before this Court. The trial court's erroneous revocation of appellant's pro se status was reversible per se, and is inalterable by subsequent proceedings that do not attempt to remedy this error.

defendant's conduct following the denial of the pro se motions could be relied upon to justify the denial. As the *Dougherty* court noted, "[t]his is like using the fruit of an unreasonable search to provide a cause making the search reasonable." (*Ibid.*; see *People v. Welch* (1999) 20 Cal.4th 701, 734-735 [affirming denial of *Faretta* request relying on defendant's disruptive conduct before, not after, trial court's ruling].)

The Ninth Circuit has taken a similar position. In *Bribiesca v. Galaza* (9th Cir. 2000) 215 F.3d 1015, 1020, disapproved on other grounds, *Kane v. Espitia* (2005) __ U.S. ___, 126 S.Ct. 407, 408, the trial court denied the defendant's request to represent himself in a murder case. Immediately after his request was denied, the defendant interrupted the court and protested the court's ruling. (*Ibid.*) The California appellate court upheld this denial, finding that "Bribiesca had demonstrated such obstructionist conduct that he could not abide by rules of courtroom procedure and protocol." (*Id.* at p. 1019.) The Ninth Circuit, reversing on another ground, observed that the subsequent misconduct "could not have been, and was not in fact, the reason for the trial court's decision . . . it is clear that the misconduct did not cause the denial; rather, if anything, the denial prompted the misconduct." (*Ibid.*)

As in *Dougherty* and *Bribiesca*, appellant's act of throwing pencils in the courtroom was prompted by the denial of his right to self-representation. This conduct cannot be used to justify the trial court's decision to revoke his pro se status because having occurred after the denial, it could not have been, and was not, the reason the trial court revoked his pro se status.

D. Reversal Is Required

The erroneous denial of the right to self-representation is reversible per se. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8; *People v.*

Dent, *supra*, 30 Cal.4th at p. 217). Thus, appellant need not show that he suffered any prejudice from the error. (*People v. Joseph*, *supra*, 34 Cal.3d at pp. 946-948; *People v. Ortiz* (1990) 51 Cal.3d 975, 988-989.) As shown above, the trial court terminated appellant's pro se status for factually unsupported and constitutionally impermissible reasons. Where, as here, the trial court improperly revokes appellant's right to self representation and no valid basis exists in the record for the revocation, reversal is required. (*People v. Poplawski, supra,* 25 Cal.App.4th at p. 896; see *Dent*, at p. 218 [same rule applied to denial of self-representation].) Accordingly, this Court should reverse the judgment.

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II

THE TRIAL COURT ERRONEOUSLY FORCED APPELLANT TO WEAR A REACT BELT RESTRAINT DURING THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF STATE LAW AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

In *People v. Mar* (2002) 28 Cal.4th 1201, this Court held that the guiding principle of *People v. Duran* (1976) 16 Cal.3d 282, that there be a showing of manifest necessity before the imposition of a restraint on a defendant in a criminal action, applies to the use of a stun belt. In discussing the appropriateness of a trial court's imposition of the stun belt, this Court noted its concern with the "psychological consequences" of requiring a defendant to wear a stun belt and the impact the use of such a device may have on the exercise of a defendant's constitutional rights of defense. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1227-1228.) Recognizing that concern for a defendant's constitutional rights requires that a court impose the least restrictive and most reasonable alternative to control and secure the court's functions, this Court identified factors, above and beyond those outlined in *Duran*, that a trial court must consider to assure that the stun belt is both safe and appropriate and the least restrictive type of restraint in the particular case. (*Id.* at pp. 1205-1206.)

In this case appellant was subjected to physical restraints throughout the duration of the proceedings. Before trial, the court refused to entertain appellant's motions regarding his restraints and delegated all security decisions to the sheriff. Once the trial began, however, the court unilaterally and without a proper consideration of the particular facts of this case elected to put a REACT stun belt on appellant. Later, at the start of the penalty phase, when appellant refused to wear the stun belt, the trial court

ordered that he be shackled instead. Because the trial court knew that appellant suffersed from a serious heart condition and was the primary witness on his own behalf, the decision to place him in a stun belt at the guilt phase necessarily impeded the exercise of his Sixth and Fourteenth Amendment rights and requires reversal.

A. Proceedings Below

On May 19, 1995, appellant filed a pro se motion objecting to the use of physical restraints. (I CT 203.) Appellant argued that the sheriff's use of physical restraints, which were handcuffs, waist chain and leg chains, was excessive and improperly impaired his ability to participate effectively in the defense of his case in violation of the Sixth and Fourteenth Amendments. (I CT 205-209.) In seeking to be relieved from the extensive physical restraints, appellant argued that their use affected his "ability to concentrate and prepare my defense before, during and after court appearances." (I CT 206.) Appellant further argued that even if manifest need were shown, the court was required to impose the least restrictive form of restraint. (I CT 210.)

On May 19, 1995, the trial court ruled that "no order shall be made either allowing or disallowing defendant's motion" on the grounds that "security is under the sheriff's jurisdiction and that the matter will have to be resolved between the sheriff's department through the courtroom bailiff and the defendant." (I CT 13.) The trial court explained, "[o]n the restraints, I have ruled. And that is up to the sheriff, and I am not going to get involved with that." (1 CT Supp III 42.)

From the beginning of the proceedings, the trial court and its staff were aware that appellant suffered from a heart condition. On March 14, 1995, the trial court signed an order for appellant to receive a special diet. (I CT 12.) On February 13, 1996, appellant's newly-appointed counsel

informed the trial court that "based on a medical examination Mr. Becerra was put on a special, assigned a special diet because he suffers from very severe high blood pressure . . . He has been denied that diet." (I CT 34-35.) The trial court agreed to sign a medical order for a low sodium diet, and noted the importance of the jail providing appellant an appropriate diet and potentially medication given his medical condition. (I CT 35.)

In appellant's first appearance before the Honorable J.D. Smith, who presided over the trial, appellant explained that he was on a medical diet for his high blood pressure and was no longer receiving the appropriate diet. (1 RT B-3-B-5.) On June 9, 1997, a few weeks before jury selection began, appellant once more discussed his high blood pressure with the court. At this proceeding, the court agreed to assist appellant in his efforts to obtain the previously ordered special diet as well as the previously prescribed medication. (1 RT N-3-N4). At the next proceeding, on June 27, 1997, which was the final court appearance prior to jury selection, appellant's counsel once again informed the court that appellant was still having trouble receiving the appropriate diet and medication within the jail. The trial court asked the bailiff to check into this problem and noted "blood pressure is a very serious and dangerous thing." (1 RT O-19.)

Prior to the guilt phase of the trial, the trial court ordered that appellant wear a REACT stun belt. (12 RT 1488.)[16]

Appellant testified on his own behalf at the guilt phase. His testimony extended over the course of two days. Appellant's testimony

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[16] There is no transcript of these proceedings. However, the record establishes that before the beginning of the guilt phase, the trial court ordered that appellant wear a stun belt. (12 RT 1488.) During record correction proceedings, the trial court concluded that there was no reporter's transcript about the decision to use a stun belt. (12/10/03 RT 3 [record correction proceedings].)

confirmed much of the prosecution's case, but differed in significant details. Appellant testified that he had come to the Pacific Grand with drugs that he had stolen (9 RT 1102); that sometime on December 24, 1994, he lost those drugs (9 RT 1116); that he suspected that Harding and Miller had his drugs (9 RT 1116; 10 RT 1266); that he and two of his "homeboys" ransacked Miller's room and another room searching for his drugs (9 RT 1129-1132); that he threatened both Miller and Harding in order to get his drugs returned (9 RT 1173); and that over half of what had been taken was ultimately returned by Miller and Harding (9 RT 1144). However, appellant denied that he remained angry over the loss of his drugs (10 RT 1283), and he testified that he had reached an agreement with Harding and Miller for each to repay him in some way for the missing drugs (9 RT 1140; 10 RT 1272, 1282). Appellant also denied ever telling Donna Meekey that he got the drugs from the Mexican Mafia (11 RT 1157), and denied that his drug sales were in any way involved with gang activity (11 RT 1180). Moreover, appellant denied any involvement in the death of Harding and Jackson. (11 RT 1175.)

The jury was instructed and began deliberations in the guilt phase on July 24, 1997. (X CT 2863.) After four days of deliberations, the jury reached a verdict, finding appellant guilty on all counts and the multiple-murder special circumstance to be true. (X CT 3051.) Immediately after the jury returned its verdict, appellant informed the court, through his counsel, that he wanted to proceed pro se. (12 RT 1469.) The court encouraged appellant to carefully consider his decision and insisted that appellant talk to his relatives and attorneys before the court would consider ruling on his motion. (12 RT 1471, 1472, 1473.) Responding to appellant's request, the court specifically noted that appellant "had not given me any trouble." (12 RT 1472.)

On the following morning, appellant agreed to proceed with counsel. (12 RT 1482.) This decision was apparently made without input from his attorneys, as appellant's lead counsel stated that he was unprepared in part because he assumed "the defendant was going through with his Faretta motion and as of last night that was the situation." (12 RT 1484.) Appellant appeared unshaven and in jail clothes. (12 RT 1486.) Appellant also told the court that he would no longer wear the stun belt, asking instead that he be shackled. (12 RT 1488.) Appellant informed the court that he sought this less restrictive and more appropriate form of restraint because he was concerned about the potential impact of an electrical shock given his heart condition. (*Ibid.*) Both the sheriff and the court agreed that given appellant's medical condition, shackling was a more appropriate form of restraint than the REACT belt. (*Ibid.*)

B. Before A Stun Belt May Be Imposed On A Criminal Defendant, The Trial Court Must Determine That There Is A Manifest Need For Physical Restraints And That A Stun Belt Is Both The Least Restrictive Form Of Restraint And A Safe And Appropriate Device

This Court long ago recognized that handcuffs, shackles, manacles, leg irons and other physical restraints "abridge and prejudicially affect [a defendant's] constitutional rights of defense" as well as his ability to testify on his own behalf. (*People v. Harrington* (1871) 42 Cal. 165, 168.) From its inception the California Penal Code has prohibited a defendant from being subjected to any more restraint than is necessary to maintain the defendant's presence in court. (§ 688.) To protect these rights, this Court has required that a trial court satisfy a two-part test before imposing physical restraints upon a defendant. First, there must be a showing of manifest need for restraints. (*People v. Duran, supra*, 16 Cal.3d at p. 290.) Second, in selecting the particular restraints to be used, the court must

"order the physical restraint most suitable for a particular defendant in light of the attendant circumstances." (*Id.* at p. 291.)

In *People v. Mar*, *supra* 28 Cal.4th 1201, this Court held that the use of stun belts was, at a minimum, subject to the principles set forth in *People v. Duran*, *supra*, 16 Cal.3d 282. This Court recognized that the imposition of a stun belt raised particular concerns in relation to the second prong of the *Duran* test – that the restraint imposed be both safe and appropriate and the least restrictive device available. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226.) As this Court explained, stun belts, while less visible than other types of physical restraints, raise unique risks that require the trial court to consider additional factors within the *Duran* rubric. (*Id.* at pp. 1205-1206.) The REACT stun belt, the device used on appellant,

> will deliver an eight-second 50,000-volt electric shock if activated by a remote transmitter which is controlled by an attending officer. The shock contains enough amperage to immobilize a person temporarily and cause muscular weakness for approximately 30 to 45 minutes. The wearer is generally knocked to the ground by the shock and shakes uncontrollably. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six month to heal. An electrical jolt of this magnitude causes temporary debilitating pain and may cause some wearers to suffer heartbeat irregularities or seizures.

(*Id.* at p. 1215, citations omitted.) This Court emphasized both a stun belt's risk of accidental activations (*id.* at pp. 1205, 1219, 1226) and its "special danger when utilized on persons with particular medical conditions such as serious heart problems" (*id.* at pp. 1206, 1229).

Given the grave physical consequences of stun belts, this Court in *Mar* admonished that courts "proceed with great caution in approving the use of this device." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1205.) This

Court rejected the view that a stun belt should be considered a "less restrictive and presumptively less prejudicial security tool than traditional shackles or chains." (*Id.* at p. 1226.) In reaching this conclusion, the Court addressed the ways in which a stun belt may impair a defendant at trial:

> Even when the jury is not aware that the defendant has been compelled to wear a stun belt, the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury especially while on the witness stand.

(*Id.* at p. 1219; see also *id.* at p. 1226 [noting that a stun belt may impede "the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury"].)

This Court in particular noted its concern that a stun belt may "materially impair and prejudicially affect" a defendant's "privilege of becoming a competent witness and testifying in his own behalf." (*Id.* p. 1216, citation omitted.) In the course of litigation it is not "unusual for a defendant, or any witness, to be nervous while testifying, but in view of the nature of a stun belt and the debilitating and humiliating consequences that such a belt can inflict, it is reasonable to believe that many if not most persons would experience an increase in anxiety if compelled to wear such a belt while testifying at trial." (*Ibid.*) This "increase in anxiety" may impact a defendant's demeanor on the stand; this reaction, in turn, may impact a jury's perception of the defendant, thus risking material impairment of and a prejudicial effect on the defendant's "privilege of becoming a competent witness and testifying on his own behalf." (*Id.* at p. 1216.) For these reasons, even when unobserved by the jury, the use of stun belts raises all of the traditional concerns about prejudice to the

"'constitutional rights of defense'" that attend the imposition of any physical restraints. (*Id.* at p. 1220, quoting *People v. Harrington*, *supra*, 42 Cal. at p. 168.)

Given the physical and psychological risks associated with stun belts, the Court expressly concluded "that a trial court before approving the use of such a device, should require assurance that a defendant's medical status and history has been adequately reviewed and that the defendant has been found to be free of any medical condition that would render the use of the device unduly dangerous." (*Id.* at p. 1206; see also *id.* at p. 1229.) In short, a stun belt should not be approved where its risks are "more onerous than necessary to satisfy the court's security needs." (*Id.* at p. 1206.) These concerns are especially pressing where a defendant testifies in his own behalf. (*Id.* at p. 1219, 1224-1225.)

In addition to the state law limits set forth in *Mar*, the unnecessary use of any physical restraints on a state criminal defendant violates his right to due process under the Fourteenth Amendment. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 569-570.) The United States Supreme Court has explained that because shackling is inherently prejudicial, "it should be permitted only where justified by an essential state interest specific to each trial." (*Id.* at pp. 568-569.) The High Court recently reaffirmed that shackling a defendant at guilt phase implicates Fifth and Fourteenth Amendment due process concerns because it compromises the presumption of innocence, interferes with a defendant's ability to communicate with his lawyer, impedes a defendant's ability to testify in his own defense, and undermines the dignity and decorum of the courtroom. (*Deck v. Missouri* (2005) 544 U.S. 622, 125 S.Ct. 2007, 2013.)

The lower federal courts, like this Court, have expressed concern about the prejudicial effect of a stun belt on a criminal defendant.

(*Gonzalez v. Pliler* (9th Cir. 2003) 341 F.3d 897, 899-900; *United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1305-1306.) They also have cautioned that the device may undermine a defendant's due process and Sixth Amendment rights including the presumption of innocence, the right to a fair trial, the right to participate in his defense, and the right to confer with counsel. (*Gonzalez v. Pliler*, *supra* 341 F.3d at p. 900; *Durham*, at pp. 1304-1306.) For this reason, "a decision to use a stun belt must be subjected to at least the same 'close judicial scrutiny' required for the imposition of other physical restraints." (*Durham*, at p. 1306; see also *Gonzalez*, at p. 900 [before stun belt is used there must be a showing of compelling circumstances of the need for physical restraints and that less restrictive alternatives have been pursued]; accord, *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 713, 728 [failure to consider and impose lesser restrictive forms of restraint is violation of due process requiring reversal of conviction.].)

C. The Trial Court Violated Appellant's Constitutional Trial Rights By Delegating All Decisions About Physical Restraints To The Sheriff, Failing To Make An Independent Determination Of Whether A Stun Belt Was The Least Restrictive And Medically Appropriate Restraint, And Requiring Him To Wear A Stun Belt Despite His Serious Heart Condition

The trial court's imposition of the stun belt on appellant throughout the guilt phase arose from a series of errors by the trial court, each of which flowed from the prior, and which when considered together, denied appellant his right to due process and related constitutional trial rights. First, the trial court abdicated its responsibility to make an independent determination that some form of physical restraint was necessary, allowing this decision to be made solely by the sheriff. Second, as a consequence of the trial court's abdication of judicial responsibility, there was no

independent determination that a stun belt was the least restrictive and medically appropriate form of restraint. As a result, the court illegally and inappropriately required appellant to wear a stun belt despite his serious heart condition. These cascading failures resulted in a violation of appellant's state and federal constitutional rights to a fair trial.

Although there may have been manifest necessity for some kind of physical restraint in this case, the trial court abdicated its duty under the second prong of the *Duran/Mar* analysis to determine that the stun belt was the least restrictive security tool and "was safe and appropriate under the particular circumstances." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1230.) The trial court did not "proceed with great caution" as required by *Mar*, *supra*, at p. 1205, in deciding that appellant must wear a stun belt at the guilt phase, including during the day and a half of his testimony. In fact, the trial court made no determination at all about whether a stun belt was the least restrictive form of restraint or was safe and appropriate for appellant. Instead of fulfilling its judicial duty under *Duran*, *supra*, 16 Cal.3d at p. 291, the trial court flatly refused to rule on appellant's pro se pretrial motion to remove his restraints, stating "that is up to the sheriff, and I am not going to get involved with that." (1 CT Supp III 42.)

This absolute delegation plainly violated the trial court's duty to make its "*own* determination of 'manifest need' for the use of such restraint as a security measure in the particular case." (*People v. Mar*, *supra*, 28 Cal.4th at p.1218, original italics.) The determinations of both the manifest necessity for a restraint and the appropriateness of the particular restraint based on the particular facts of a case are decisions that the trial court must make independently. They are not decisions that may be delegated. (*People v. Hill* (1998) 17 Cal.4th 800, 841 [trial court must make independent determination of manifest necessity and "abuses its discretion

if it abdicates this decisionmaking responsibility to security personnel or law enforcement"]; *People v. Fierro* (1991) 1 Cal.4th 173, 219 [failure by trial court to make independent determination of need to shackle defendant at preliminary hearing was abuse of discretion]; *People v. Cox* (1991) 53 Cal.3d 618, 652 [trial court must make determination of manifest need based on facts that are present in the record and not on mere rumor or innuendo]; *People v. Duran*, *supra,* 16 Cal.3d at p. 293 [trial court must make decision to impose physical restraint on a case-by-case basis and not as a matter of general policy].)

In this case, the trial court did not reach an independent determination that a stun belt was needed and "that the defendant ha[d] been found to be free of any medical condition that would render the use of the device unduly dangerous." (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1201, 1206.) At some point after the trial court's improper abdication to the sheriff of all decisions regarding the use of physical restraints in this case, appellant was required to wear a stun belt. (12 RT 1488.) It is evident that the court did not consider appellant's medical condition in ordering that he wear a stun belt, because had the court done so, appellant's heart condition would have precluded use of the stun belt. (*Hawkins v. Comparet-Cassani* (2001) 251 F.3d 1230, 1234 [citing to Los Angeles County Sheriff's written policy precluding the use of the REACT stun belt on "persons with heart diseases" in civil action to enjoin use of stun belt in Los Angeles County courtrooms].) Having been categorically informed by the court that it would not hear appellant's complaints about his physical restraints and that all decisions about such restraints rested with the sheriff, appellant at this juncture was left without judicial recourse. (See *People v. Dent* (2003) 30 Cal.4th 213, 219 ["[w]e do not require trained counsel to repeatedly make a motion that has been categorically denied; how much

more should we require of an untrained defendant seeking self-representation?"]; *City of Long Beach v. Farmers and Merchants Bank of Long Beach* (2000) 81 Cal.App.4th 780, 784 [having raised the issue before the trial court and asked for a ruling, counsel reasonably could believe further action was futile]; *People v. Hopkins* (1992) 10 Cal.App.4th 1699, 1702 [after trial court overruled mistrial motion, defense counsel could reasonably believe further objection would be fruitless].) Thus, the trial court's unlawful abdication of his judicial duty to determine both the necessity of restraints and what restraints were safe and appropriate rendered use of the stun belt on appellant unlawful. (*People v. Mar*, *supra*, 25 Cal.4th at p. 1226.)

The trial court's unlawful delegation of his judicial authority to the sheriff not only violated state law, but also infringed upon appellant's federal due process rights. The due process clauses of the Fifth and Fourteenth Amendments prohibit the use of physical restraints "absent a trial court determination in the exercise of its discretion that they are justified by a state interest specific to a particular trial." (*Deck v. Missouri*, *supra*, 125 S.Ct. at p. 2012.) As the *Deck* court noted, although there is not unanimity about "specific procedural steps a trial court must take" prior to the imposition of physical restraints, there is unanimity on "the basic principle" that the court must exercise its discretion. (*Ibid.*) Whatever else may be required, at a minimum due process requires that prior to the imposition of a particular form of physical restraints, the trial court must "take[ ] account of the circumstances of the particular case." (*Deck*, *supra*, 125 S.Ct. at p.1024; see *Langnes v. Green* (1931) 282 U.S. 531, 541 [describing the exercise of discretion as "a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the

reason and conscience of the judge to a just result"].) Additionally, the trial court's unlawful delegation violated appellant's rights under both the confrontation clause of the Sixth and Fourteenth Amendments and his federal constitutional right to be present at any proceeding "'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745, quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106; *United States v. Gagnon* (1985) 470 U.S. 522, 526; *Badger v. Carwell* (9th Cir. 1978) 587 F.2d 968, 970 [finding violation of defendant's right to be present when he was excluded upon insufficient showing that he would not be peaceful].)

As a result of the trial court's repeated and significant failures to adhere to the procedural requirements for the use of physical restraints, appellant was required to wear the stun belt despite the fact that for him it was neither a safe nor appropriate restraint. Although informed of appellant's serious heart condition, the trial court failed to consider the impact that requiring appellant to wear a stun belt would have on the exercise of his constitutional rights. The trial court was repeatedly made aware of appellant's heart condition (1 RT B-3, B–4, O-19), and the court itself identified that appellant's high blood pressure was a "very serious and dangerous thing" (1 RT O-19). The Los Angeles County Sheriff's own policies prohibit the use of the stun belt on persons, like appellant, with heart disease. (*Hawkins v. Comparet-Cassani, supra*, 251 F.3d at p. 1234.) As the president of the company that manufactures the REACT belt has explained, "We don't recommend that it be placed on anyone who has a heart condition. The reason is that, if they have to wear it for eight hours, there's a tremendous amount of anxiety. The fear will elevate blood pressure as much as the shock will." (Cusac, *Life in Prison: Stunning*

Technology: Corrections Cowboys Get a Charge Out of Their New Sci-Fi Weaponry (July 1996) The Progressive, p. 20.) As this Court itself has noted, "use of a stun belt without adequate medical precautions is clearly unacceptable." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1229.) Despite the court's awareness of appellant's medical condition, which rendered him categorically unfit for the use of the stun belt, the trial court chose to proceed with the stun belt, apparently with complete disregard for the protocols of the Los Angeles County Sheriff's Department and, more importantly, appellant's health and his right to a fair trial. (*Hawkins v. Comparet-Cassani*, *supra*, 251 F.3d at p. 1234.)

As this Court has explained, the imposition of the stun belt does not satisfy the requirement of *Duran* when "the security officials who placed the stun belt on defendant made no on-the-record showing of any circumstances to support the imposition of a stun belt on defendant and the trial court failed to require any such showing." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1220.) This was precisely what happened in this case. It was not until after the guilt phase, when appellant finally was able to lodge an objection to the use of the stun belt, that the trial court actually considered the appropriateness of the device. When appellant himself identified that the device was unsafe because of his heart condition, the court agreed that the REACT belt was not appropriate and that shackles were more appropriate for appellant. (12 RT 1488.) The record here is clear that the use of the REACT stun belt was neither appropriate nor the least restrictive restraint available. The trial court abused its discretion in imposing a stun belt on appellant and thereby violated appellant's Fourteenth Amendment right to due process and his related constitutional trial rights.

D. The Judgment Must Be Reversed Because Appellant Was Prejudiced By Being Forced To Wear A Stun Belt During The Guilt Phase

This Court historically has assessed the erroneous imposition of physical restraints under *People v. Watson* (1956) 46 Cal.2d 818, 836-837, the standard applicable to ordinary state law error. (*People v. Duran*, *supra*, 16 Cal.3d at pp. 288-289, citations omitted.) In *Mar*, this Court found the improper use of a REACT belt in that case to be prejudicial under the *Watson* standard, but specifically left open the question whether the "error in requiring a defendant to testify while wearing a stun belt, without an adequate showing of danger, constituted federal constitutional error that is subject to a more rigorous prejudicial error test." (*People v Mar*, *supra*, 28 Cal.4th at p. 1225, fn. 7; see also *Duran*, at p. 296, fn. 15 [court did not express an opinion whether the erroneous imposition of physical restraints, alone or in combination with other trial court errors, resulted in the deprivation of a federal constitutional right of sufficient stature to require reversal based the rule of *Chapman v. California* (1967) 386 U.S. 18, 24].)

However, as noted above, federal courts have long recognized the erroneous imposition of physical restraints to be of federal constitutional dimension. Federal precedent establishes that the improper use of a stun belt is not only a federal constitutional violation, but is also structural in nature, and therefore not subject to harmless error analysis. (*Arizona v. Fulminante* (1991) 499 U.S. 217, 307-309.) At a minimum, the error should be subject to the *Chapman* prejudice standard. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Under any standard of review, the trial court's erroneous imposition of a stun belt on appellant during the guilt phase, including during his testimony in his own defense, requires reversal of the judgment.

1. Reversal is Required Under *Riggins v. Nevada*

The United States Supreme Court has developed distinct analyses to determine whether an error of federal constitutional magnitude is subject to or defies harmless error analysis. In *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 307-309, the Court differentiated "structural error," which defies harmless error analysis and thus requires automatic reversal, from "trial error," which is amenable to such analysis and thus requires reversal when the prosecution cannot prove the error harmless beyond a reasonable doubt. (*Id.* at pp. 307-308.) As this Court noted in *Mar*, *supra*, 28 Cal.4th at pp. 1227-1228, the error in this case is similar to the involuntary administration of antipsychotic medication during trial at issue in *Riggins v. Nevada* (1992) 504 U.S. 127, which the United States Supreme Court found cannot be subject to harmless error analysis. Use of a stun belt, like use of psychotropic medication, may mentally or psychologically impair a criminal defendant's ability to conduct his defense. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1227-1228.)

In *Riggins v. Nevada*, *supra*, 504 U.S. 127, the High Court, eschewing the structural-trial error categorization, reversed Riggins's robbery and murder convictions because the Nevada courts failed to make sufficient findings to support the forced administration of the drug Mellaril. (*Id.* at p. 129.) Riggins was not required to show how the trial would have proceeded differently if he had not been given Mellaril. (*Id.* at p. 137.) As the High Court explained:

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. . . . Like the consequences of compelling a defendant to wear prison clothing, (*Estelle v. Williams*, *supra*, 425 U.S. at pp. 504-505) "or of binding and gagging an accused during trial," (*Illinois*

> *v. Allen*, *supra*, 397 U.S. at p. 344), the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript.

(*Ibid.*) What the United States Supreme Court would "not ignore, is a strong possibility that Riggins' defense was impaired due to the administration of Mellaril." (*Ibid.*) The High Court held that, even if the Nevada Supreme Court was correct in holding that expert testimony allowed jurors to assess Riggins's demeanor fairly, "an unacceptable risk of prejudice remained." (*Id.* at p. 138.)

Riggins governs this case and requires, without an actual prejudice assessment, reversal of appellant's convictions and death judgment. The precise consequences of forcing the stun belt restraint upon appellant cannot be shown from a trial transcript. There is a strong possibility appellant's defense was impaired due to the involuntary stun belt restraint. An unacceptable risk of prejudice remains that, because of the stun belt restraint, jurors were not allowed to assess appellant's demeanor fairly during the two days he testified in his own defense. Reversal of the judgment is required. (*Id.* at pp. 129, 137-138; *Illinois v. Allen* (1970) 397 U.S. 337, 344; *Arizona v. Fulminante*, *supra*, 499 U.S. 279, pp. [all rejecting harmless error doctrine for unjustified use of physical restraints].)

2. Even Assuming the Erroneous Use of a Stun Belt Is Subject to Harmless Error Review, Reversal Is Required Under Both the *Chapman* and the *Watson* Standards

Assuming that improperly forcing appellant to wear a stun belt during trial does not require a per se reversal, appellant urges this Court to hold that the *Chapman* standard applies in determining whether the erroneous use of a stun belt requires reversal. Under *Chapman*, 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.) "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, supra*, 508 U.S. at p. 279.) The prosecution should be held to, and cannot meet, this burden here. But even if this Court were to apply the *Watson* "reasonable probability" standard, reversal still would be necessary. Under the *Watson* standard, reversal is required when there exists "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result." (*People v. Watson, supra*, 46 Cal.2d at pp. 836-837.) Whether judged under the *Chapman* standard or the *Watson* standard, appellant was indeed prejudiced by being forced to wear a stun belt, because the device both had an impact on his demeanor while testifying and impeded his ability to communicate with his counsel (10 RT 1233, 1260, 1286) and the prosecutor emphasized appellant's demeanor on the witness stand, calling it evidence of his guilt (11 RT 1404).

Appellant's testimony was critical to his defense. The prosecution's case rested primarily on the believability of four admitted drug addicts, all of whom had been smoking crack heavily during the time of the events about which they testified, and the gang experts. Although the prosecution's case was heavy on motive and opportunity, the other evidence linking appellant to the crime was far from compelling. The sole physical evidence against appellant were two of his fingerprints found at the crime scene (6 RT 728) which were as consistent with appellant's exculpatory testimony as with the inculpatory theory put forward by the prosecution (9 RT 1138-1140). The other evidence relied upon by the prosecution was weak and highly circumstantial: appellant's access to cutting tools and wire

through his work as a glass installer (9 RT 1060, 1070; 11 RT 1354), which never were connected to the crime scene, and appellant's prior ransacking of McPherson's hotel room (11 RT 1336). Without overwhelming evidence of appellant's guilt, the jury's verdict turned on who it found more credible – the prosecution's witnesses or appellant. The prosecutor conceded before the jury that the guilt phase was a credibility contest: "The defendant's credibility is absolutely at issue here because if you find that the defendant was evasive, lied to you, was not credible, that goes to the heart of what the defense is trying to do." (11 RT 1404).

Simply put, if the jury had believed appellant, he would have been acquitted. The pressure that any defendant would feel testifying in such a situation is tremendous – his freedom, and perhaps very life, depends on convincing twelve strangers from entirely different walks of life of his truthfulness. For appellant, the pressure was magnified exponentially, as he sat wired with a belt around his midriff, prepared to be shocked with 50,000 volts of electricity if his conduct on the stand caused any concern to a sheriff's deputy, or if the belt was accidentally activated for no reason whatsoever. In *Mar*, this Court acknowledged the plain reality of this situation (*People v. Mar*, *supra*, 28 Cal.4th at p. 1224), and found that "it is reasonable to conclude that defendant's being required to wear the stun belt had at least some effect on his demeanor while testifying." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1225.)

Not surprisingly, as a result of all this pressure appellant, like the defendant in *Mar*, was extremely nervous while testifying. His nervousness is readily apparent in the difficulty he had in responding to many of the questions that were put to him. The trial court repeatedly had to remind appellant to simply answer the questions the prosecutor asked. (9 RT 1213; 10 RT 1230, 1232, 1233, 1252.) As appellant continued to testify and got

more and more nervous, the court repeatedly reminded him to calm down and not to interrupt the attorneys. (10 RT 1233, 1260, 1286.) The following exchange, in front of the jury, evinces appellant's nervousness:

> Court: You are on the witness stand. They will ask you questions. They will go back to these questions. Your lawyer is here. All right? Answer yes or no and quit adding things.
>
> Appellant: I just want to give like an intelligent answer.
>
> Court: Would you listen to me. Calm down. I am sure they will get to it.

(10 RT 1233.)

The prosecutor aggravated the prejudicial effect of the stun belt by relentlessly exploiting its debilitating impact on appellant's demeanor and, therefore, his credibility. Her comments during appellant's testimony encouraged the jury to draw a cold, callous interpretation from what was likely understandable nervous reactions, as when she commented on appellant's smiling by asking him, "is this funny?" (9 RT 1203.) Given that the guilt phase was a credibility contest between appellant and the prosecution's drug-addict witnesses, it is unremarkable that the prosecutor's argument focused on appellant's demeanor during his testimony and asserted that his conduct during, as well as the content of, his testimony showed him to be incredible. (11 RT 1337.) In so doing, however, the prosecutor unfairly exploited the effects of the stun belt by encouraging the jury to draw negative inferences from appellant's demeanor which, unbeknownst to the jury, was adversely affected by the hidden stun belt.

The prosecutor was direct and persistent in her attack. For example, in the opening line of her rebuttal argument, the prosecutor informed the jury that she was going to "hit on" appellant's credibility a lot in her argument. (11 RT 1398.) The prosecutor went on to link appellant's demeanor and his credibility and argued that an adverse finding as to either

required the jury to reject the defense case. (11 RT 1404.) The prosecutor further exploited the effect of the stun belt when she argued to the jury that appellant's nervousness while testifying revealed his underlying rage. "You had the opportunity to see this defendant on the stand; and you could see the undercurrent, as Mr. Berry described it, the undercurrent that was going on as this defendant was testifying." (11 RT 1337.) The prosecutor returned to this theory later in her argument, this time linking appellant's demeanor while testifying even more directly to his guilt:

> When you saw the defendant testify yesterday, after he was getting more and more upset because he couldn't answer the questions that were asked of him, he wanted to explain everything under the sun, other than answering the question that was asked of him, you began to see what Wilson Berry was talking about. There is an undercurrent flowing in this man, and when he is disrespected he gets very violent. When he got violent in this case, he murdered two people and he did it in a very, very personal and rageous [*sic*] kind of way.

(11 RT 1349.)

In *Mar*, this Court found the unjustified use of a stun belt prejudicial under the *Watson* standard in light of "the relative closeness of the evidence, the crucial nature of defendant's demeanor while testifying, and the likelihood that the stun belt had at least some effect on defendant's demeanor while testifying." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1225.) All those factors and one more – the prosecutor's persistent focus on appellant's demeanor and credibility – are present in this case. Given these circumstances, the State cannot carry its burden of showing the guilty verdict was harmless beyond a reasonable doubt, i.e., "surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Similarly, in light of these factors, there is a reasonable probability that – or at least a serious doubt as to whether – the error affected the outcome of appellant's

trial. (*People v. Watson*, *supra*, 46 Cal.2d at 835-837.) Accordingly, appellant's convictions and sentence of death must be reversed.

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III

THE ERRONEOUS ADMISSION OF THE PROSECUTION'S INCOMPETENT AND IRRELEVANT EXPERT TESTIMONY ABOUT GANGS IMPERMISSIBLY BOLSTERED THE PROSECUTION'S THEORY OF THE CASE AND DENIED APPELLANT A FAIR TRIAL

The prosecution was allowed to bolster its case through the testimony of two expert witnesses, drug dealer Wilson Berry and police sergeant Richard Valdemar. They provided irrelevant and inflammatory testimony about the violent conduct of gang members and appellant's alleged gang association with the Mexican Mafia. In fact, appellant did not belong to the Mexican Mafia, and his association with the 18th Street gang was immaterial. The testimony served no legitimate evidentiary purpose but biased the jury against appellant by demonizing him and erroneously allowed the experts to give their seal of approval to the prosecution's theory of the case.

The ostensible purpose of each witness was to offer the expert opinion that when drugs are stolen from a gang member, he will retaliate violently against whoever stole the drugs. This testimony should have been excluded for four reasons: (1) the evidence was not the proper province of an expert opinion, as it is a commonly understood fact that gang members and other drug dealers may retaliate and seek revenge for the theft of drugs; (2) the evidence was irrelevant, as it did not tend to prove any material fact at issue in the case; (3) Wilson Berry was incompetent to testify as an expert witness; and (4) even if otherwise admissible, the evidence was cumulative and was far more prejudicial than probative.

The admission of the expert opinions about gangs violated state evidentiary rules as well as appellant's rights to due process, a fair trial, and

a reliable determination of guilt and penalty as guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 15 and 17 of the California Constitution. Given the paucity of evidence of appellant's guilt and the inflammatory nature of the gang evidence, its admission was prejudicial and requires reversal of appellant's first degree murder convictions, special circumstance finding and death sentence.

A. Proceedings Below

The prosecution filed a motion in limine for the admission of gang evidence through an expert, arguing that the gang expert testimony would be relevant to:

> explain the defendant's allegiance to the 18th Street gang and his responsibility as a gang-member for the cocaine . . . An expert would testify that it is common in the gang-drug culture to kill over the loss of narcotics. Further, an expert witness can testify to Becerra's motive for threatening, assaulting, and murdering hotel residents. A gang expert will enlighten the jurors to the consequences the defendant faces for losing the drugs, such as death or severe bodily harm.

(X CT 2814.)[17] At the hearing on the motion, the prosecutor noted that the jury was certain to know of appellant's gang affiliation, as his admission to the assault on George McPherson referred to his gang membership. (5 RT 528.) The defense did not dispute this assertion.

Defense counsel objected to the introduction of the gang expert evidence, arguing (1) that the evidence was not relevant; (2) that although appellant was an admitted gang member of the 18th Street gang, there was

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[17] The prosecution's motion also proffered that the gang expert's testimony was "admissible to show the effect of intimidation upon a witness" (X CT 2815-2816); however, no such evidence was ever offered through the expert at trial.

no evidence linking gangs to appellant's possession or sale of narcotics, so that the introduction of the gang experts' testimony was highly speculative; and (3) that even if the evidence had some minimal relevance, its introduction would violate Evidence Code section 352. (5 RT 527, 530.)[18] Defense counsel emphasized that proof of the prosecution's case did not rely on any evidence relating to gang membership, and that the government's use of gang expert testimony was simply a ploy to bias the jury against appellant. (5 RT 526.) He repeatedly asserted that gang evidence "is not important for the people's case, and the only reason why the people would be bringing it in is for the prejudicial effect that it would have." (5 RT 527, 531.)[19]

The prosecutor did not dispute that appellant's alleged motive for the murders existed independent of the gang evidence, but argued that "the connection of the gangs, it makes the motive even stronger that he has someone to answer to. He's got the gang to answer to." (5 RT 528.) The prosecutor disputed that there was not sufficient evidence linking gangs to appellant's drugs, arguing that appellant's statement to Donna Meekey that he got his drugs "from the mafia" showed a gang connection. (5 RT 528, 531.)

The trial court ruled that because appellant was an admitted gang member, gang evidence was admissible:

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[18] The defense did not file written opposition to the motion for introduction of gang evidence.

[19] The trial court echoed the defense view that the gang evidence was not important to the prosecution's case in comments made after the close of the prosecution's case-in-chief. In overruling a defense objection, the court stated: "I think it goes to the bottom of the case. He admitted taking cocaine; cocaine is taken from him; two people are dead." (10 RT 1228.)

> I think the gang expert can testify. I think if you belong to a gang, you dress like a gang member, you act like a gang member, you intimidate like a gang member, you use homeboys like gang members, if you have tattoos like a gang member, if you sell dope like a gang member, you are a gang member . . . It is not a major thing for this court. The appellate court, the Supreme Court, feels the same way I do.

(5 RT 533.) The trial court then ruled that the gang experts would be limited to testimony regarding the use of intimidation to effectuate the return of lost drugs and prohibited the prosecution from introducing evidence regarding gang violence generally. The trial court explained its ruling:

> The testimony can be limited to the fact if someone is selling dope, how they get it back. I think they can do that. Whether violence is involved, that is a different thing. Intimidation is certainly circumstantial evidence of gang membership. If you lose dope, to get it back you use muscle. I don't think it is unique, different. Every juror would probably know about it. They are entitled to a gang expert to talk about that, not gangs killing everybody or drive-by shootings. That will be limited to that. Understand?

(5 RT 533-534.)

The prosecution offered two gang experts, Wilson Berry and Richard Valdemar. As already discussed, Wilson Berry was a resident of the Pacific Grand Hotel in December of 1994. (8 RT 969.) He had been using and selling drugs for a long time, although the extent of his experience as a drug dealer was not established. (8 RT 970.) Nor was there any proffer that Berry ever had belonged to a gang. Over defense objection, the prosecution sought and was allowed to have Berry testify as an expert "on the world of the dope seller, pusher." (8 RT 985.)[20]

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[20] Although no specific proffer was made as to the scope of Berry's (continued...)

Berry testified that a drug dealer is disrespected whenever he loses his drugs. He explained that as a drug dealer, "you have to do something to stay in business. You have to basically do something to them. You have to influence them, make an example out of them or influence them not to do it or influence everyone else not to do what they did." (9 RT 986.) The prosecutor then shifted her inquiry and asked Berry's opinion about gang involvement in drug sales:

> Q: You've been around a long time. If a dope seller gets a whole bunch of dope from his gang, how are things handled?
>
> A: You know, you either – you lie to them in order to get it. If you take – if you get their dope to sell and make a profit and you go out and you party with it, then you lie to them, you lie to your homeys, you just lie, and so that makes it bad.
>
> Then on top of that if you lose it, if you lie again and say that someone took it from you, then they are going to exert pressure on you to either get it back, or, if someone took it, they want to know why didn't you do anything to the person that took if from you.
>
> Q: And so what do you have to do then?
>
> A: You have to basically either do something to the person that took it from you or they're going to do something to you.

(8 RT 987.)

Sergeant Richard Valdemar testified as the prosecution's main gang expert witness.[21] In establishing Sgt. Valdemar's expertise, the jury heard

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[20](...continued)
expertise, the foundational questions were all directed at Berry's experience regarding the way that drugs are bought and sold on the street. The lack of proffer was complicated by the fact that the trial court laid the foundation for Berry to testify as an expert. (8 RT 986-987.)

[21] The defense renewed its objection to Valdemar's testimony prior to its commencement. (8 RT 1001.)

of his 27-year tenure with the Los Angeles Sheriff's Department (8 RT 1001); his extensive experience working on gang related issues as a young adult growing up in East Los Angeles before he joined the Sheriff's Department as well as during his tenure at the Sheriff's Department (8 RT 1002-1003); his current assignment as the supervisor of the unit which was responsible for disrupting the criminal activities of the four major prison gangs in the Los Angeles area (8 RT 1001-1002); his extensive experience lecturing to various law enforcement agencies about gang related issues (8 RT 1002); and his prior qualification as an expert witness before the grand jury and numerous courts, including the federal court (8 RT 1005). Finally, Sgt. Valdemar testified that as part of his duties as the supervisor of the Prison Gang Section, he received regular updates from informants as well as law enforcement officers regarding both street and prison gangs and the relationship between the two. (8 RT 1006.)

Sgt. Valdemar testified that he knew appellant to be a member of the 18th Street gang based on review of appellant's statements as recorded on his jail classification card and by his tattoos. (8 RT 1015, 1016.)[22] Sgt. Valdemar described the 18th Street gang as a huge, multi-state and multi-national gang that is involved in drug dealing and has narcotics operations linked to the Mexican Mafia. (8 RT 1013.) Sgt. Valdemar opined that appellant himself was aligned and affiliated with the Mexican Mafia, based on the "SUR" tattooed on appellant's leg. (8 RT 1018, 1031.)[23]

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[22] Appellant's tattoos were displayed to the jury in photographs. (8 RT 1016.)

[23] Sgt. Valdemar testified that "Sur is the Spanish pronunciation for South." (8 RT 1016.)

Sgt. Valedmar described the Mexican Mafia as "the worst of the worst and they are often violent, and retribution is a common factor. And often that retribution and violence is overkill." (8 RT 1018.) Sgt. Valdemar testified that the Mexican Mafia is a small gang, with only a few hundred members who all have one rank. (*Ibid.*) All of the Mexican Mafia associates, like appellant, are "loyal soldiers" for the gang. (*Ibid.*) "When a person prominently marks themselves with SUR, indicating that they are aligned to the Mexican Mafia, they are in fact identifying with that group and saying, 'I am a loyal soldier.'" (*Ibid.*)

Throughout his testimony, Sgt. Valdemar repeatedly discussed the Mexican Mafia's incredibly violent potential. (8 RT 1018, 1019, 1023, 1029, 1036, 1037.) He emphasized the long reach of the Mexican Mafia in exacting revenge and retaliating for perceived acts of disrespect, and he told the jury that the punishing arm of the Mexican Mafia could even reach as far as the courtroom proceedings. (8 RT 1029.) In explaining the danger of falsely claiming status as an associate of the Mexican Mafia, Sgt. Valdemar stated:

> [t]hat would be very dangerous to imply that you have some part in the Mexican Mafia and that became part of a court record and that came to the attention of people who were actually part of the Mexican Mafia. That could be lethal.

(*Ibid.*) Valdemar opined that "disrespecting the Mexican Mafia is normally a death sentence." (8 RT 1018.)

Sgt. Valdemar asserted that violent sexual conduct is often used by the Mexican Mafia as a means to retaliate. Sgt. Valdemar referred to the movie American Me (Universal Pictures 1992) as accurately depicting the Mexican Mafia's practice of using sexual humiliation as a form of retaliation, describing how various characters were raped and, in one instance, how a character was murdered. (8 RT 1019.) Sgt. Valdemar also

noted that the Mexican Mafia was so insulted by their portrayal in the movie that "they put out a hit contract on people who were associated as advisors in that movie, and, in fact, killed three of them." (*Ibid.*)

Sgt. Valdemar testified that all gangs are involved in drug trade and that some, such as the Mexican Mafia, support their organization through their drug sales. (8 RT 1007.) According to Sgt. Valdemar, a gang member might be entrusted to receive a large quantity of drugs from his gang to sell. (8 RT 1008.) However, if a gang member loses drugs that have been fronted by the gang, that person would be under suspicion and would have to work hard to prove that the drugs in fact had been lost or stolen. (8 RT 1009.) If the gang believed the drugs had been lost or stolen from the gang member, "that would mean that that person had been foolish and disrespected by the person who took that drug and he, as a gangster, would have to retaliate or at least make some kind of face saving move to show that he was not irresponsible with the drugs." (8 RT 1009.) If a large quantity of drugs had been stolen, "then the person would have to take some kind of a face-saving action, and in the gang world that primarily means killing someone." (8 RT 1010.) The prosecutor and Sgt. Valdemar then had the following colloquy:

> Q: Would the manner in which the person – you've got a drug seller who's lost or some of his dope has been stolen and he believes he knows who did it. If he wanted to save face by killing the other individual, would the method of killing have an impact on his saving face in front of the gang?
>
> A: Yes, Ma'am.
>
> Mr. Taylor: I am going to object, your honor, speculation.
>
> The Court: Overruled.
>
> The Witness: The person would be expected to make an example of a person who disrespected them in that manner. And by "make an example" I mean that the method of killing

would be particularly heinous so as to terrorize other street gang members and prevent anything like that happening again.

(8 RT 1010-1011.)

B. The Testimony Of Gang Experts Berry And Valdemar Was Not The Proper Province Of An Expert Witness

The prosecution sought to introduce testimony from expert witnesses that a gang member will exact revenge against someone who takes their drugs, both to retaliate for the theft and to preserve their reputation. Using violence as a means to exact revenge is not an aspect of gang culture or practice that is so far removed from common experience that it requires an expert opinion. One needs no special training or experience to understand violent revenge.[24] The prosecution's theory of appellant's actions – an age-old tale of retaliation and revenge – was simply not a matter beyond the common knowledge of the jury which required expert testimony to render it "comprehensible and logical." (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551.) Because the conclusions to which both Berry and Valdemar testified could have been reached just as intelligently by a lay person as by an expert, the introduction of this improper opinion testimony was error.

Opinion testimony is generally inadmissible at trial (Evid. Code, §§ 702, 800, 801; *People v. Chapple* (2006) 138 Cal.App.4th 540, 546), and its admission is reviewed for an abuse of discretion (*People v. Guerra* (2006) 37 Cal.4th 1067, 1118). An expert witness may give an opinion on a matter if the expert possesses "special knowledge, skill, experience, [or] training" (Evid. Code, § 801, subd. (b)), and if the subject matter about

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[24] Revenge for real or perceived disrespect and wrongs is the major theme in many of the significant stories of the Western Canon. The Iliad, Hamlet, Othello, Moby Dick, the Cask of Amontillado are all stories ultimately about revenge.

which the expert testifies is one in which the trier of fact could not reach the inferences and conclusions testified to by the expert. (*People v. Cole* (1956) 47 Cal.2d 99, 103 [testimony that wound could not have been self-inflicted was proper subject of expert testimony]; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299 [expert testimony regarding child abuse accommodation syndrome was properly admitted to disabuse jurors of commonly held misconceptions about child sexual abuse and to explain delays in reporting of molestation].) The testimony of an expert regarding the culture and habits of street gangs may meet this criterion in some cases. (*People v. Gardeley* (1997) 14 Cal.4th 605, 618.) However, testimony by a gang expert may be admitted only when the expert testifies to matters that are beyond the common experience of the jury. (*Ibid.*; see *People v. Torres* (1995) 33 Cal.App.4th 37, 47 [opinion testimony of gang expert was inadmissible because it would not assist the trier of fact].)

The testimony of Wilson Berry and Sgt. Valdemar did not meet this essential prerequisite. Berry first testified, over defense objection, that dope dealers generally are "almost duty bound" to do something physical to someone who takes their dope. (8 RT 974-975.) He then testified that if a dope dealer gets his dope from a gang, "you have to basically either do something to the person that took it from you or they're going to do something to you." (8 RT 987.) The focus of Sgt. Valdemar's testimony was on the need for a gang member to retaliate violently when he is disrespected, and the need for a particularly heinous revenge when a gang member has been fronted drugs by the Mexican Mafia which were then stolen. (8 RT 1010.) None of this testimony was sufficiently beyond common knowledge and experience such that the opinion of an expert would assist the jury. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1118.)

The trial court's ruling and Sgt. Valdemar's testimony themselves

demonstrate that the expert testimony did not address matters beyond the common knowledge of the jury. First, the court itself noted in its initial ruling on the admissibility of the gang expert testimony "[i]f you lose dope, to get it back you use muscle. I don't think it is unique, different. Every juror would probably know about it." (5 RT 533.) Since the trial court found that every juror would know that gangs use intimidation to regain lost or stolen drugs, there was no basis for the admission of Berry's and Valdemar's expert testimony on the subject. (*People v. Cole, supra*, 47 Cal.2d at p. 103 [expert testimony is prohibited when "the subject of the inquiry is one of such common knowledge that [people] of ordinary education could reach a conclusion as intelligently as the witness"].)

Second, Sgt. Valdemar's reliance on a popular movie, American Me, confirms that his testimony did not address some esoteric subject that the jury could not understand on its own. A fact or phenomenon that is part of mainstream culture is within the jury's common knowledge, and an expert's opinion is not necessary. (*Carey v. Lima, Salmon and Tully Mortuary* (1959) 168 Cal.App.2d 42, 46 [expert testimony properly excluded where jury had sufficient knowledge to reach conclusion on ultimate fact without aid of expert opinion].) As Sgt. Valdemar's own references to American Me make clear, his expert testimony added nothing to the jury's "common fund of information" about the propensity of gangs to react violently and to humiliate their victims when they are disrespected, and should have been excluded. (*People v. McAlpin, supra*, 53 Cal.3d at p. 1299.)

Although expert testimony on the culture and habits of criminal street gangs sometimes may be a proper subject for expert testimony (*People v. Gardeley, supra*, 14 Cal.4th at p. 618), this Court has long held that "[t]he determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be

likely to assist the jury in the search for the truth, and no hard and fast rule can be laid down which would be applicable in every circumstance." (*Brown v. Colm* (1974) 11 Cal.3d 639, 645.) Thus, there is no rule of automatic admissibility that permits expert opinions about gangs to be introduced in any case involving a gang member. Instead, the gang expert must be necessary to "make [] comprehensible and logical that which is otherwise inexplicable and incredible." (*People v. Gonzalez, supra,* 126 Cal.App.4th at p. 1551 [gang expert's testimony was admissible in attempted murder case to explain intent behind inmate's unprovoked attack upon nearly naked fellow inmate].) That standard was not satisfied here.

In cases upholding the admission of expert testimony about gangs, there has been a specific showing of the necessity of the expert's opinion to provide critical information for an inference that was otherwise unfathomable to the jury. For example, in *Gardeley, supra,* 14 Cal.4th 605, the expert testimony was offered to explain why an assault on an unarmed man who was urinating in a carport was "gang related activity" under Penal Code section 186.22, former subdivision (c). (*Id.* at p. 619.) The expert's testimony explained the economic utility of such assaults to the gang, as they secure the members' ability to engage in open drug dealing within a certain neighborhood. This information was not commonly known to the jury but rather was the type of specialized knowledge that would help them in deciding the case.

The same holds true for other cases in which expert testimony about gang conduct has been held properly admitted: the expert witness testified about some esoteric or generally unknown fact about gangs that was relevant to the case. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 945 [expert testimony that a gang would retaliate against one of its own members who testified against a member of a rival gang was appropriate

expert testimony]; *People v. Carter* (2003) 30 Cal.4th 1166, 1194 [expert testimony was admitted to explain why defendant, as member of one Crips gang, possessed the intent to kill a member of another Crips gang]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370 [expert testimony was admitted to explain the use of graffiti by Hispanic gangs to mark territory and that crossing out a rival gang's graffiti is a sign of encroachment which can result in a violent retaliation]; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965 [expert testimony was admitted to show that group to which appellant belonged was criminal street gang engaged in pattern of criminal activity in prosecution under Penal code section 186.22, subdivision (b)]; *People v. McDaniels* (1980) 107 Cal.App.3d 989, 904 [expert testimony was admitted to explain that fist fights between rival gang members usually take place at " mutual" sites such as schools, but if a gang travels to a rival gang's territory, more than just a fight would be expected].)

Unlike the experts in those cases, Berry's and Sgt. Valdemar's opinions – which simply asserted the likelihood of violent revenge by a gang drug dealer – was not necessary to explain the "inexplicable or incredible." (*People v. Gonzalez, supra,* 126 Cal.App.4th at p. 1551.) The motive for the murders offered by the prosecution – that appellant killed Harding and Jackson in retaliation for the theft of his drugs – was easily understandable by the jury. The testimony of Berry and Sgt. Valdemar did nothing more than reinforce something the jury already knew – that theft can lead to revenge and revenge can be violent – and thus amounted to no more than an impermissible assertion of the experts' opinions that appellant likely committed the crime charged. (See *People v. Torres, supra,* 35 Cal.App.4th at pp. 47-48 [expert opinions about matters that are not sufficiently beyond common experience are "tantamount to expressing the opinion that defendant was guilty"].) Since the experts' opinions did not

explain the inexplicable and unimaginable, they served no valid evidentiary purpose. Instead, the testimony of Berry and Sgt. Valdemar simply reiterated the prosecution's theory that appellant killed Harding and Jackson in retaliation for the theft of his drugs – but did so burnished in the authoritative gloss of expert opinions about gangs. The trial court abused its discretion in admitting this evidence.

C. The Testimony Of Gang Experts Berry And Valdemar Was Not Relevant To Any Disputed Fact

Even assuming, arguendo, the admissibility under Evidence Code section 801 of expert testimony about how a gang member, especially one associated with the Mexican Mafia, would retaliate against someone whom he believed had stolen his drugs, the trial court nonetheless abused its discretion in admitting the opinions of Berry and Sgt. Valdemar. The trial court failed to determine the relevance of their testimony by "apply[ing] the law to the facts and opinions offered by the witness." (*People v. Killebrew*, *supra*, 103 Cal.App.4th at p. 654.) Instead, the trial court simply reasoned that because appellant was a gang member, a gang expert could testify. (5 RT 533.) Its reasoning was erroneous. To be sure, gang expert testimony is admissible when it is probative of a material fact about gang habits and practices that is unintelligible to the general population – "concerning territory, retaliation, graffiti, hand signals and dress." (*People v. Valdez* (2003) 112 Cal.App.4th 925, 930.) But that does not mean, as the trial court mistakenly assumed, that a gang expert may testify in any case involving a gang member. The expert testimony still must be relevant. In this case it was not. First, the opinions of Berry and Sgt. Valdemar were offered to prove an undisputed fact – that a drug dealer, whether a gang member or not, might retaliate violently for the theft of his drugs. Second, there was no competent evidence before the jury that the drugs taken from

appellant were from a gang, much less from the Mexican Mafia. Because the expert testimony was irrelevant, it should have been excluded.

To be relevant, a gang expert's testimony, like all evidence, must address some disputed fact. Evidence Code section 210 makes this requirement clear: "'relevant evidence'" must have a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1076, 1086 [acknowledging that to be admissible expert testimony on battered women's syndrome must be relevant to an issue in the case]; see also *People v. Brown* (2004) 33 Cal.4th 892 (dis. opn. of Brown, J.) [expert testimony must meet the requirements of Evidence Code Section 210, and, "unless and until the proponent demonstrates that an expert's testimony has the requisite relationship to a disputed fact, it is irrelevant and cannot assist the trier of fact."].)

Berry's and Sgt. Valdemar's opinions did not relate to a disputed fact and, thus, were not relevant. The prosecution's evidence that a drug dealer, regardless of gang affiliation, generally will respond violently against someone who steals his drugs was not disputed by the defense. Indeed, appellant admitted as much in his testimony. (9 RT 1190, 1191; 10 RT 1228, 1265, 1267, 1270.) The defense position was that Harding's taking of appellant's drugs was not a typical theft from a drug dealer because (1) the drugs were returned (8 RT 1137, 1143); (2) Harding agreed to sell drugs for appellant to make up for those drugs he had used (6 RT 684; 8 RT 1139, 1140, 1158; 10 RT 1285); and (3) appellant himself had stolen the drugs and, thus, was not as concerned about their loss as a drug dealer commonly would be. (10 RT 1245, 1284, 1285.) The general practice of violent retaliation for drug thefts was an unquestioned fact – a non-issue – in this case. Therefore, Berry's and Sgt. Valdemar's expert opinions could not be

used to prove facts already established by other evidence, including appellant's own testimony. They did not support any reasonable inference that would prove a disputed fact, but rather allowed "unreasonable inferences to be made by the trier of fact that the defendant was guilty of the offense charged on the theory of 'guilt by association.'" (*People v. Perez* (1981) 114 Cal.App.3d 470, 477 [reversible error to admit expert gang testimony to show that appellant and co-defendant were members of the same gang where appellant had already been identified as one of the perpetrators by an eyewitness].) Because the defense did not dispute the point about retaliation by drug dealers, any reference to gang behavior was irrelevant and should have been excluded.

In addition, to be relevant, a gang expert's testimony, like all evidence, must be logically relevant to the factual issues before the jury. (Evid. Code, § 210.) There must be an "evidentiary link" based on the particular facts of the case between the gang evidence and an issue at trial. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193 [finding reversible error to admit expert testimony about the gang-related graffiti in the room in which firearms were found where there was no connection between the graffiti and the guns].) This prerequisite for relevance also was missing. Berry's and Valdemar's testimony about gangs was not logically probative of the factual issues at trial. Sgt. Valdemar focused on the violent conduct of the Mexican Mafia and the likely conduct of a gang member who received his drugs from the Mexican Mafia. (8 RT 1017-1023, 1028-1029, 1036-1037.) Berry's testimony regarding gang practice focused on the likely response of a drug dealer, who had received his drugs from a gang, to the theft of his drugs. (8 RT 986-987.) However, there was no competent evidence before the jury that the Mexican Mafia, or any other gang, had anything to do with the drugs in this case. Without this foundation, the

evidence regarding gangs was entirely irrelevant.

The prosecution's theory was that Donna Meekey provided the proof that appellant got his drugs from the Mexican Mafia. (5 RT 528, 531.) In arguing for the admission of Sgt. Valdemar's testimony, the prosecutor represented that "the defendant specifically tells Donna Meekey that he gets the drugs from people he knows who are affiliated with his gang, the Mafia." (5 RT 531.) However, contrary to the prosecutor's assertions, Meekey did *not* clearly testify that appellant got his drugs from the his gang, the Mexican Mafia. Moreover, Meekey's hedged statements on direct examination attempting to link appellant to a "large organization" are incredible, and clearly the result of the government's influence on a key witness to provide some connection between the drugs appellant had at the Pacific Grand and his gang membership.

According to Meekey, she and appellant were hanging out on Christmas Eve in appellant's hotel room.[25] Meekey's initial description of her interaction with appellant in his room was quite benign:

> I went to defendant's room and we kind of sat on the bed and started talking. And again I had reminded him that I'm not sexually active or anything, and he said not to be afraid, that he wasn't going to hurt me or anything. So he took off his shirt and he had some tattoos on his body. And I asked him what they were. And he said they were some – something to do with a gang or something like that. And we just started talking. He was telling me about his girlfriends and we were talking about relationships. And basically that's about –

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[25] In describing her interaction with appellant while in his room, Meekey tried to include the important factor that she was upset because of the beating she had suffered from Vishaun. This testimony was excluded by the trial court upon the prosecutor's objection. (5 RT 671.) (See argument IV, *post*.)

that's most of it that evening.

(5 RT 671.) Dissatisfied with this completely non-inculpatory response and the sympathetic characterization of appellant contained within it, the prosecutor began prompting Meekey:

> Q: Now, you knew he had been in possession of a lot of drugs right?
>
> A: Right. Right.
>
> Q: Did you ask him anything about the drugs?
>
> A: Yes, well he was smoking an awful lot and he was offering me an awful lot, just giving it, 'here, you can have this, you can have that.' And so, you know, I was kind of concerned about, you know, where he was getting all the drugs from
>
> . . .
>
> It was more than I had ever seen anybody have or smoke or give away. So I was real curious. And he said he gets a lot of it – he gets quantities and keys and things from a big organization that he is involved with.
>
> Q: Okay, and what was that organization?
>
> A: I don't recall exactly the name, but he said something about Mafia associated or something like that.

(5 RT 672.) This phrase "mafia associated" is neither clear enough nor sufficient enough to support a reasonable inference that appellant got his drugs from the Mexican Mafia.

Moreover, even if this testimony was sufficient to draw a connection between appellant's drugs and the Mexian Mafia, it is simply not credible. Donna Meekey gave a statement to Inspector Long during the initial investigation of these murders in 1995. (6 RT 680; 8 RT 956, 957.) Nowhere in this interview is there any mention of appellant being associated with the Mexican Mafia or stating that he got his drugs from the Mexican Mafia. (6 RT 721.) It was not until Meekey was questioned by

the prosecutor immediately prior to trial that Meeky alleged any "Mafia" references by appellant. (5 RT 531; 6 RT 681.) Appellant denied making any such statement to Meekey. (9 RT 1157.)

Inspector Long described Meekey as a material witness that he personally interviewed and from whom he took a written statement. (8 RT 956-957.) Meekey initially testified that in her 1995 interrogation with Inspector Long she "wasn't asked that many questions . . . I believe all he asked me mainly is to identify the victim." (6 RT 681-682.) In fact, Meekey's oral statement to Inspector Long was memorialized in a three page written statement, in which Meekey described, to the best of her abilities, her interactions and conversations with appellant. (6 RT 711.) Although under prompting from the prosecutor Meekey testified that, in her subsequent conversations with the prosecutor, she was asked many questions not asked by Inspector Long (6 RT 712), she repeatedly testified that she did not remember what questions Long asked her. (6 RT 710, 721.)

Meekey's testimony simply does not provide a sufficient evidentiary link to show that the drugs taken from appellant in December 1994 were provided to him by a gang, much less by the Mexican Mafia. Without this link, the testimony regarding gang custom and practice when drugs are stolen, particularly the custom and practice of the Mexican Mafia when its drugs are stolen, was irrelevant. (Cf. *People v. Champion* (1995) 9 Cal.4th 879, 921-922 [appellant's gang membership is "a significant evidentiary link in the chain of proof" and is not irrelevant when substantial evidence was offered to show that members of appellant's gang were involved in the charged murders and appellant's gang membership provides meaning to a tape recorded conversation between the co-defendants].) Lacking the proper factual foundation, there was no reasoned inference the jury could draw from the expert gang testimony and thus no basis for its admission.

The decision in *People v. Avitia, supra*, 127 Cal.App.4th 185, supports the finding of error here. Avitia was charged with discharging a firearm in a grossly negligent manner (§ 246.3), possession of an assault weapon (§ 12280, subd. (a)(2)), and possession of a firearm by a misdemeanant (§ 12021, subd. (c)(1)). The police arrested Avitia after a neighbor identified him as the person who had been shooting a gun in the backyard. (*Id.* at p. 187.) Police searched Avitia's house and discovered firearms and ammunition in his bedroom. (*Id.* at p. 188.) The weapons found in the room included a pellet pistol, numerous handguns, a 12-gauge shotgun, and an assault rifle. (*Id.* at pp. 188-189.) "Chivo" was tatooed on Avitia's left hand and was also written on various items in the room, including a box of ammunition and the butt of an assault rifle found in the room. (*Id.* at p. 188.) At trial, Avitia testified that he had been firing the pellet gun, which was not illegal, rather than the handgun prior to the arrival of the police. (*Id.* at p. 190.) He also admitted to ownership of the assault rifle, but testified that he had purchased it in 1999, when such weapons were legal, and believed that it was registered at the time he purchased it. (*Ibid.*) Over defense objection, the prosecution was allowed to introduce expert testimony that graffiti on the posters in Avitia's room was gang graffiti, under the theory that this evidence "tended to link the firearms to Avitia." (*Id.* at pp. 191-192, 193.)

The appellate court reasoned that even if the gang evidence did provide some link between the weapons and Avitia, admission of this evidence was in error because appellant's ownership of the weapons was not in dispute. (*People v. Avitia, supra*, 127 Cal.App.4th at p. 193.) Given "the absence of dispute [that] the weapons were Avitia's, admission of the graffiti evidence lacked any probative value." As in *Avitia*, the trial court in this case abused its discretion because the issue was undisputed and the

proffered gang expert testimony had no tendency in reason to prove a matter of consequence to the case.

D. Wilson Berry Was Incompetent To Testify As A Gang Expert

Even assuming, arguendo, that expert testimony about gangs was proper and relevant, the trial court abused its discretion in admitting Berry's testimony because there was no proof of his qualifications as a gang expert. Wilson Berry initially was asked by the prosecution to give an opinion on what a drug dealer would do to someone who took his drugs. The trial court reasoned that Berry was a "quasi-expert" and allowed Berry's opinion testimony that a drug dealer "was duty bound to do something physical." (8 RT 975.)[26] At the close of Berry's direct testimony, the prosecutor again attempted to elicit Berry's opinion on "the way things work out on the streets with regard to the way drugs are bought and sold." (8 RT 985.) After defense counsel objected to eliciting opinion testimony from the witness regarding the habits and practices of drug sellers and gang members, the trial court proceeded to lay a foundation as to Berry's expertise:

> The Court: You live on the streets primarily?
>
> The Witness: Yeah.
>
> The Court: You sell dope, buy dope there?
>
> The Witness: Yes.
>
> The Court: You know the world of the dope seller, pusher, user, what happens –

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[26] There is no designation of "quasi-expert" testimony under Evidence Code section 801. A witness may only give opinion testimony based on specialized training and/or experience if the witness has been qualified as an expert pursuant to the statutory scheme. (*People v. Williams* (1992) 3 Cal.App.4th 130, 133-135.)

The Witness: Yes.

The Court: – If you are involved in something?

The Witness: Yes.

(8 RT 985-986.) Based on this voir dire, the trial court overruled the defense objection to Berry's expert opinion testimony. (8 RT 986.) Its ruling was in error.

When a party objects to the admission of opinion evidence from a proposed expert witness, the proponent of the expert testimony must establish that the witness possesses "special knowledge, skill, experience, training or education sufficient to qualify him as an expert." (Evid. Code, § 720, subd. (a).) The expert witness must be qualified on "the particular subject upon which he is giving testimony. Qualifications on a related subject matter are insufficient." (*People v. Hogan* (1982) 31 Cal.3d 815, 852-853 [criminalist who was qualified to testify about blood typing was not qualified to testify regarding blood spatter evidence where he had no formal training or experience in the subject and his qualifications were limited to having read one book years earlier, observed one discarded blood spatter exhibit, and seen bloodstains at crime scenes], overruled on other grounds, *People v. Cooper* (1991) 53 Cal.3d 771.) Noting the "increasingly important" role of expert evidence in modern litigation, one appellate court has ruled that "courts have an obligation to contain expert testimony within the area of proffered expertise, and to require adequate foundation for the opinion." (*Korsak v. Atlas Hotels* (1992) 2 Cal.App.4th 1516, 1523; see, *Miller v. Los Angeles County Flood Control District* (1973) 8 Cal.3d 689, 701 [a mechanical engineer with training in hydraulics, hydrology and in evaluating flooding characteristics in hillside areas was not qualified to testify about the standard of care for the design of hillside residence].)

The prosecutor asked Berry to express an opinion on what a "dope

dealer" would do if he lost drugs that had been given to him by a gang. (9 RT 987.) Berry opined that "they are going to exert pressure on you to either get it back, or, if someone took it, they want to know why didn't you do anything to the person that took if from you . . . You have to basically either do something to the person that took it from you or they're going to do something to you." (9 RT 987.) Although the trial court's voir dire arguably established Berry's expertise to testify to the habits and culture of the "dope seller, pusher, user," there was nothing in Berry's testimony demonstrating that he had any expert qualifications relating to the habits and culture of gang members. Indeed, Berry's testimony is devoid of any mention of gangs until he is asked to give an opinion on gang practices. (See 8 RT 968–987.)

The prosecution completely failed to carry its burden of establishing Berry's qualifications as an expert on the habits and culture of gang members. There is no mention of any knowledge, training, education or even personal experience that might have allowed Berry to give an expert opinion regarding gang practices. The introduction of Berry's expert testimony regarding how gang members behave was clearly outside the realm of whatever expertise he may have had about drug sales, and there was no additional expertise shown regarding Berry's knowledge of gangs that would have rendered this opinion admissible. In short, the record presents no factual basis for designating Berry as an expert on any aspect of gangs. (Cf. *People v. Chavez* (1985) 39 Cal.3d 823, 828-829 [although the question is "not entirely free from doubt," trial court's admission of a pathologist's expert opinion on the effect of alcohol on a person's ability to form requisite intent for robbery was not an abuse of discretion because the witness, a medical doctor, knew the medical literature on alcohol and its effect].) Because there was no showing that Berry possessed even minimal

knowledge, let alone expertise, about gang culture and practices, the trial court abused its discretion in permitting him to testify as an expert, and his testimony about gangs should have been excluded.

E. The Testimony Of Gang Experts Berry And Valdemar Was Cumulative And Far More Prejudicial Than Probative

Even assuming, arguendo, that the gang testimony of Berry and Sgt. Valdemar was proper and relevant and that Berry was competent to testify as an expert witness, their testimony still should have been excluded because it was cumulative of other, less prejudicial evidence, and its prejudicial impact far outweighed its probative value. The introduction of this cumulative and emotionally-charged evidence permeated the case against appellant, in which the verdict likely reflected the jury's fear of gang members rather than an abiding conviction of appellant's guilt beyond a reasonable doubt.

Courts repeatedly have found error in the introduction of gang expert testimony that is cumulative of other, less prejudicial evidence. "The prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant." (*People v. Cardenas* (1982) 31 Cal.3d 897, 905 [error to admit evidence of gang membership to show possible bias of defense witnesses when a close connection between defendant and witnesses had already been established through other, less prejudicial evidence]; see *People v. Avitia*, *supra*, 127 Cal.App.4th at pp. 193-194 [error to admit evidence of gang graffiti in defendant's room to establish connection between defendant and guns where other evidence already established that guns belonged to defendant]; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1495 [when evidence already established close affinity between defendant and a witness,

admitting evidence of gang membership to establish a relationship between the two was reversible error]; *People v. Munoz* (1984) 157 Cal.App.3d 999, 1013 [evidence of gang affiliation was cumulative, and should not have been admitted].)

In this case, the prosecution offered the gang evidence ostensibly to show motive – that appellant killed Harding and Jackson because gang members react violently when their drugs are stolen. Gang evidence, however, is only admissible to show motive when such evidence is not only relevant, but is also necessary. (*People v. Beyea* (1974) 38 Cal.App.3d 176, 195 [proof of defendant's membership in the Hell's Angels was admissible as it was relevant to prove motive and was material and necessary]; *People v. Carter* (2003) 30 Cal.4th 1166, 1194 [introduction of gang expert testimony to show defendant possessed an intent to kill was not erroneous as it was not cumulative of evidence introduced to show motive or other intent].) The gang experts were not necessary here. As discussed *ante* in section C of this argument, the evidence presented at trial established that appellant was a drug dealer, and that drug dealers respond violently to the theft of their drugs. The expert testimony regarding a gang member's likely violent response to the theft of drugs was cumulative of this other, probative and less prejudicial evidence and, therefore, should have been excluded.

In addition, the gang expert testimony should have been excluded pursuant to the defense objection under Evidence Code Section 352, because it was "evidence of little evidentiary impact" that "evoke[d] an emotional bias." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.) Gang evidence, especially graphic and detailed evidence like that offered by Sgt. Valdemar, exacerbates the jury's natural fear of gangs. It also risks conviction based solely on the jury's perception that the defendant has a criminal disposition. (*People v. Cardenas*, *supra*, 31 Cal.3d at p. 904;

People v. Carter, *supra*, 30 Cal.4th at p. 1194.) As this Court has plainly stated, "[i]n cases not involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez*, (2004) 33 Cal.4th 1040, 1049.) This Court also has specifically "condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact." (*People v. Cox* (1991) 53 Cal.3d 618, 660.) Thus, gang evidence, even when relevant, must be carefully scrutinized before it is admitted. (*People v. Avitia*, *supra*, 127 Cal.App.4th at p. 192.)

In this case, the gang evidence had little probative value because it focused on the conduct of the Mexican Mafia – a gang to which it was undisputed that appellant did not belong. (8 RT 1031.) The prosecution's theory, supported solely by Sgt. Valdemar's testimony, was that appellant's status as a Sureno made him an associate of the Mexican Mafia; based on this assertion, the trial court allowed extensive evidence about the Mexican Mafia. (8 RT 1032, 1035.) However, there are over 500 Sureno gangs in California alone,[27] and, by Sgt. Valdemar's own estimate, the Mexican Mafia is a small gang comprised of about 250-400 members, most of whom are in California prisons. (8 RT 1017.) Although there may be some affiliation between the Surenos and the Mexican Mafia, the link established between appellant and the Mexican Mafia was simply too tenuous, and thus of too little evidentiary value, to support the admission of Sgt. Valdemar's

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[27] See discussion of Sureno gangs at *http://www.streetgangs.com/hispanic/*

prejudicial testimony about the Mexican Mafia.[28]

In effect, the prosecution was permitted to bootstrap appellant's irrelevant membership in the 18th Street gang, which itself was prejudicial, into exceedingly inflammatory expert testimony about the much more powerful and dangerous Mexican Mafia. The introduction of this highly prejudicial testimony based on this extremely loose connection was an abuse of discretion which allowed the jury to convict appellant based on speculation about his alleged association with the Mexican Mafia and its reputation for violence rather than on actual proof of appellant's actions. (See *People v. Ayala* (2000) 23 Cal.4th 225, 276-277 [noting with approval efforts of trial court to exclude references to the "Mexican Mafia" from witness' testimony, given the inflammatory and prejudicial effect of such references].)

There can be no question that the gang expert testimony, especially Sgt. Valdemar's opinions about the Mexican Mafia, was extremely prejudicial. Valdemar described appellant as a "loyal soldier" of the Mexican Mafia (8 RT 1017), and went on to describe in vivid detail the extreme violence of the Mexican Mafia as follows:

- People affiliated with the Mexican Mafia "are the worst of the worst and they are very violent, and retribution is a common factor. And often that retribution and violence is overkill" (8

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[28] Moreover, the link between Surenos and the Mexican Mafia is far more tenuous than presented by Sgt. Valdemar's testimony. According to the Department of Justice, "hundreds of Hispanic gangs identify with the Sureño philosophy and use the number 13 as part of their gang identifiers. The presence of the number 13 does not necessarily indicate affiliation with the Mexican Mafia. Claiming Sureno merely indicates that the gang resides or originated in southern California; in some cases the gang may not be from southern California but simply identifies with the Sureno gang style." *http://www.ojp.usdoj.gov/BJA/what/2005_threat_assesment.pdf*

RT 1018);

- The Mexican Mafia is driven by a warrior culture of masculinity and machismo (8 RT 1019);
- Disrespecting the Mexican Mafia is normally a death sentence (8 RT 1018);
- The Mexican Mafia put out hit contracts and killed three people associated with the making of the film American Me because it was disrespectful to the gang (8 RT 1019);
- "[I]t could be lethal" to say something in a court proceeding that the Mexican Mafia found disrespectful (RT 1029);
- The Mexican Mafia will kill someone within minutes who they perceive to be improperly claiming to be part of the gang (RT 1036-1037);
- Sexual humiliation and degradation, including anal rape, are retaliatory tools used by the Mexican Mafia (8 RT 1019);
- The more gruesome a killing is, the more likely it is to satisfy the Mexican Mafia (8 RT 1022).

In a further attempt to focus the jury on the violent nature of the Mexican Mafia, Sgt. Valdemar relied on the representation of the Mexican Mafia in the movie American Me. (RT 1019.) The reference to this chilling portrayal of the Mexican Mafia served to divert the jury's attention away from the facts of the case, and gave the imprimatur of authority to a fictionalized account of the Mexican Mafia which interjected fearful, offensive and wholly extraneous considerations into the determination of whether appellant was guilty or not guilty.

Relying on this expert testimony, the prosecution made appellant's gang membership the cornerstone upon which it built its case against him. In her summation of the evidence, the prosecutor led off with appellant's

gang membership (10 RT 1336, 1338) and then quickly moved to his association with the Mexican Mafia, relying on Sgt. Valdemar's expert opinion to describe the Mexian Mafia as "a big overseer" for gang members' drug sales in downtown Los Angeles. (10 RT 1338.) The prosecutor described the import of Berry's testimony as telling the jury "what really goes on" and as "the heart of the case." (10 RT 1339, 1340.) She argued that the veracity and weight of the gang experts' testimony was enhanced because each corroborated the other. (10 RT 1339, 1341.) In explaining the essence of her case, the prosecutor highlighted appellant's gang membership: "what this all boils down to in this case is that this defendant, a long-time gang member, felt disrespected." (10 RT 1339.)

However, as a review of the evidence and the prosecutor's own argument makes manifest, gang membership was not factually critical to the prosecution's case. Both Berry and Vashaun testified that drug dealers will retaliate with violence against someone who steals their drugs. (6 RT 758-759; see *ante* section C of this argument.) The prosecutor also argued that drug dealers, regardless of gang affiliation, react violently to the theft of drugs. She told the jury, "As now all of you know . . . when someone's cocaine is taken from them in this manner there are repercussions, people are disrespected, and there are results. There are killings that happen." (10 RT 1340.) She further asserted, "Drug sellers do not just let drugs get lost. There has to be, according to these people, some way to control that. And the way they control it is by doing something physical." (10 RT 1342.) As the prosecutor's argument itself shows, the prosecution could have presented its case that appellant had a motive to kill Harding without any reference to gang affiliation or gang conduct. But it did not.

Instead, the prosecutor infused the case with the Mexican Mafia. Sgt. Valdemar testified repeatedly about the violent conduct of the Mexican

Mafia, and the intensity and rapidity of the Mexican Mafia's violence if they perceive they are being disrespected. (8 RT 1018, 1019, 1022, 1028, 1029, 1036.) The relevance of this testimony, if any, was minimal and remote. Nevertheless, the prosecutor pumped her case against appellant with the fear and loathing of the Mexican Mafia, arguing that the killing of Harding and Jackson was fueled by appellant's anger at being disrespected which, according to her gang experts, arose from a code of conduct and propensity for violence based on his purported but unproven link to the Mexican Mafia. As one court noted long ago, "we must recognize that the prejudicial effect of inadmissible gang membership evidence lies in its tendency to suggest that a defendant is the type of person predisposed to commit violent acts of the type engaged in by the gang to which he belongs." (*People v. Luparello* (1986) 187 Cal.App.3d 410, 426.) That was precisely the message delivered by the gang experts, and underscored by the prosecutor, here. They damned appellant with the Mexican Mafia's sins. Because the gang evidence was far more prejudicial than probative, the trial court abused its discretion under Evidence Code section 352 by failing to exclude the testimony of expert witnesses Berry and Sgt. Valdemar.

F. Reversal Is Required Because The Erroneous Admission Of The Gang Experts' Testimony Resulted In Both A Fundamentally Unfair Trial And A Miscarriage of Justice

As set forth above, the expert testimony about gangs in general and the Mexican Mafia in particular was inherently prejudicial. The erroneous admission of such inflammatory evidence rendered appellant's trial fundamentally unfair in violation of the due process clause of the Fourteenth Amendment to the federal Constitution as well as resulted in a miscarriage of justice under article VI, section 13 of the state Constitution. The federal courts have recognized that the introduction of irrelevant but

inflammatory evidence may deprive the defendant of his due process right to a fair trial. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 67; see also *Walter v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.) In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, the Ninth Circuit found that the admission of irrelevant "other acts" evidence rendered a trial fundamentally unfair in violation of the due process clause where: (1) the challenged evidence was emotionally charged (*id.* at p. 1385); (2) the challenged evidence pervaded the prosecution's case (*ibid.*); and (3) the prosecution's case against the defendant was solely circumstantial and not weighty (*ibid*). Like the "other acts" evidence at issue in *McKinney*, the gang evidence in this case essentially was "offered to prove character and [gave] rise to a propensity inference, and did not tend to prove a fact of consequence." (*Id.* at pp. 1382-1383.) The court's conclusion about McKinney's trial applies equally to appellant's:

> His was not the trial by peers promised in the Constitution of the United States, conducted in accordance with centuries-old fundamental conceptions of justice. It is part of our community's sense of fair play that people are convicted because of what they have done, not who they are.

(*Id.* at p. 1386.) The gang evidence in this case encouraged the jury to convict appellant on the basis of who the prosecution purported he was rather than on the basis of what the prosecution proved he did. As a result, the trial was rendered fundamentally unfair and resulted in a miscarriage of justice.[29]

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[29] In *People v. Partida* (2005) 37 Cal.4th 428, 433-439, this Court held that where a defendant's objection sufficiently alerted the trial court to the nature of his federal constitutional claim, he may raise that claim on appeal. Partida argued on appeal that evidence of his gang involvement was inherently prejudicial and, therefore, its erroneous admission rendered (continued...)

First, as discussed *ante* in section E, the gang evidence, especially the focus on the Mexican Mafia, was emotionally-charged and highly inflammatory. The jury heard not only that showing disrespect to the Mexican Mafia is "normally a death sentence" (8 RT 1018) and that the Mexican Mafia had killed three people involved with the making of the film American Me because the Mexican Mafia perceived the movie as disrespectful (8 RT 1019), but also that the punishing arm of the Mexican Mafia could even reach participants in court proceedings, exacting revenge against those whom it perceived testified in a manner that was disrespectful to the organization. (8 RT 1029.) This compelling evidence of other people's violence and criminality played on the jury's fear of gangs, thereby inflaming the jury against appellant. The gang evidence also impermissibly permitted conviction based not simply on appellant's own alleged criminal disposition arising from his membership in the 18th Street gang but on the criminal disposition of the Mexican Mafia to whom appellant was linked only by Sgt. Valdemar's opinion that he, as a Sureno, necessarily was a "loyal soldier" for that gang. (8 RT 1017; see *People v. Williams* (1997) 16 Cal.4th 153, 193 [given highly inflammatory impact of gang evidence on a

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[29](...continued)
his trial fundamentally unfair in violation of the due process clause of the federal constitution. (*Id.* at pp. 433, 437.) This Court concluded that, where the defendant objected at trial that the court erred in admitting certain evidence because it was more prejudicial than probative under Evidence Code section 352, his claim that the trial court's error in overruling the objection violated his due process rights could be raised on appeal. (*People v. Partida*, supra at pp. 436-437.) The same holds true here: appellant's Fourteenth Amendment due process claim and his Eighth Amendment reliability claim simply ask the Court to draw alternative legal conclusions from the same objection that he presented to the trial court. (*Id.* at p. 436.)

jury, "trial courts should carefully scrutinize such evidence before admitting it."] This risk of conviction based on speculation, association and predisposition was prejudicial. (*People v. Cardenas*, *supra*, 31 Cal.3d at p. 904 [admission of gang membership required reversal given the substantial danger that the jury would improperly infer appellant had a criminal disposition].)

Second, as set forth *ante* in section E, the gang expert testimony pervaded the prosecutor's case against appellant. A prosecutor's exploitation of erroneously admitted evidence often is a key factor in finding the error prejudicial. (*People v. Hernandez* (2003) 30 Cal.4th 835, 877 [prejudice of erroneously admitted evidence amplified by prosecutor's argument]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [prosecutor's exploitation of erroneously admitted evidence in argument establishes prejudice.)] The prosecutor repeatedly emphasized that "the heart of her case," what it "all boiled down to," was that appellant's status as a gang member required and demanded of him that he retaliate with lethal violence against Harding for the theft of his drugs. (10 RT 1339, 1340, 1342, 1343, 1345, 1351, 1353.)

The prosecutor's emphasis on the gang expert testimony allowed her to distract the jury from the evidentiary weaknesses of the case against appellant and instead focus the jury's attention on the problem, and their own fear, of gang violence. Moreover, the prosecutor used the gang evidence to imbue her theory of the case with the imprimatur of authority from witnesses identified by the trial court as experts. (See e.g., 11 RT 1341 [arguing to the jury that, "as Wilson Berry and Sergeant Valdemar testified," the way to stop other drug users from taking another dealer's cocaine is "you kill someone and you make an example out of them."].)

Third, the prosecution's evidence against appellant was far from

overwhelming. Apart from evidence of motive based on appellant's anger over Harding's theft of his drugs, the prosecution's case consisted of thin and problematic circumstantial evidence including: appellant's presence at the Pacific Grand Hotel when the murders occurred (9 RT 1106-1109; 11 RT 1354); appellant's fingerprints at the crime scene, which was a room he had visited (6 RT 728; 11 RT 1400, 1401); appellant's access to cutting tools and wire through his job (9 RT 1060, 1070; 11 RT 1354); and appellant's admitted prior assault and ransacking of McPherson's hotel room two days prior to the murders (11 RT 1336). The lack of any direct evidence linking appellant to these crimes and the weakness of the circumstantial evidence underscore the prejudicial effect of the erroneous admission of the gang expert testimony. (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1386 ["lack of a 'weighty' case against [appellant] and pervasiveness of erroneously admitted evidence" evince prejudice of trial court error]; *People v. Cardenas*, *supra*, 31 Cal.3d 897, 907, 910 [given that evidence against appellant was "not overwhelming," consisting solely of cross-racial eyewitness identification, it was reasonably probable that appellant was convicted based on "status as a heroin addict and gang member rather than on evidence connecting him to the crimes"]; *People v. Maestas*, *supra*, 20 Cal.App.4th at pp. 1498-1499 [erroneous admission of gang evidence was prejudicial because guilt evidence was weak and gang retribution testimony and argument was pervasive].)

Fourth, in addition to improperly bolstering the prosecution's case, the expert gang testimony unfairly undermined the defense case by unjustifiably portraying appellant as a "foot soldier" for a notoriously violent gang. Appellant's defense consisted primarily of his own testimony. The expert testimony about gangs essentially told the jury that appellant was a bad person whose word should not be trusted. Rather than try to

impeach appellant by his own conduct and own statements, the prosecution branded appellant as an associate of the Mexican Mafia which, by itself, was sufficient to make him incredible. After hearing that the Mexican Mafia killed people involved with filming of American Me and used sexual humiliation as a form of revenge, there was little chance that the jury would rationally and dispassionately evaluate appellant's testimony. (*People v. Avitia, supra,* 127 Cal.App.4th at pp. 194-195 [gang evidence was prejudicial where the government's case "was not overwhelming" and appellant's credibility was "key to the success of his defense"].)

In sum, the irrelevant expert gang evidence, which the prosecutor fully exploited in her closing argument, corroded the jury's verdict by preying on their fear of gangs, influencing them to distrust appellant's testimony, encouraging them to disregard the weaknesses of the prosecution's case, and ultimately leading them to believe that appellant would rather kill Harding in an act of gang revenge than have him sell drugs for appellant to fully repay for the drugs he had stolen. The highly inflammatory gang evidence falsely bolstered the prosecution's case – which was far from overwhelming – and unfairly undercut the defense by sabotaging appellant's credibility. As a consequence of the erroneous admission of Berry's and Valdemar's highly prejudicial gang testimony, appellant's trial was rendered fundamentally unfair in violation of the due process clause of the Fourteenth Amendment. (*McKinney v. Rees, supra,* 993 F.2d at p. 1385.)

Whether judged as federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18, 24, which places the burden on the prosecution to prove that the error was harmless beyond a reasonable doubt, or as state error under *People v. Watson* (1956) 46 Cal.2d 818, 836, which places the burden on appellant to prove there is a reasonable probability that

but for the error he would have achieved a more favorable result, the erroneous admission of the gang expert testimony was prejudicial, and the murder convictions, special circumstance finding and death sentence should be reversed.

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IV

APPELLANT WAS DENIED HIS RIGHTS TO A FAIR TRIAL AND TO PRESENT A DEFENSE WHEN THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE OF THIRD PARTY CULPABILITY FOR THE MURDERS OF HARDING AND JACKSON AND EVIDENCE THAT APPELLANT WAS NOT ANGRY AT HARDING BECAUSE OF THE THEFT OF HIS DRUGS

The trial court erroneously excluded defense evidence that impeached and contradicted the prosecution's theory of appellant's guilt for the two charged capital crimes. The trial court erroneously excluded evidence of third party culpability for the murders of Harding and Jackson and evidence that contradicted the prosecution's theory that appellant's anger at Harding was related to the earlier theft of his drugs. Appellant sought to introduce evidence that in the evening hours of December 24, 1994, while Donte Vashaun and Donna Meekey were alone in room 415, Vashaun ordered Meekey to seduce appellant so that Vashaun could steal the cocaine he believed had been returned to appellant by Miller. (5 RT 536.) When Meekey refused, Vashaun stripped off her clothes and began to beat her about her face and body, ultimately pushing her naked, bruised body into room 416, where she stood crying before appellant. (6 RT 686.)

At trial, appellant sought to introduce evidence of Vashaun's beating of Donna Meekey for two purposes. First, through cross-examination of Meekey and Vashaun, appellant sought to show Vashaun's culpability for the murders of Harding and Jackson. Vashaun's beating of Meekey occurred in the exact location and very close in time to the beating and murders of Harding and Jackson (i.e., after the theft of appellant's cocaine but before the murders) and evinced Vashaun's willingness to use violence to gain access to appellant's cocaine. The trial court erroneously excluded

this evidence of third party culpability on its mistaken finding that the proffered evidence was not relevant.

Second, appellant sought to prove, through his own testimony, that he was angry at Harding not because of the earlier theft of his drugs, but because Harding had allowed Meekey to be brutally beaten by Vashaun without intervening. This evidence would have contradicted what the prosecutor described as "the heart of the case" (11 RT 1340) – that appellant's anger toward Harding was fueled by his sense of being disrespected by Harding for not returning all of appellant's drugs. The trial court erroneously excluded this evidence, relying on his prior order excluding testimony from Vashaun and Meekey about this incident as determinative of the issue and finding that the reason for appellant's anger was not material to the case. (10 RT 1293-1295.)

The United States Constitution guarantees every criminal defendant the right to present a defense:

> "Whether rooted directly in the Due Process clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants, 'a meaningful opportunity to present a defense.'"

(*Holmes v. South Carolina* (2006) 126 S.Ct. 1727, 1731, citations omitted.) The California Constitution provides a similar guarantee. (Cal. Const. art. I, § 15; *People v. Lucas* (1995) 12 Cal.4th 415, 436.) The exclusion of appellant's evidence prejudicially denied these state and federal constitutional rights.

A. Proceedings Below

Appellant repeatedly attempted to introduce evidence that in the days immediately preceding the murders of Jackson and Harding, Donte Vashaun had severely beaten Donna Meekey and left her naked in room

416 because she would not cooperate in his scheme to steal cocaine from appellant. (5 RT 536, 671; 6 RT 686, 690, 720, 813.) From the outset of the trial the prosecutor sought to exclude evidence of the interaction between Meekey and Vashaun, which she blandly described as evidence that Vashaun had come into the hotel room and told Meekey to take off her clothes. (5 RT 536; 6 RT 687.) In response to the prosecutor's motion to exclude the evidence, appellant's initial proffer was that:

> Donte Vashaun, the people's witness, took [Meekey] into a room, made her get undressed and told her he wanted her to go outside and screw – that isn't the word. The word was a different word, a four letter word – and while she was in the process of doing that, he was going to steal the defendant's drugs; that when she told him she wouldn't do that, he beat her up and told her he would do things to her if she didn't go out and do it. The motivation is obvious. The people who had the most to gain from the death of the victims in this case was not Mr. Becerra.

(5 RT 535-536.)

The court refused to allow this evidence to be presented to the jury, ruling that "third party culpability, it can't come in. There is no way you can get it in this time." (5 RT 536.)

During his cross-examination of Donna Meekey, defense counsel asked Meekey about Vashaun threatening her and beating her up when she refused to cooperate with him in stealing appellant's drugs. (6 RT 686.) The prosecutor again objected, stating that "I don't see the relevance [of this] to whether or not the defendant, who is totally different than Donte Vashaun, whether this defendant killed Fontain and J.J." (6 RT 688.) Appellant's counsel again made the proffer that Meekey would testify that she was beaten by Vashaun after she refused to keep appellant occupied so that Vashaun could steal his dope, and that this evidence is a "link in the chain of circumstances which will clearly indicate that the people who had

the . . . motive for killing Fontain were Donte Vashaun and Jerry Haywood, who is the people's next witness." (6 RT 688.)

The trial court rejected this offer, flatly stating that the proffered evidence was not relevant. (6 RT 688.) In rejecting the relevance of Vashaun's use of brutal violence in an attempt to seize appellant's drugs, the court first stated that the evidence thus far established that appellant had a motive to kill Harding and Jackson, because "it is his dope, he has a motive to get it back and kill somebody." (*Ibid.*) The court then explained that the proffered evidence "that [Vashaun] is going to beat her up so they can steal his dope" did not establish a motive for the murders. (6 RT 689.) The court acknowledged that the proffered evidence was third party culpability evidence, but stated "if you want to put on a defense, do it some other way." (*Ibid.*)

As the trial progressed, the testimony from Vashaun and others established further foundation for the relevance of the proffered evidence of Vashaun's attempts to use violence to seize appellant's drugs. The evidence established that at the time of Harding's murder, Vashaun believed that Harding was in possession of close to half a kilo of cocaine. (6 RT 784, 792.) Vashaun knew that Harding and Miller had taken appellant's drugs (6 RT 786); Vashaun knew that Miller had returned her portion of appellant's cocaine (6 RT 792) and that Harding's portion was much larger (6 RT 799); and Vashaun did not know that Harding had returned to appellant the portion of the drugs he had taken (6 RT 800).[30] Vashaun's testimony also established that he was not opposed to violence such as that exhibited in these murders. He testified, "Fontain broke a law

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[30] Wilson Berry, not Vashaun, brokered the return of Harding's drugs. Once this was completed, Berry left the hotel. (8 RT 981.)

in our world, our world is different from your world . . . in our world people [murder] every day." (6 RT 758.)

Having established these facts, which further underscored the relevance of Vashaun's assault on Meekey, appellant's counsel again attempted to introduce the evidence of the assault, this time through his cross-examination of Vashaun. He asked Vashaun about his beating Meekey in an attempt to force her to cooperate in stealing appellant's cocaine. (6 RT 813.) The trial court, however, refused to consider the additional evidence, ruling that the question was "direct contempt" and that counsel should "stay away from it." (6 RT 814.)

In the defense case, appellant attempted to introduce evidence of Vashaun's attack on Meekey through his own testimony for a new and different purpose – to impeach the prosecution's theory that appellant murdered Jackson and Harding in retaliation for the theft of his drugs. Throughout its case, the prosecution emphasized that appellant was angry at Harding for the theft of his drugs, that as a gang member appellant had to retaliate violently for the theft of his drugs, and that the circumstances of the crimes showed that they were a gang retaliation killing. The prosecutor mentioned this theory repeatedly in her opening statements. (5 RT 541, 544, 545.) Indeed, she emphasized that the strength of the motive evidence overcame the paucity of physical evidence:

> You are not going to hear from any eyewitnesses. No person can come into this courtroom and say, 'I saw this man with his two homeboys do the strangling.' But what you have is evidence of motive; you have opportunity; you have the reasoning for what was going on in his mind at the time. You have the narcotics and the motivation behind that and how people are responsible for that quantity of cocaine and how it has to be handled. You will hear ample evidence of that during the course of this trial.

(5 RT 546.) The prosecutor was clear that explaining why appellant committed the murders, as retaliation for the theft of his drugs, was integral to her case: "At the end of this trial you will have in front of you the evidence which shows you, explains to you exactly what it is that happened and, most importantly, why it happened." (5 RT 548.)

During the prosecutor's cross-examination of appellant, she repeatedly elicited testimony that appellant was angry at Harding and that appellant's anger was related to the theft of his cocaine; indeed, every time that the prosecutor asked appellant about his anger, she immediately followed up with a question or statement relating to the theft of his cocaine. (9 RT 1191, 1192; 10 RT 1270, 1280, 1283, 1285, 1286.) On redirect examination, defense counsel asked appellant why he was angry at Harding. The prosecutor objected, stating "I believe that the court has already ruled on this area." (10 RT 1291.) The court upheld the objection, ruling that the reason for appellant's anger was irrelevant:

> The Court: Tell me what you want him to say.
>
> Mr. Garber: Well, he is going to discuss he had an argument and what the argument was about.
>
> The Court: What is the relevance of that argument and what it is about? What is the relevance when I have already ruled the only thing that is relevant here is the fact he was mad? She is trying to show his anger, he has a propensity to get angry. The reason he is angry is not material. Why she keeps going over it is a mystery to me. The fact that you people want to get into something in that I already ruled on is not going to change my position. It is not relevant; it is not coming in. It is offered for one limited purpose. I told you that before. Stay the hell away from it. If you insist on going over this stuff, both of you, you are stuck with it.
>
> Mr. Garber: Judge we haven't gone over anything on this.
>
> The Court: You are not going to. I am not going to change my ruling because you don't object when she asks a question

> or you say she opened the door and it snuck in. You opened the door originally; you baited her.
>
> Mr. Garber: Judge, she has been opening the door, for example, about the statement –
>
> The Court: Mr. Garber, your client opened the door, and he has been well trained. That's the end of the issue. Let's get on with it. If I hear one more time how much dope he took, I am going to step in. We are not going to get into this. I have already ruled. The fact you guys open the door, that is your problem. You think she opened the door; you opened the door. You stay away from the door.

(10 RT 1293-1295.)

Finally, appellant raised the trial court's error in excluding the evidence of third party culpability in his motion for a new trial. (X CT 3111-3126.) In his moving papers, trial counsel asserted that the trial court's error in excluding the evidence of Donte Vashaun's attack on Meekey denied appellant "due process of law and a fair trial." (X CT 3117.)

B. The Trial Court Abused Its Discretion In Excluding The Relevant Evidence Of Donte Vashaun's Violent Assault On Donna Meekey As Part of Vashaun's Scheme To Steal Appellant's Cocaine From Harding And Thereby Denied Appellant A Fair Trial And The Right To Present A Defense

The trial court abused its discretion in excluding the evidence of Donte Vashaun's violent assault on Donna Meekey in an attempt to get appellant's cocaine two days prior to the murders of Harding and Jackson, particularly in light of the evidence that Vashaun believed Harding still had appellant's cocaine. The trial court repeatedly erred in finding this third party culpability evidence "not relevant." (5 RT 536; 6 RT 688.)

Article I, section 28, subdivision (d) of the California Constitution provides that "relevant evidence shall not be excluded in any criminal

proceedings." Relevant evidence is defined statutorily as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) As this Court has explained, "[t]he test of relevance is whether the evidence tends 'logically, naturally and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Garceau* (1993) 6 Cal.4th 140, 177; *People v. Babbitt* (1988) 45 Cal.3d 660, 681 [to be relevant, proffered evidence must have a tendency in reason to prove the fact for which it is offered].) The essential inquiry does not change because the evidence addresses the potential culpability of another person. Rather, as this Court has held, "courts should simply treat third party culpability evidence like any other evidence: if relevant it is admissible (Evid. Code, § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion (Evid. Code, § 352)." (*People v. Hall* (1986) 41 Cal.3d 826, 834 [rejecting any previous distinction between the evaluation of evidence of third party culpability and all other evidence].) As shown below, appellant's excluded evidence not only was relevant to the motive behind the murders of Harding and Jackson but circumstantially linked Vashuan to the actual killings, and there was no basis for any concern that the probative value of appellant's evidence would be outweighed by any of the factors set forth in Evidence Code section 352.

Motive was central to this case. The prosecution's theory was that appellant killed Harding and Jackson both in retaliation for the theft of his drugs and in an attempt to ward off retaliation against appellant from other gang members for having allowed cocaine that belonged to the gang to be stolen. (5 RT 545-546; 11 RT 1339-1341.) The prosecution's case necessarily focused largely on this motive, as there was no significant

physical or other evidence linking appellant to the crime.[31]

The evidence appellant proffered regarding Vashaun's violence toward Meekey supported an alternative theory that also focused largely on motive: that Vashaun, believing Harding still possessed the lion's share of appellant's cocaine, wanted the cocaine and resorted to violence to get what he wanted, ultimately killing Harding in pursuit of the stolen drugs. (5 RT 535-536.) Vashaun's brutality toward Meekey evinced his willingness to use violence to get his hands on appellant's cocaine. As appellant's counsel explained, this evidence was a "link in the chain of circumstances" showing Vashaun's motive for killing Harding. (6 RT 688.)

The relevance of the excluded evidence is readily apparent. First, the evidence provided circumstantial proof of disputed issues of motive and opportunity, linking a specific third person, Donte Vashaun, by his own violent act to the commission of the murders with which appellant was charged. (*People v. Hall, supra*, 41 Cal.3d at p. 833 ["there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime"].) This evidence did not simply point to a theoretical motive on the part of others, but identified a particular individual with specific motive to commit the crimes. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 176 [to be relevant evidence of third party culpability must establish actual motivation on the part of another, not just the idea that others might have wanted to kill the victim].) Second, Vashaun's violent conduct toward Meekey, like the murders of Harding and Jackson, was related to appellant's crack cocaine. (Cf. *People v. Avila* (2006) 38 Cal.4th 491, 578

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[31] The sole physical evidence linking appellant to the murders were fingerprints in room 415, a room in which appellant testified he had spent a substantial amount of time in the days preceding the murders. (6 RT 728, 740; 8 RT 964.)

[evidence that third party committed an unrelated rape was too speculative to be relevant]; *People v. Harris* (2005) 37 Cal.4th 310, 340 [evidence that third party was involved in drug dealing with victim of attempted murder and ultimately murdered that victim was not sufficiently linked to the actual perpetration of the crimes charged].) Third, the evidence of Vashaun's motive and willingness to use violence was close in time and physical proximity to the murders: Vashaun's assault on Meekey occurred just two days before and in the same location as the killing of Harding and Jackson. (*People v. Mendez* (1924) 193 Cal. 53 [third party evidence may be relevant if it shows the third parties close to the scene of the crime]; Cf. *People v. Robinson* (2005) 37 Cal.4th 592, 624 [proffered third party evidence was too remote in time and did not link the third parties to this crime].) Finally, the relevance of motive evidence is "particularly significant" where, as here, there is "an absence of physical evidence linking defendant to the . . . killings." (*People v. Garceau, supra*, 6 Cal.4th at p. 176.)[32]

In excluding appellant's proffered evidence, the trial court both misinterpreted the law and misperceived the facts. The trial court failed to

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[32] Because appellant's proffered third party culpability evidence had a "tendency in reason" to disprove the prosecution's theory of motive and inferentially to disprove its theory that appellant killed Harding and Jackson, the excluded evidence did not ask the jury to draw "speculative inferences." (*People v. De La Plane* (1979) 88 Cal.App.3d 223, 244.) Evidence is either relevant, or it is irrelevant. If it is relevant, it is presumptively admissible (Evid. Code, § 351; *People v. Green* (1981) 27 Cal.3d 1, 39, fn. 25, overruled on other grounds, *People v. Martinez* (1999) 20 Cal.4th 225.) If it is irrelevant, it is inadmissible. (Evid. Code, § 350; *People v. Babbitt, supra*, 45 Cal.3d at p. 681.) Evidence is not rendered "speculative" and thus "irrelevant" simply because it may be subject to various interpretations. As long as one of the interpretations has a tendency to prove the fact for which the proponent offers it, the evidence is relevant. (*People v. Kraft* (2000) 23 Cal.4th 978, 1034.)

grasp that the admissibility of third party culpability evidence does not turn on the strength of this evidence when compared to the prosecution's theory, but turns solely on whether or not the evidence has a tendency in reason to prove the fact for which the defendant offers it. In *People v. Hall*, *supra*, 41 Cal.3d at p. 833, this Court expressly rejected as a requirement for relevance that third party evidence present "substantial proof of a probability" of another's guilt. Nevertheless, in refusing appellant's proffered evidence, the trial court relied only on the prosecution's theory: "[i]t is Becerra's dope, as the evidence is now. It is his dope, he has a motive to get it back and kill somebody" (6 RT 688.) The trial court failed to consider whether appellant's third party culpability evidence would tend to disprove this theory. Misapprehending its duty under *Hall*, the trial court misjudged the probative value of appellant's evidence.

Moreover, as the trial continued and established further foundation for the relevance of the proffered evidence (6 RT 792, 799, 800), the trial court refused to revisit its ruling. As this Court has stated, it is incumbent upon a trial court to reconsider proffered third party evidence as further testimony is introduced, because evidence which had been speculative and inadmissible may become relevant and admissible. (*People v. Harris*, *supra*, 37 Cal.4th at p. 339.) In this case, the trial court flatly dismissed this duty, warning trial counsel that it was "direct contempt" to question Vashaun about his beating of Meekey. (6 RT 814.) This refusal to reconsider the admissibility of the proffered evidence compounded the trial court's abuse of discretion.

Had the court admitted the proffered evidence, the jury would have heard of Vashaun's cocaine-motivated beating of Meekey two days prior to, and in the same room as, the cocaine-motivated beating and murders of Harding and Jackson. This is precisely the kind of circumstantial evidence

that is capable of raising a reasonable doubt as to appellant's guilt because it shows the motive, opportunity and capacity of a third person to have committed the murders of Harding and Jackson. (*People v. Hall, supra*, 41 Cal.3d at p. 833.) The trial court's ruling that the excluded evidence did not show "any motivation or any relevance" was simply wrong. (6 RT 689.)

The trial court's exclusion of appellant's evidence about Donte Vashaun violated not only state law but the federal Constitution as well. The compulsory process and confrontation clauses of the Sixth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution guarantee every criminal defendant "'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.) Few rights are as fundamental as this one (*Rock v. Arkansas* (1987) 483 U.S. 44, 51, fn. 8), which is "among the minimum essentials of a fair trial." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) As the Supreme Court explained forty years ago, "The right to present a defense is . . . a fundamental element of due process of law." (*Washington v. Texas* (1967) 388 U.S. 14, 19.)

Recently, the United States Supreme Court reaffirmed the importance of the right to a meaningful opportunity to present a complete defense in a capital case, like appellant's, involving third party culpability evidence. In *Holmes v. South Carolina* (2006) ___ U.S. ___, 126 S.Ct. 1727, the Court held that the defendant had been denied his right to present a defense when the trial court applied a state rule barring admission of third party culpability evidence where the state presents strong evidence, especially strong forensic evidence, of the defendant's guilt. Because forensic evidence implicated the defendant, the trial court excluded defense evidence tending to show that another man had committed the murder. (*Id.*

at pp. 1731-1732.) While finding constitutional error, the High Court made clear that a state court may exclude a defendant's evidence that someone else committed the crime with which he is charged if his evidence "does not sufficiently connect the other party to the crime or does not tend to prove or disprove a material fact in issue at the defendant's trial." (*Id.* at p. 1733.) However, a state court may *not* exclude the defendant's third party culpability evidence because, in its opinion, the proffered defense evidence does not raise a reasonable inference as to the defendant's innocence in light of the weight of the prosecution's incriminating evidence. (*Id.* at p. 1734.)

Holmes highlights the violation of appellant's constitutional right to present a complete defense. Appellant's evidence about Vashaun suffered from none of the defects that *Holmes* identifies as permissible grounds for exclusion. As shown above, the evidence about Vashaun directly and immediately connected him to the motive, location, people, and type of violence involved in the murders. In addition, the evidence tended to prove the defense theory, and to disprove the prosecution's theory, of the motive for and the perpetrator of the murders and thus focused on central issues in the case.

Moreover, the trial court's relevance ruling in this case, like the state evidentiary rule at issue in *Holmes*, erroneously premised the decision to exclude the third party culpability evidence on the strength of the prosecution's proof. As discussed above, the trial court here began its analysis by noting that the evidence at trial strongly supported the prosecution's theory of guilt, i.e. that appellant killed Harding and Jackson because Jackson had stolen appellant's cocaine. (6 RT 688.) Rather than carefully evaluate the probative value of appellant's evidence, the trial court made an initial ruling summarily rejecting the evidence and then refused to

reconsider the proffer. (6 RT 688, 814.) As *Holmes* teaches, the strength of the prosecution's case is irrelevant to the logical connection of the proffered third party culpability evidence to the central issue for which it is offered. (*Holmes v. South Carolina, supra*, 125 S.Ct. at p. 1734.)

The erroneous exclusion of the defense evidence about Donte Vashaun's assault on Donna Meekey violated appellant's Sixth and Fourteenth Amendment rights to present a complete defense as well as his Fourteenth Amendment due process right to a fair trial. The excluded evidence was integral to appellant's defense, especially since it independently corroborated his own testimony, and there was no other means for him to present this evidence. The evidence was highly probative, in that it tended to show that someone other than appellant had committed the murders. In analogous cases, the exclusion of relevant defense evidence has resulted in a denial of the federal constitutional right to present a defense. (*Gill v. Ayers* (9th Cir. 2003) 342 F.3d 911, 916-921 [trial court's refusal to allow defendant to testify at sentencing hearing to explain circumstances of prior conviction on ground that proof of prior conviction is limited to record of conviction violated defendant's constitutionally protected right to testify]; *Greene v. Lambert* (9th Cir. 2002) 288 F.3d 1081, 1089-1092 [trial court's refusal to allow evidence of defendant's dissociative identity disorder, which was relevant to his mental state, violated his constitutional right to present a defense]; *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062 [trial court's exclusion of husband's journal and petitioner's reaction to reading it was constitutional error, not mere evidentiary error, because it would have corroborated defendant's testimony on the critical issue of her state of mind when she shot her husband].) A similar Sixth and Fourteenth Amendment violation occurred here.

The trial court's ruling also denied appellant his Eighth Amendment right to a reliable sentencing determination. Even if the jury had convicted appellant of the murders of Harding and Jackson after considering the evidence of third party culpability, the jury still could have considered it as lingering doubt evidence at the penalty phase. (See *People v. Terry* (1964) 61 Cal.2d 137, 145-146 [jury may determine that guilt proven beyond reasonable doubt but still demand greater degree of certainty for imposition of death penalty].) The failure to permit appellant to introduce this evidence effectively removed his ability to present a potential mitigating factor in violation of the Eighth and Fourteenth Amendments. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

Appellant acknowledges that this Court has held that the erroneous exercise of discretion under ordinary state evidentiary rules does not violate the federal Constitution. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611-612.) In *Cudjo*, the Court drew a distinction between the exclusion of defense evidence resulting from the application of "*general rules* of evidence or procedure which preclude material testimony or pertinent cross-examination for arbitrary reasons, such as unwarranted and overbroad assumptions of untrustworthiness" and the exclusion of defense evidence resulting from the application of state rules that themselves are not unconstitutional. In the Court's view, the former but not the latter ruling runs afoul of the federal Constitution. (*Id.* at p. 611.) This view is difficult to reconcile with the purpose of constitutional protections. A defendant's right to present a defense is no less infringed when judicial error, as opposed to an unduly restrictive state statute or evidentiary rule, stymies the right. Under the Court's *Cudjo* analysis, judicial errors which infringe on fundamental constitutional rights are not violations of the federal

Constitution, despite the fact that the infringement is just as serious as if it were caused by an unconstitutional statute. This result makes no sense.

Since *Cudjo*, this Court has addressed claims of federal constitutional error arising from the exclusion of defense evidence without applying the distinction used in *Cudjo*. In *People v. Fudge* (1994) 7 Cal.4th 1075, the Court held that the trial court's ruling that prevented defense counsel from introducing hearsay testimony on cross-examination did not deny the defendant his due process right to present a defense. As the Court explained:

> Although completely excluding evidence of an accused's defense theoretically could rise to this [constitutional error] level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 58.)

(*Id.* at p. 1103.) Thus, the claim was rejected because this Court found that the excluded evidence was unimportant without any reference to whether the exclusion resulted from the operation of an unconstitutional state rule or statute or from "mere" judicial error.

More recently, in *People v. Cunningham* (2001) 25 Cal.4th 926, this Court reaffirmed the holding in *Fudge* and found that the trial court rulings precluding defense questions were not of constitutional dimension because it did "not appear that, had the trial court permitted the inquiries that defense counsel sought to make, the resulting testimony would have produced evidence of significant probative value to the defense . . ." (*Id.* at p. 999.) Thus, *Cunningham* also utilized a test that looks at the effect of the ruling rather than whether the ruling is based upon "mere" judicial error rather than some form of systemic error.

In this case, the trial court's error did not simply address "a minor or

subsidiary point" (*People v. Fudge*, *supra*, 7 Cal.4th at p. 1103). Rather, it excluded "evidence of significant probative value" that was essential to appellant's third party culpability defense. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 999.) As a result, the exclusion of appellant's evidence violated his due process right to a fair trial under the Fourteenth Amendment and his right to present a complete defense under the Sixth and Fourteenth Amendments.

C. The Trial Court Abused Its Discretion In Excluding Evidence That Appellant Was Angry At Harding For Not Stopping Donte Vashaun's Assault On Donna Meekey Rather Than For The Theft Of His Drugs And Thereby Denied Appellant A Fair Trial And The Right To Present A Defense

Faced with a paucity of facts linking appellant to the murders of Jackson and Harding, the prosecutor resorted to a theory built on fear and innuendo. Central to this theory was the notion that the murders were a revenge killing for the theft of the drugs, and somehow were connected to appellant's membership in a Sureno gang. As set forth in Section B of this argument, *ante* at pages 114-123, the prosecutor repeated this same set of facts over and over in her opening statement (5 RT 541, 544, 545, 546, 548) and her cross examination of appellant (8 RT 1191, 1192; 10 RT 1270, 1280, 1283, 1285, 1286). Indeed, this motive theory was the very reason used to justify admitting the testimony of the prosecution's gang experts. (See Argument III, *ante.*) Yet, when, in the course of his own testimony, appellant attempted to offer an alternative explanation for his anger toward Harding which was not linked to the theft of his drugs, the trial court refused even to consider the offer of proof and excluded the evidence on the grounds that the reason for appellant's anger was irrelevant. (10 RT 1293-1295.) As shown below, the trial court abused its discretion in excluding

appellant's evidence and thereby denied appellant his federal constitutional rights to a fair trial, to present a complete defense, and to present evidence on his own behalf.

Relevant evidence is admissible as discussed in Section B of this argument, *ante* at pages 114-116 and incorporated here. Contrary to the trial court's ruling, the evidence appellant sought to introduce was relevant because the prosecution's case rested not only on the fact that appellant was angry but also on the reason for his anger. Lacking significant physical or other strong evidence to link appellant to the murders, the prosecution emphasized motive. And its theory of appellant's motive focused on why he was angry. The prosecutor directly argued the reason for appellant's anger to the jury: "[W]hat this all boils down to in this case is that this defendant, a long-time gang member, felt disrespected." (11 RT 1339.) What was critical to the prosecution's case was not simply appellant's anger, but that as a gang member who was angry about the theft of his drugs and the disrespect that the theft showed, appellant would have had to retaliate with a level of violence such as that reflected in the murders of Harding and Jackson. (11 RT 1339, 1340, 1341, 1343, 1349.) The prosecutor's motive theory informed her closing argument in which she recited the evidence from her gang experts that the particular manner of the killings – strangulation with the victims' pants pulled down – could be consistent with what a gang member who has been disrespected would do. (11 RT 1350, 1351.) Given this record, the trial court's analysis that the prosecution was only "trying to show his anger, he has a propensity to get angry" (10 RT 1294) was simply wrong. The reason for appellant's anger was clearly central to the prosecution's case.

Appellant's evidence that his anger at Harding had nothing to do with the prior theft of his drugs and was not related to appellant's gang

status would have called into question the major thrust of the prosecution's case. His evidence would have countered the prosecution's proof on the substantial, disputed issue of motive which, as the prosecutor herself explained, was what the case "all boils down to." (11 RT 1339.) The exclusion of this relevant and important evidence was error, especially since no other equivalent evidence was presented to the jury. (*People v. Cunningham* (2001) 25 Cal.4th 926, 994 ["Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of significant probative value"]; *People v. Boyette* (2002) 29 Cal.4th 381, 425 [error to exclude evidence that corroborated defense presented through appellant's testimony]; *Hammarley v. Superior Court* (1979) 89 Cal.App.3d 388, 401 [state evidentiary rules may not be applied in a manner that denies the defendant the right to present "all evidence that can throw light on the issues in the case"]; see, *People v. Garceau, supra*, 6 Cal.4th 140, 177 [evidence of motive is particularly significant in cases without physical evidence].) Appellant's proffered testimony that his anger stemmed from what he perceived of as Harding's failure to protect Meekey would have given the jury a reasonable explanation for appellant's anger that did not support the prosecution's theory of guilt. Appellant's proffered evidence would have undermined the state's entire approach to the case, and may well have caused a juror to have a reasonable doubt as to appellant's guilt. (*People v. Reeder* (1979) 82 Cal.App.3d 543, 550 [error for trial court to exclude evidence of appellant's state of mind from which the jury could have drawn an exculpatory inference]; see X CT 2881 [CALJIC 2.01, instructing jury that if circumstantial evidence permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, the jury must adopt that interpretation that points to the defendant's innocence, and

reject that interpretation that points to his guilt].)

The exclusion of appellant's own testimony about the reason for his anger, like the exclusion of his third party culpability evidence, violated not only state evidentiary law but the federal Constitution as well. The right to a fair trial under the Fourteenth Amendment and the right to present a defense under the Sixth and Fourteenth Amendments are set forth in section B *ante* at pages 119-124 and that discussion is incorporated here. In addition, appellant had the right to testify in his own defense and "to present relevant testimony" under the due process clause of the Fourteenth Amendment, the compulsory process clause of the Sixth Amendment, and the privilege against self-incrimination under the Fifth Amendment. (*Rock v. Arkansas*, *supra*, 483 U.S. at pp. 51-53, 55.) Just as the state may not arbitrarily prevent the defendant from testifying (*Rock v. Arkansas*, *supra*, at pp. 49, 55), it may not arbitrarily restrict his testimony, as the trial court did here, so as to exclude relevant evidence on a material issue.

As a result of the trial court's order, the prosecution was permitted to present its theory for appellant's anger at Harding and to argue its theory as pointing to appellant's guilt, but appellant was precluded from presenting evidence that would have provided an alternative reason for his anger, pointing to a reasonable doubt about his guilt. Simply stated, appellant was entitled to be heard on the question of his anger. (*Crane v. Kentucky*, *supra*, 476 U.S. at p. 690 ["an essential component of procedural fairness is an opportunity to be heard."].) Excluding appellant's evidence deprived him "of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" (*Id.* at pp. 690-691, citations omitted [a defendant is entitled to present evidence of the circumstances surrounding his confession if it is used against him at trial].)

Moreover, the trial court's ruling also violated due process by

applying state evidentiary standards unevenly in a way that favored the prosecution over the defendant. (*Green v. Georgia* (1974) 442 U.S. 95, 97 [hearsay rule that excluded testimony offered by the defense that would have been exculpatory in sentencing hearing, but allowed the government to introduce the same evidence in his co-defendant's trial was an unjustified and uneven statute that violated defendant's due process rights]; *Webb v. Texas* (1972) 409 U.S. 95, 97 [trial court's conduct in admonishing the sole defense witness to testify truthfully, without giving similar admonitions to prosecution witnesses, and the subsequent refusal by the sole defense witness to testify deprived the defendant of due process]; *Washington v. Texas*, *supra*, 388 U.S. at p. 23 [rule that prevented an accomplice from testifying on a defendant's behalf while permitting prosecution to use accomplice's testimony in codefendant's trial violated due process]; see also *Wardius v. Oregon* (1973) 412 U.S. 470, 472, 475-476 [statute requiring that defendant give notice of an alibi defense prior to trial without requiring reciprocal discovery from prosecution violated due process].)

Although the right to present a defense and related constitutional trial rights under the Sixth and Fourteenth Amendments "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process'" (*Rock v. Arkansas*, *supra*, 483 U.S. at p. 55, citation omitted), there was no valid, countervailing state interest here that justified either the exclusion of appellant's evidence or the unequal treatment of the prosecution and the defense evidence regarding the motivation behind appellant's anger at Harding. Appellant's evidence was probative and impotant and its arbitrary exclusion violated his federal constitutional trial rights.

D. The Trial Court's Erroneous Exclusion Of Relevant Defense Evidence Impeaching the Prosecution's Theory Of The Case Was Prejudicial and Requires Reversal

The impact of the trial court's evidentiary errors must be assessed in light of the overall strength of the prosecution's case. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103-1104.) Here, the proof was far from overwhelming. There was no unexplained physical evidence implicating appellant in, and no direct evidence explicitly linking him to, the murders of Harding and Jackson. The prosecution's case against appellant rested on the circumstantial evidence of his apparent motive to retaliate against Harding for the theft of his drugs and the argument that the manner of the murders was consistent with a gang retaliation killing. Except for Sergeant Valdemar, the prosecution's case rested on witnesses like Vashaun, Berry, Meekey, Miller, and McPherson – admitted felons or drug addicts who had used cocaine throughout the time period about which they testified.

The jury deliberations confirm that the prosecution's case was not overwhelming. The jury deliberated appellant's culpability for the murders of Harding and Jackson over the course of four days prior to reaching its verdicts. (X CT 2863, 2967, 2868, 2869, 3051.) Yet, the legal issues before the jury were not complex. Appellant had conceded his guilt for the non-homicide charges. (9 RT 1129-1131.) Moreover, the jury was instructed on only one theory of first degree murder (X CT 3005-3007), and the physical evidence, showing Harding and Jackson bound together and strangled, offered a factual basis for finding premeditation and deliberation without much debate. Clearly, the jury must have had serious questions about the only disputed issue – whether appellant was the killer.

As discussed in section B, *ante*, at pages 115-117, the prosecution's case was all about appellant's motive and opportunity to kill Harding. The

prosecutor made this clear in both her opening statement (5 RT 546) and her closing argument (11 RT 1335-1336). In her own words, motive was "the heart of the case." (11 RT 1340.) The excluded evidence of Vashaun's beating of Meekey – offered both to establish Vashaun's motive to kill Harding in order to obtain appellant's cocaine and to show that appellant's anger at Harding was not related to Harding's theft of his cocaine – would have countered the prosecution's fundamental theory thereby presenting a factual basis for reasonable doubt about appellant's guilt. Succinctly stated, the trial court's rulings undermined appellant's defense. Given that the prosecution's proof was far from overwhelming, the centrality of the excluded evidence and the prosecutor's exploitation of each error rendered them prejudicial and requires reversal of the murder convictions, special circumstance finding and death sentence.

1. The Exclusion of Evidence of Third Party Culpability Was Prejudicial

The defense theory was that notwithstanding appellant's anger at Harding, the evidence was insufficient to prove beyond a reasonable doubt that appellant was the person who murdered Harding and Jackson. The defense rested on the argument that a third party was guilty of the murders. The excluded evidence was key to the defense. The introduction of evidence that one day prior to the murders, Donte Vashaun, in the very room where the murders occurred, had used brutal violence against Meekey in an attempt to get appellant's cocaine, would have given the jury cause to evaluate the inculpatory evidence against appellant in a totally different light. Without this evidence, the jury was left only with appellant's word, and his testimony was compromised by the requirement that he wear a stun belt while testifying. (See Argument II, *ante*.) Defense counsel was left in the untenable position of having to argue a theory of defense without the

available supporting evidence.

Defense counsel specifically told the jury that the prosecution's case rested solely on the appearance of a motive on appellant's part for the murders, but that this theory was wholly unsupported by the evidence (11 RT 1365, 1372, 1392), and that the evidence at trial showed that numerous other individuals had a motive to commit these murders in an attempt to take the drugs they believed Harding had. (11 RT 1380, 1381, 1384.) Defense counsel theorized:

> How about a what if situation where we have a situation where someone loses a whole amount of drugs and everybody in the hotel who is a drug user or sell – and you know that from all the witnesses – finds out about it. The drugs are returned to what appears to be the rightful owner, but unfortunately not everybody in the hotel knows that. And what they hear is that in this case Mr. Harding or Mr. Fontain has a whole bunch of drugs . . . Mr. Valdemar wasn't asked about whether or not if other individuals knew about the drugs that were found by Mr. Harding and Darlene Miller, whether or not they had any incentive or motive to commit these murders.

(11 RT 1380-81.)

The prosecutor, who objected to the admission of the defense evidence, exploited the trial court's erroneous ruling by pointing out the absence of third party culpability evidence. Responding to defense counsel's argument, the prosecutor plainly told the jury: "You have been presented with no credible evidence that anyone other than the defendant had the motive, means or opportunity to commit this crime." (11 RT 1403.) She highlighted appellant's failure to present any evidence to support his defense:

> [T]hey chose to put on a defense, and in choosing to put on a defense, they had better put on a defense . . . You heard not one shred of corroboration in this case about what the

> defendant told you. You didn't hear from a single witness who could have corroborated anything he said.

(11 RT 1405-1406.) She went on to argue that appellant's anger and prior violence all showed that he had the motive and means to commit the murders. (11 RT 1410, 1411, 1412.) She concluded this section of her argument by underscoring the dearth of contrary evidence from the defense. She asked the jury:

> Did you hear any credible evidence during the course of this whole trial about anyone else who had a motive? No, you didn't. Anyone else who had the means to do this? No, you didn't. Anyone else who had put themselves into a place of opportunity to have done this? No.

(11 RT 1413.)

The evidence relating to Donte Vashaun supplied the answer to the prosecutor's questions and clearly supported the defense argument. Testimony from both Donna Meekey and Vashaun would have shown that Vashaun had both a motive to kill Harding in order to get the drugs he believed Harding still had and a willingness to use violence to gain access to drugs. Vashaun's own testimony indisputably established opportunity, as he was in the hotel at the time the murders occurred. (6 RT 757, 762, 824.) Yet, because of the trial court's error in excluding this evidence, appellant was prevented from competently answering the prosecutor's questions and assertions. In this "who dunnit" case, the trial court's rulings left appellant with no independent corroboration of his own testimony. In this way, the exclusion of the third party culpability evidence that was crucial for proving his defense was prejudicial. (See *DePetris v. Kuykendall, supra*, 239 F.3d at pp. 1063-1064 [finding exclusion of husband's journal and petitioner's reaction to reading it prejudicial because it would have corroborated her testimony on the critical issue of her state of mind when she shot her

husband]; *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273 [finding exclusion of evidence that would have impeached the complainant in a sexual molestation case prejudicial in light of importance of her credibility and weakness of the physical evidence].)

The importance of the excluded evidence to appellant's defense, combined with the weaknesses in the prosecution's case, differentiates this case from those in which this Court found trial error in rejecting evidence of third party culpability to be harmless. For example, in *People v. Hall*, *supra*, 41 Cal.3d at p. 835, the error was held to be harmless because evidence directly linking the third party to the crime was placed before the jury in other ways. Similarly, in *People v. Cudjo*, *supra*, 6 Cal.4th at pp. 612-613, the Court concluded that the error was harmless because the defendant was conclusively placed at the crime scene by both prosecution and defense evidence; there was overwhelming evidence that only one person was at the crime scene at the pertinent time; and there was strong evidence impeaching the defense theory. The excluded evidence relating to third party culpability in this case was far more crucial to the defense than the excluded evidence in *Hall* or *Cudjo*. Without this evidence, appellant was entirely precluded from presenting his defense to the capital murders. Trial counsel clearly viewed this error as crucial at the time of trial, as he raised it as a denial of "due process of law and a fair trial" in his motion for a new trial. (X CT 3117.)

Finally, the prosecutor's ready exploitation of her own success in excluding appellant's third party culpability evidence is a strong indication that the error was prejudicial. (See e.g., *People v. Minifie* (1996) 13 Cal.4th 1055, 1071; *People v. Daggett* (1990) 225 Cal.App.3d 750, 757; *People v. Varona* (1983) 143 Cal.App.3d 566, 570; *United States v. Ebens* (6th Cir. 1986) 800 F.2d 1422, 1440-1441; *United States v. Toney* (6th Cir. 1979)

599 F.2d 787, 790-791 [all relying on the fact that the prosecutor's argument took advantage of the error to find prejudice]; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage" from an evidentiary omission for which the prosecution is responsible "is best understood by taking the word of the prosecutor . . . during closing arguments . . ."].)

In *People v. Minifie*, *supra*, 13 Cal.4th at p. 1055, this Court held that the trial court erred in excluding evidence offered in support of a claim of self-defense that third parties, whom the defendant arguably associated with the victim, had threatened the defendant. (*Id.* at pp. 1065-1068.) In argument the prosecutor insisted that there was "no evidence" that the defendant had been threatened and that his claim of self-defense was "contrived" because it was "not supported by the evidence." (*Id.* at p. 1071.) This Court unanimously concluded that "[t]he jury argument of the district attorney tips the scales in favor of prejudice . . . ." (*Ibid.*) As the Court explained:

> The reason there was 'no evidence' and the 'contrived' defense was 'not supported by the evidence' is easily explained. The missing evidence was erroneously excluded. This argument demonstrates that the excluded evidence was not minor, but critical to the jury's proper understanding of the case. It is, therefore, reasonably probable [under the state law test for harmless error] the error affected the verdict adversely to defendant."

(*Id.* at pp. 1071-1072.)

Similarly, in *People v. Daggett*, *supra*, 225 Cal.App.3d 751, a child molestation prosecution, the trial court erred in excluding defense evidence that the complaining child witness had previously been molested by third parties, which was relevant to explain how the child could have acquired knowledge of molesting behavior. The appellate court concluded that the error was prejudicial due in large part to the prosecutor's closing argument

that the child must have acquired the knowledge because the defendant had molested him. (*Id.* at pp. 757-758.) As the court stated, "[t]he prosecutor asked the jurors to draw an inference that they might not have drawn if they had heard the evidence the judge had excluded. He, therefore, unfairly took advantage of the judge's ruling" and compounded the prejudicial effect thereof, which required reversal. (*Id.* at p. 758.)

Here, as in *Minifie* and *Daggett*, the prosecutor highlighted the absence of the excluded evidence and encouraged the jurors to draw inferences adverse to appellant from this lack of proof. The prosecutor repeatedly emphasized that appellant had failed to present a defense and that no evidence had been presented to show any alternative suspect. As in *Minifie* and *Daggett*, the prosecutor's argument here seriously compounded the damage of the trial court's evidentiary error thus making it prejudicial.

2. The Exclusion of Evidence That Appellant's Anger at Harding Was Not Related to the Theft of His Drugs Was Prejudicial

Like the exclusion of the third party culpability evidence, the exclusion of appellant's testimony explaining the reason he was angry at Harding was prejudicial. It, too, was crucial to his defense. The evidence that appellant was angry because Harding failed to protect Meekey from Vashaun would have countered the heart of the prosecution's case – that the murders were a gang retaliation because Harding's theft of appellant's drugs was an intolerable sign of disrespect.

The prosecutor hammered relentlessly on this theme. She wove her opening argument around the concept of appellant feeling disrespected, mentioning the term on almost every page of her statement. (See 11 RT 1339, 1340, 1341, 1342, 1434, 1344, 1345, 1346, 1348, 1349, 1350, 1351, 1352, 1355, 1357.) As noted previously, in her closing argument, she told

the jury that "what this all boils down to in this case is that this defendant, a long-time gang member, felt disrespected." (11 RT 1339.) She emphasized over and over that as a gang member, appellant had to kill whoever had taken his drugs in order to maintain his respect on the street. "As now all of you know . . . when someone's cocaine is taken from them in this manner there are repercussions, people are disrespected, and there are results. There are killings that happen." (11 RT 1340.)

The prosecutor expounded this theme further throughout her argument:

> [a]s [appellant] is talking to all of these people he is continually showing off his demeanor, his words, his actions about the disrespect and anger that he feels and what he is going to do about it. He is going to kill Fontain . . . Drug sellers do not just let drugs get lost. There has to be, according to these people, some way to control that. And the way they control it is by doing something physical.

(11 RT 1342.) She insisted that the case was about gang retaliation:

> when you disrespect someone, when you disrespect 18th street, an 18th street gang member and, in this case, the two homeboys with the defendant retaliated. They made an example out of Fontain and out of J.J., and that's what happened in this case.

(11 RT 1343.) The prosecutor also emphasized that the manner of killing proved that the appellant killed Harding and Jackson because he felt disrespected. (11 RT 1351.) As discussed already, a prosecutor's use of evidentiary error to her advantage is an unmistakable sign that the error was prejudicial. (See *People v. Minifie*, *supra*, 13 Cal.4th at p. 1071; *People v. Daggett*, *supra*, 225 Cal.App.3d at p. 757.)

The theft-disrespect theory for appellant's anger was, without a doubt, the linchpin of the prosecution's case. Appellant's testimony explaining that he was angry because Harding had abandoned Meekey to

Vashaun would have refuted the claim that the case was all about appellant's drug dealing and gang membership. The evidence of appellant's concern for Meekey also would have shown a sympathetic aspect of appellant's character that would have dampened the prosecution's attempt to portray appellant as a violent, out-of-control monster. By casting the case in an entirely different light, the excluded evidence would have permitted the jury to entertain a reasonable doubt about whether appellant was the person who killed Harding and Jackson. Without testimony about the reason he was angry at Harding, appellant was denied his sole opportunity to support this aspect of his defense, since he was the only witness who could explain his state of mind. (Cf. *People v. Wells* (1949) 33 Cal.2d 330, 357 [erroneous exclusion of testimony from psychiatrist that appellant was in 'state of tension' was not prejudicial because appellant's own testimony established that he had acted with the requisite mental state].)

In short, the exclusion of appellant's testimony about his own anger was prejudicial for the same reasons that the exclusion of his third party culpability evidence was prejudicial: the excluded evidence, which would have undercut the prosecution essential theory of motive, was crucial to appellant's defense in a case in which the evidence of appellant's guilt was not overwhelming and in which the prosecutor fully exploited the evidentiary error by relying heavily on her unimpeached theory of motive to argue appellant's guilt for a double murder.

3. The Exclusion of the Defense Evidence, Considered Singly or Together and Under Any Prejudice Standard, Requires Reversal of the Judgment

Reversal of the judgment is required whether the errors are judged under the state law standard in *People v. Watson* (1956) 46 Cal.2d 818, 836, or the federal constitutional standard in *Chapman v. California* (1967) 386

U.S. 18, 24. And reversal is required whether the prejudicial effect of each error is considered separately or cumulatively. (*Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211; *People v. Holt* (1984) 37 Cal.3d 436, 459 [both finding the cumulative effect of errors was prejudicial].) The trial court's errors severely impeded appellant's defense. The exclusion of the third party culpability evidence, showing that Vashaun had the motive and means to commit these crimes, deprived appellant of any independent evidence in support of his defense that someone else was responsible for the murders of Harding and Jackson. (See 11 RT 1403.) And the exclusion of evidence about the reason appellant was angry at Hardy completely prevented him from challenging the prosecution's central theory of motive. As a result of each of these separate errors, appellant was unable to impeach what the prosecutor herself viewed as "the heart of the case" (11 RT 1340), and each separate error prejudiced appellant. The synergistic effect of these errors was to eviscerate appellant's defense, precluding him from introducing the very evidence that could have created a reasonable doubt as to his guilt in the minds of the jurors. When the combined effect of these errors is considered in the context of the evidence introduced at trial against defendant, the prejudice suffered by appellant is plain. The murder convictions, special circumstance finding and death sentence must be reversed.

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V

THE COURT ERRED IN ADMITTING SPECULATIVE AND IRRELEVANT EXPERT TESTIMONY THAT UNREADABLE FINGERPRINTS AT THE MURDER SCENE MIGHT POSSIBLY BELONG TO APPELLANT

Despite the vast amount of evidence at the crime scene, the only physical evidence that linked appellant to the charged murders were two innocuous fingerprints recovered from room 416. In an attempt to improperly augment the weight of the scant physical evidence linking appellant to the Harding and Jackson murders, the prosecutor, over defense objection, elicited expert testimony that an additional three more incriminating prints, which did not possess sufficient characteristics to allow an identification to be made, were possibly appellant's. This testimony was speculative and irrelevant and, thus, was improper expert testimony. The trial court erred in admitting it. The introduction of this testimony violated appellant's federal constitutional rights to fair trial (U.S. Const., 14th Amend.) and a reliable determination of guilt and penalty based on the jury's consideration of only accurate and relevant evidence (U.S. Const., 8th & 14th Amends).

A. Proceedings Below

Forensic Print Specialist Sandra Claiborne lifted 11 fingerprints from the crime scene, rooms 415 and 416 of the Pacific Grand Hotel. (6 RT 725-726.) Upon examination, not all 11 of the prints were readable. (6 RT 730.) Wendy Cleveland, a forensic print specialist for the Los Angeles Police Department, identified two of the lifted prints as belonging to appellant. (6 RT 728.) The first print was recovered from a lamp which was on a glass table in the room. (*Ibid.*) The second was recovered from an empty Pepsi can which was recovered from the trash can. (*Ibid.*) Of the remaining nine prints, "a couple" were identified as belong to Harding. (6

RT 730.)

Cleveland testified that the remaining prints "were really not clear enough to make a definite decision about whether they would be able to match someone." (*Ibid.*) However, over defense objection, she testified that it was "possible" that three of these unreadable latent prints belonged to appellant. (*Ibid.*) The three unreadable prints were recovered, respectively, from the stem of the lamp which was on the glass table, the top portion of a fan which was located near the bed, and the front door knob. (6 RT 732.) Although Cleveland conceded that she "would never identify something without enough characteristics to form an opinion" (6 RT 735), she repeatedly asserted that she was able to give an expert opinion, based on her analysis of the unclear prints, that she could not exclude appellant as the source of the three remaining fingerprints. (6 RT 730, 742.)

B. The Fingerprint Examiner's Irrelevant Speculation Linking Unreadable Fingerprints Found At The Crime Scene To Appellant Was Inadmissible Under Evidence Code Sections 210 And 801, And Its Admission Violated The Federal Constitution

Confronted with a case in which the evidence of appellant's guilt was limited to testimony from drug addicts and a police gang expert as to appellant's motive and opportunity to commit the crime, the prosecutor seized an opportunity presented by fingerprint expert Cleveland to improperly inflate the physical evidence linking appellant to the crime scene. The prosecutor had Cleveland testify that in her expert opinion it was "possible" that three unclear and unidentified prints at the crime scene belonged to appellant. (6 RT 730.) The trial court abused its discretion in admitting this undisguised conjecture because it failed to meet the prerequisites for expert testimony (Evid. Code, § 801) and for relevant evidence (Evid. Code, § 210).

Evidence Code section 801, subdivision (b) creates two distinct requirements for admission of expert testimony: "the matter relied on must provide a reasonable basis for the particular opinion offered, and . . . an expert opinion based on speculation or conjecture is inadmissible. (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564, citing Cal. Law Revision Com. Com. to § 801(b) "irrelevant or speculative matters are not a proper basis for an expert's opinion."].)[33] Cleveland's expert testimony fails to meet both requirements.

Cleveland's opinion plainly violated Evidence Code section 801, subdivision (b) in that it was based on precisely the type of matter that *may not* reasonably "be relied upon by an expert in forming an opinion upon the subject to which his testimony relates" (Evid. Code, § 801, subd. (b); *In re Lockheed Litigation Cases, supra,* 115 Cal.App.4th at p. 564.) Cleveland herself acknowledged that the quality of the unidentifiable prints precluded her from giving an expert opinion regarding identity. (6 RT 735.) However, Cleveland did not acknowledge that the accepted standards

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[33] Evidence Code section 801, in its entirety reads as follows:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

within the "forensic identification community" specifically preclude a fingerprint identification expert from giving an opinion of probable or possible identification. The Scientific Working Group on Friction Ridge Analysis, Study and Technology, (hereinafter "SWGFAST") was established in 1995, before the trial in this case, under the sponsorship of the FBI crime laboratory, with a mission to "formalize and document guidelines and standards" for the fingerprint analysis community. (*Commonwealth v. Patterson* (Mass. 2005) 840 N.E.2d 12, 21, fn. 9.) Pursuant to the published SWGFAST methodology for latent print examiners, a latent print examiner may only give an opinion of identification or exclusion, and is specifically prohibited from testifying as to possible or probable identifications.[34] Moreover, Cleveland's opinion

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[34] The SWGFAST standards provide in pertinent part:

3.3 Evaluation

Evaluation is the formulation of a conclusion based upon analysis and comparison of friction ridge impressions. Conclusions which can be reached are:

3.3.1 Individualization (Identification)

Individualization is the result of the comparison of two friction ridge impressions containing sufficient quality (clarity) and quantity of friction ridge detail in agreement. Individualization occurs when a latent print examiner, trained to competency, determines that two friction ridge impressions originated from the same source, to the exclusion of all others.

3.3.2 Exclusion

Exclusion is the result of the comparison of two friction ridge impressions containing sufficient quality (clarity) and quantity of friction ridge detail which is not in agreement. Exclusion occurs when a latent print examiner, trained to competency determines that two friction ridge impressions originated from

(continued...)

that the unreadable prints could not exclude appellant was rank speculation and therefore was inadmissible under Evidence Code section 801, subdivision (b). (*In re Lockheed Litigation Cases, supra,* 15 Cal.App.4th at p. 564 [construing § 801, subd. (b) to prohibit the admission of expert testimony based on speculation or conjecture].) Even absent this statutory scheme, this Court has long required that an expert's opinion be based on more than speculation and conjecture. (*Eisenmayer v. Leonardt* (1906) 148 Cal. 596, 600 [proper to exclude expert opinion which is "unsubstantial and imaginary . . . for which no facts [are] stated - either real or hypothetical - as a basis for an intelligent opinion"]; *Long v. California-Western States Life Insurance Co. Cal.* (1955) 43 Cal.2d 871, 882 [not proper for expert witness to testify to matters based upon speculation or conjecture].) Although expert witness testimony has changed dramatically over the years, courts have consistently held that it is improper for expert witnesses to testify based on speculation and conjecture because such an opinion is of no assistance to the finder of fact:

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[34](...continued)
different sources.

3.3.3 Inconclusive

Inconclusive evaluation results when a latent print examiner, trained to competency, is unable to individualize or exclude the source of an impression. Inconclusive evaluation results must not be construed as a statement of probability. Probable, possible or likely individualization (identification) conclusions are outside the acceptable limits of the friction ridge identification science.

(SWGFAST, Friction Ridge Examination Methodology for Latent Print Examiners, (pp. 3-4, *http://www.swgfast.org/Friction_Ridge_Examination_Methodology_for_Latent_Print_Examiners_1.01.pdf* [as of October 21, 2006].)

> Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide? [citation.]

(*Jennings v. Palomar Pomerado Health Systems* (2004) 114 Cal.App.4th 1108, 1117; see *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-1136 ["Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value."] In other words, an expert witness's out-and-out conjecture is not relevant evidence because it does not have "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see *People v. Humphrey*, *supra*, 13 Cal.4th at pp. 1076, 1086 [acknowledging that expert testimony on battered women's syndrome must be relevant to a disputed issue in the case].)

Cleveland's testimony – that it was possible that three of the unreadable prints were appellant's – was irrelevant speculation. Cleveland explained that latent prints are processed by "dust[ing] powder over a surface that we think may have been touched. The powder clings to the moisture left behind from having touched an item, and the moisture is in the pattern on the ridges on your fingers or on your palms and even on the soles of your feet." (6 RT 724.) Cleveland explained to the jury her process of latent fingerprint analysis:

> What I do is I examine the fingerprint on the card with a ten print inked print from a former arrest from a former time when Mr. Becerra was fingerprinted to the lift. After I have examined it and looked at the characteristics within the ridges and where they are in that fingerprint and where they relate to the fingerprint on the inked print and after I have decided that

they couldn't have been made by any other person, that is when I would sign the back of the lift with my initials.

(6 RT 728.)

The record is clear that the three unclear prints did not display a sufficient level of detail for the analyst to be able to determine all the characteristics of the print. A conclusion drawn based on a partial analysis simply requires too much guesswork and conjecture to be admissible testimony. As trial counsel noted "anything is possible." (6 RT 730.) Cleveland's testimony is exactly the type of speculative, irrelevant testimony that provides no assistance to the trier of fact, and was likely to mislead and confuse the issues before the jury. The trial court's admission of Cleveland's testimony about the three unreadable prints was an abuse of discretion, as it was irrelevant, speculative and exceeded the boundaries of Evidence Code section 801.

In addition to violating state evidentiary law, the trial court's admission of the improper expert fingerprint testimony violated the due process clauses of the Fourteenth Amendment to the United States Constitution and article I, section 15 of the California Constitution. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 67; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.) The trial court's erroneous admission of Cleveland's irrelevant expert testimony rendered appellant's trial fundamentally unfair. (*Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 738 [admission of expert's opinion about credibility of child victim of alleged sexual abuse violated due process by making the trial fundamentally unfair]; *McKinney v. Rees*, *supra*, 993 F.2d at p. 1385 [admission of irrelevant "other acts" evidence rendered trial fundamentally unfair].) In addition, the improper admission of Cleveland's speculative testimony deprived appellant of the right to a reliable adjudication at all stages of a

death penalty case. (See *Lockett v. Ohio,* (1978) 438 U.S. 586, 603-605; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Penry v. Lynaugh,* (1989) 492 U.S. 302, 328, abrogated on other grounds, *Atkins v. Virginia* (2002) 536 U.S. 304.)[35]

C. The Admission Of The Fingerprint Examiner's Speculative And Irrelevant Opinion Was Prejudicial and Requires Reversal

Despite the plethora of physical evidence present at the crime scene and amenable to analysis, there was a paucity of physical evidence analysis linking appellant to the murders of Harding and Jackson. There was a patterned abrasion on the body of Harding, which Dr. Carpenter testified could be analyzed to identify the weapon used to beat him. (7 RT 845.) No apparent attempt was made to identify this weapon. Although the bodies were bound with numerous ligatures made from cut or crimped electrical cords, no tool, other than appellant's knife which was precluded, was identified or tested to determine if it could have cut the cords. (8 RT 949.) Although blood was found on the victim's bindings and throughout the crime scene, no serological evaluation was conducted, and although DNA tests were conducted on evidence at the scene, no DNA evidence was introduced at trial. (8 RT 950.) Although the small hotel room in which the bodies were found, measuring only 18 feet by 10 and a half feet (8 RT 945), was littered with objects and materials, Inspector Long believed it was

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[35]As discussed above at page 102, footnote 29, appellant's federal constitutional claims may be raised on appeal under *People v. Partida, supra,* 37 Cal.4th at pp. 433-439. Defense counsel's objection sufficiently advised the trial court and the prosecution of the basis of appellant's opposition to fingerprint testimony, and the Fourteenth Amendment due process violation and the Eighth Amendment reliability violation are the consequences of the trial court's erroneous evidentiary ruling.

infeasible to book them all into evidence (8 RT 934).

The police investigation led to only one link between appellant and the crime scene – his two fingerprints. Yet, the two fingerprints, one of which was on a soda can in the wastebasket, were not inculpatory. Indeed, the contents of the wastebasket actually underscored the credibility of appellant's version of events, as it corroborated he had in fact eaten a meal in Harding's room. (9 RT 1146.)

The testimony elicited from fingerprint expert Cleveland changed the nature of the fingerprint evidence, linking appellant specifically to the lamp from which one of the cords used to bind the victims had been cut. (8 RT 910.) This improper evidence did not just provide further evidence that appellant was in room 416, but tied appellant to the murder weapon. In her closing argument, the prosecutor repeatedly emphasized this link, focusing on how the prints which were "possibly" appellant's tied him to the cut cords which were used to strangle Jackson and Harding:

> Now, the print that matches Mr. Becerra's is on the glass portion of the table, on the upper portion. There's a possible print – it can not be made or it can not be excluded to Mr. Becerra – on the stem of the table. *And, lo and behold, the cord is cut*
>
> . . .
>
> So now we've got a positive print of Mr. Becerra on the top of the table, a possible print of Mr. Becerra on the bottom of the table
>
> . . .
>
> The prints. We have prints then on the table right above where the cord was cut and at the base of that cord.

(11 RT 1400, 1401, italics added.) The prosecutor's emphasis of the erroneously admitted evidence underscored and compounded the prejudice of the trial court's error. (*People v. Hernandez* (2003) 30 Cal.4th 835, 877

[prejudice of erroneously admitted evidence amplified by prosecutor's argument].)

Reversal of the judgment is required whether the errors are judged under the state law standard in *People v. Watson*, *supra*, 46 Cal.2d at p. 836, or the federal constitutional standard in *Chapman v. California*, *supra*, 386 U.S. at p. 24. The trial court admitted evidence which being bald conjecture was irrelevant and an impermissible subject of expert opinion, and the prosecutor then relied on this evidence to argue the sole physical link between appellant and the murder weapon. Given the weakness of the prosecution's case, and the way in which the improper admission of this evidence shifted the nature of the physical evidence linking appellant to means of the crime, the admission of this evidence was prejudicial. (See Argument IV D, *ante*.) The judgment should be reversed.

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VI

THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT IT COULD DRAW ADVERSE INFERENCES FROM APPELLANT'S FAILURE TO EXPLAIN OR DENY EVIDENCE AGAINST HIM WAS PREJUDICIAL ERROR

The trial court instructed the jury in the language of CALJIC No. 2.62 as follows:

> In this case defendant has testified to certain matters. If you find that defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable.
>
> The failure of a defendant to deny or explain evidence against him does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.
>
> If a defendant does not have the knowledge that he would need to deny or explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence.

(11 RT 1432-1433; X CT 2994.) The trial court erred in giving the jury this instruction, since there were no facts or evidence presented by the prosecution which were within appellant's knowledge that he failed to explain or deny. Under the facts of this case, the instruction erroneously permitted the jury to infer appellant's consciousness of guilt if it disbelieved or rejected for any reason any portion of his testimony. Further, the misinstruction violated the due process clause of the Fourteenth Amendment by presenting the jury with an unconstitutional permissive

inference that allowed the jury to convict upon proof less than beyond a reasonable doubt. Whether viewed as state law or federal constitutional error, the erroneous instruction was prejudicial and requires reversal of the judgment.

A. The Trial Court Erred In Instructing The Jury Pursuant To CALJIC No. 2.62 Because Appellant Did Not Fail To Deny Or Explain The Evidence Against Him

As this Court has explained, CALJIC No. 2.62 should only be given if a defendant "fail[s] to explain or deny any fact of evidence that was within the scope of relevant cross- examination." (*People v. Saddler* (1979) 24 Cal.3d 671, 682; *People v. Roehler* (1985) 167 Cal.App.3d 353, 392 [instruction may only be given, as a matter of law, if defendant has failed to adequately answer a question posed on cross- examination]; *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1120 [instruction should only be given if there is some "specific and significant defense omission that the prosecution wishes to stress or the defense wishes to mitigate"].) As this Court noted in *Saddler*:

> [t]he trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence, [citations omitted] and has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." (*People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10.)

(*People v. Saddler*, *supra*, 24 Cal.3d at p. 681.) Where, as here, the defendant's testimony responds to and denies the prosecution's evidence, it is error for the court to give CALJIC No. 2.62. (*Id.* at p. 683.)[36]

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[36] Although appellant's trial counsel did not object to the adverse (continued...)

Contradictions between a defendant's testimony and the prosecution's witnesses are "not a failure to explain or deny." (*People v. Saddler, supra,* 24 Cal.3d at p. 682; see *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.) Moreover, "the test for giving the instruction is not whether the defendant's testimony is believable." (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57 [rejecting the Attorney General's argument that when appellant's argument is so improbable it amounts to no explanation at all].) Thus, if the defendant's testimony fully counters the evidence offered by the prosecution, it is error to give the instruction, regardless of the plausibility of appellant's version of events. (*People v. Marsh* (1985) 175 Cal.App.3d 987, 994 [trial court erred in instructing jury pursuant to CALJIC No. 2.62 even though defendant's explanation was inherently implausible]; *People v. Peters* (1982) 128 Cal.App.3d 75, 86 [that defendant's explanation may not have been believed by the jury does not justify giving CALJIC No. 2.62].)

In this case, there were no specific questions asked on cross-examination that appellant failed to answer. Nor did appellant fail to explain or deny the evidence against him. The focus of the prosecution's case was that appellant had a motive to kill Harding to retaliate for the prior taking of his drugs. (5 RT 546; 11 RT 1340.) Appellant denied that this

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[36](...continued)
inference instructions, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request modification or amplification when the error consists of a breach of the trial court's fundamental instructional duty. *(People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

motive existed, testifying that although his drugs had been taken by Harding and Miller, a large portion of his drugs had been returned by both Miller and Harding (9 RT 136, 1143), and Harding had agreed to sell for him to make up for the missing portion (9 RT 1140). The prosecution's theory was that appellant had received his drugs from either the Mexican Mafia or the 18th Street gang, and that he had committed the murders in anger at being disrespected by the theft of his drugs and out of fear of retaliation from the gang for the loss of the drugs. (9 RT 1338.) Appellant admitted that he was a long- time member of the 18th Street gang (9 RT 1178), but testified that his gang affiliation had nothing to do with the drugs he had at the Pacific Grand in December, 1994, and that he had stolen them from his "connection" (9 RT 1206). The prosecutor argued that appellant's statement to Meekey that he got his drugs from "the gang" was further evidence that the lost drugs belonged to either 18th Street or the Mexican Mafia. (11 RT 1408.) Appellant denied making any such statement. (9 RT 1157.)

In closing argument, the prosecution focused on testimony regarding appellant's anger at Harding and Miller as evidence of appellant's express malice and intent to kill. (11 RT 1336, 1339.) Appellant repeatedly admitted that he had been angry at Harding and Miller for the theft of his drugs and had threatened both of them for having taken his drugs and smoking a portion of them, but he denied that he had killed Harding and Jackson. (10 RT 1282, 1286; 9 RT 1176.)[37] The only direct evidence

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[37] Appellant also attempted to testify that on the night of December 24 and morning of December 25 he was angry at Harding not for the theft of his drugs but because he believed Harding had allowed Meekey to be beaten by Donte Vashaun, but the trial court precluded the introduction of this evidence. (See Argument IV, *ante*.)

linking appellant to the crime were two fingerprints found in room 416. (6 RT 728.) However, appellant's testimony provided an exculpatory explanation for his fingerprints at the crime scene, as he testified that he had been in room 416 on December 24 eating, drinking and partying. (9 RT 1188.) Finally, appellant admitted that much of what he testified to at trial was not contained in his written statement to the police, but explained that "a two or three hour interview is not in a three page statement." (10 RT 1321.)

Appellant's testimony on direct and cross-examination offered a cohesive, consistent explanation of all the facts that the prosecution offered against him, and offered "general and specific denials concerning the evidence presented by the prosecution." (*People v. Campbell* (1978) 87 Cal.App.3d 678, 686 [error to give CALJIC No. 2.62 where appellant categorically denies the charges against him].) Because there was no failure to explain or deny any significant aspect of the prosecution's case in the course of appellant's testimony, it was error to instruct pursuant to CALJIC No. 2.62.

B. The Court's Error In Instructing Pursuant To CALJIC No. 2.62 Requires Reversal

The trial court's error in instructing pursuant to CAJLIC No. 2.62 requires reversal because it is reasonably probable the jury would have reached a more favorable result had the instruction been omitted. (*People v. Saddler*, *supra*, 24 Cal.3d at p. 683; see *People v. Watson* (1956) 46 Cal.2d 818, 836.) Given the whole charge to the jury and the prosecutor's argument, this misinstruction directed the jury into a two-step analysis that prejudiced appellant. First, the jurors likely applied this instruction to the portions of appellant's testimony that they disbelieved or rejected, rather than to any failure to explain or deny the evidence against him. Second, the

jurors likely drew the inference that their disbelief or rejection of appellant's statements was evidence of appellant's consciousness of guilt. (*People v. Saddler*, *supra*, 24 Cal.3d at p. 684 [the full charge to the jury must be considered when assessing prejudice]; *People v. Marsh*, *supra*, 175 Cal.App.3d at p. 994 [the focus of the prosecutor's argument is a significant factor in considering the impact of an erroneous charge to the jury pursuant to CALJIC No. 2.62.].) Such an inference was highly prejudicial.

As has been discussed in Argument III, *ante*, pp.104-106, the prosecution's case against appellant was not overwhelming. There was no physical evidence implicating appellant in, and no direct evidence explicitly linking him to, the murders of Harding and Jackson. The prosecution's case against appellant rested on the circumstantial evidence of his apparent motive to retaliate against Harding for the theft of his drugs and the argument that the manner of the murders purportedly was consistent with a gang retaliation killing. Appellant's testimony flatly contradicted the prosecution's theory of guilt and denied all culpability for the murders of Harding and Jackson. Except for Sergeant Valdemar, the prosecution's case rested on witnesses like Vashaun, Berry, Meekey, Miller, and McPherson – admitted felons or drug addicts who had used cocaine throughout the time period about which they testified. Appellant's hope for acquittal rested on the jury putting enough faith in his version of events to undermine the prosecution's ability to prove their case beyond a reasonable doubt.

The prosecutor, however, repeatedly argued that appellant had lied to the jury and that his version of events was simply incredible. (11 RT 1340, 1398, 1408, 1413-1415.) The prosecutor told the jury that there were 13 times that appellant had lied to them during his testimony. (11 RT 1404.) Among the identified "lies" were which room appellant occupied December

24 - 26, i.e. room 720 or room 811 (11 RT 1398, 1409); where in room 416 he rocked cocaine on the night of December 24 (11 RT 1401); that appellant got his cocaine by stealing it from a drug dealer (11 RT 1407, 1414); appellant's denial of the moniker "Killer Frank" (11 RT 1413, 1415); appellant's testimony of how cocaine affects his body and mood (11 RT 1414): whether he got to the Pacific Grand on December 22 on public bus or got a ride from Aida (11 RT 1414); and how Lefty came to provide backup to appellant on the morning of December 24 (11 RT 1415). Moreover, the prosecutor repeatedly emphasized to the jury that any lies it found appellant had told showed a consciousness of guilt. (11 RT 1404 ["[w]hen the defendant lies, that shows a consciousness of guilt. There is no question in this case that this man murdered Mr. Jackson and Mr. Harding"]; 11 RT 1415 ["[i]t's lies, it's lies. When he got on the stand and he lied to you, you must take that into account when you judge his credibility, because that specifically goes to his consciousness of guilt"].)

In grappling with the import of what the prosecution called appellant's "lies," the jury likely turned to CALJIC No. 2.62, which was the only instruction the jury received regarding the significance of any perceived lack of credibility by the appellant. (X CT 2874-3041.) Unlike the qualification in CALJIC No. 2.03, this instruction did not require that the jury must find that defendant's purported failures to explain or deny were willfully false or deliberately misleading.[38] Rather, the instruction

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[38] The jury was not instructed pursuant to CALJIC No. 2.03 which provides:

> If you find that before this trial [a] [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance

(continued...)

permitted any failure to explain or deny to be considered as "indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable." (12 RT 1432.)

The clear import of the prosecution's argument was that the unfavorable inference to the defendant mandated at the close of the first paragraph of CALJIC No. 2.62 was that any perceived failure to explain or deny the evidence showed appellant's "consciousness of guilt." (11 RT 1415.)[39] However, as this Court has noted with regard to CALJIC No. 2.03, a finding of consciousness of guilt must be predicated on "deceptive or evasive behavior on a defendant's part" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224), not a mere misstatement. It is the deliberate dishonesty of the testifying defendant that allows the jury to draw the inference of the defendant's "consciousness of some wrongdoing." (*People v. Crandell* (1988) 46 Cal.3d 833, 871; accord *People v. Wayne* (1953) 41 Cal.2d 814, 823 [inference of consciousness of guilt only permissible "where the false statement or testimony is intentional rather than merely mistaken and where such statement or testimony suggests that defendant has no true exculpatory explanation"]; *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1102 [CALJIC No. 2.03 may be given when there is evidence that the defendant prefabricated a story to explain his conduct];

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[38](...continued)
tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

[39] In applying CALJIC No. 2.62, the jury was instructed to draw two inferences: first, the jury was to infer the truth of whatever matter appellant failed to explain or deny or, as applied here, of whatever matter about which it disbelieved or rejected appellant's testimony. Second, the jury was to infer an "unfavorable" inference to appellant.

see also CALJIC No. 2.21.1 ["innocent misrecollection is not uncommon."].) In this case, relying on the erroneous instruction under CALJIC No. 2.62 and the prosecutor's argument, the jury likely inferred appellant's consciousness of guilt from any misstatement – whether inadvertent or honestly mistaken – that appellant made in his testimony.

In this case, which turned on appellant's credibility, such an inference was prejudicial. It is reasonably probable that, as a result of the misinstruction of CALJIC No. 2.62, the jury incorrectly reasoned that its rejection of appellant's version of events allowed for a finding of consciousness of guilt. There is a reasonable probability that this erroneous inference made the difference in this case in which the prosecution's evidence was weak, and the jury's verdict turned on who it believed, appellant or the prosecution's witnesses. The judgment should therefore be reversed. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

This case is readily distinguished from *Saddler*, in which the court found that the error in instructing pursuant to CALJIC No. 2.62 did not prejudice appellant. (*People v. Saddler*, *supra*, 24 Cal.3d at p. 684.) First, unlike *Saddler*, in this case there was no identification evidence linking appellant to the charged crime. (*Id.* at p. 683 [discussing the positive identification of the appellant by the robbery victim]). Second, in *Saddler* this Court reasoned that the jury's rapid return of a guilty verdict underscored the strength of the prosecution's case and the unlikely prejudice from the instructional error, whereas in the instant case the jury deliberated over the course of four days. (*Ibid.*) Finally, in *Saddler*, the prejudice the court considered was limited to the giving of the instruction itself; there was no exploitation of the error in prosecutorial argument as in this case.

C. The Erroneous Instruction Pursuant To CALJIC No. 2.62 Also Resulted In A Prejudicial Due Process Violation By Creating An Irrational Permissive Inference

The erroneous instruction under CALJIC No. 2.62 also resulted in a prejudicial violation of the due process clause of the Fourteenth Amendment. For the reasons explained above, there is a reasonable likelihood that, given the charge to the jury and the argument of counsel, the jury applied the challenged instruction in a manner that created an irrational permissive inference of the truth of the prosecution's evidence and appellant's consciousness of guilt based solely on its disbelief of any portion of his testimony. (See *Tyler v. Cain* (2001) 533 U.S. 656, 658-659; *In re Winship* (1970) 397 U.S. 358.)

The validity of a permissive inference must be determined by review of the application of the inference to the specific facts of the case. (*Ulster County v. Allen* (1979) 442 U.S. 140, 162-163.) For a permissive inference to be constitutional and not shift the prosecution's burden of proof, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Id.* at p. 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67.) The due process clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the facts proved and the fact to be inferred." (*People v. Castro* (1958) 38 Cal.3d 301, 313; see also *People v. Hannon* (1977) 19 Cal.3d 588, 597.) This requisite "'rational connection'" exists only when the fact to be inferred is "'more likely than not to flow from'" the basic fact. (*Ulster County v. Allen, supra,* 442 U.S. at p. 165, citations omitted.)

In this case, it is reasonably likely that the instruction pursuant to CALJIC No. 2.62, which had no willfulness limitation as in CALJIC No.

2.03, created an irrational permissive inference. As explained in Section B, at pp. 153-157, *ante*, the inapplicable instruction together with the prosecutor's argument permitted the jury first to conflate any statement by appellant that it disbelieved or rejected with a failure to explain or deny the prosecution's evidence and then to conclude that appellant's false statements made more probable the inferences unfavorable to appellant – specifically that appellant's misstatements showed a consciousness of guilt. Although inculpatory inferences arguably may be rational when the jury rejects a defendant's testimony as willfully or intentionally false or misleading, the same does not hold true for false statements that result from inadvertent mistake or an honest failure of recollection.

Unintentionally false statements do not rationally increase the probability of the truth of the prosecution's case and are not logically connected to a defendant's guilt. Thus, it cannot be said with "substantial assurance" (*Ulster County v. Allen*, *supra*, 442 U.S. at p. 166, fn. 28) that appellant's consciousness of guilt flows from his failure to accurately recall how he got to the Pacific Grand Hotel on December 22 or how, exactly, Lefty came to accompany appellant to McPherson's room on December 24. But the erroneous instruction here permitted the jury to reach precisely this conclusion. In this way, the giving of CALJIC No. 2.62 created an irrational permissive inference that violated appellant's due process rights because "there is no rational way the trier could make the connection permitted by the inference." (*Id.* at p. 157.)

The decision in *People v. Saddler*, *supra*, 24 Cal.3d 671, does not answer appellant's constitutional claim. In *Saddler*, this Court rejected the argument that CALJIC No. 2.62 "denies a defendant the presumption of innocence and places in its stead an 'inference of guilt'" in violation of due process. (*People v. Saddler*, *supra*, 24 Cal.3d at pp. 679-681.) In

upholding the constitutionality of CALJIC No. 2.62 as applied to a testifying defendant's failure to explain or deny the evidence against him, the Court noted that "[n]o inference can be drawn if defendant does not have the knowledge necessary" or cannot "reasonably be expected to explain or deny" the evidence against him. (*Id.* at p. 680.) The Court also pointed to the instruction's cautionary directive in the second paragraph regarding the prosecution's burden of proof. (*Ibid.*) Finally, the Court held that CALJIC No. 2.62 "may be given in an appropriate case." (*Id.* at p. 681.)

The instruction, however, was *not* appropriate here. Unlike the rational permissive inference from the appropriate application of CALJIC No. 2.62 in *Saddler*, the permissive inference resulting from the erroneous application of CALJIC No. 2.62 here was not rational. And the irrationality of the inference is the crux of appellant's due process claim. The general assertion in CALJIC No. 2.62 that the prosecution must prove appellant's guilt beyond a reasonable doubt may afford a defendant an additional safeguard when the instruction is given correctly. But that directive does not remedy the jury's use of the irrational inference, as permitted by the instruction in this case, in finding that the prosecution carried its burden of proof.

This constitutional error is to be judged under the *Chapman* (*Chapman v. California, supra*, 386 U.S. at p. 24) prejudice standard which places the burden on the prosecution to prove the error was harmless beyond a reasonable doubt. For all the reasons given in Section B of the argument, the giving of the erroneous instruction was prejudicial, and the judgment should be reversed.

VII

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS, A TRIAL BY JURY, AND RELIABLE VERDICTS, AND REQUIRES REVERSAL OF THE JUDGMENT

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, *supra*, 397 U.S. at p. 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle" (*In re Winship*, *supra* at p. 363) at the heart of the right to trial by jury. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278.) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood [them] to allow conviction based on proof insufficient to meet the Winship standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court instructed the jury with CALJIC Nos. 2.02, 2.21.2, 2.22, 2.27, 2.51, 2.62 and 8.20. (X CT 2882, 2889, 2890, 2992, 2993, 2994, 3008.) These instructions violated the above principles and thereby deprived appellant of his constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) and trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16). (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265.) They also violated the fundamental requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (U.S. Const., 8th & 14th Amends.;

Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Because the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 275.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here in order for this Court to reconsider those decisions and in order to preserve the claims for federal review if necessary.[40]

A. The Instruction On Circumstantial Evidence Under CALJIC No. 2.02 Undermined The Requirement Of Proof Beyond A Reasonable Doubt

The jury was instructed with CALJIC No. 2.02 that if one interpretation of the evidence regarding mental state "appears to be reasonable, you must accept [it] and reject the unreasonable" interpretation. (X CT 2882; 11 RT 1426-1427.) In effect, the instruction informed the jurors that if appellant reasonably appeared to be guilty, they were to find him guilty as charged of first degree premeditated murder even if they entertained a reasonable doubt as to whether he had premeditated the killings. The defects in this instruction were particularly damaging here where the prosecution's case rested almost exclusively on circumstantial evidence and appellant countered with his own version of what happened.

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[40] In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court ruled that "routine" challenges to the state's capital-sentencing statute will be considered "fully presented" for purposes of federal review by a summary description of the claims. This Court has not indicated that repeatedly-rejected challenges to standard guilt phase instructions similarly will be deemed "fairly presented" by an abbreviated presentation. Accordingly, appellant more fully presents the claims in this argument.

The instruction undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at 638.)[41]

First, the instruction compelled the jury to find appellant guilty on both counts of murder and to find the sole special circumstance of multiple murder to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instruction directed the jury to convict appellant based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (X CT 2883.) However, an interpretation that appears reasonable is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required conviction and a true finding of the special circumstances, and findings of fact necessary to support those verdict, on a degree of proof less than the constitutionally-

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[41] Although defense counsel did not object to the giving of CALJIC No. 2.02, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (Pen. Code, § 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

mandated one.

Second, the circumstantial evidence instruction required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In this way, the instruction created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, the instruction plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (X CT 2883.) In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction which required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. Accordingly, this Court should invalidate the instructions given in this case, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The instruction had the effect of reversing, or at least significantly lightening, the burden of proof, since it required the jury to find appellant guilty of first degree murder as charged unless he came forward with evidence reasonably explaining the incriminatory evidence put forward by the prosecution. The jury may have found appellant's defense unreasonable but still have harbored serious questions about the sufficiency prosecution's

case. Nevertheless, under the erroneous instruction the jury was required to convict appellant if he "reasonably appeared" guilty of murder, even if the jurors still entertained a reasonable doubt of his guilt. The instruction thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship, supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty of both charges of first degree murder and a true finding on the special circumstance on a standard which was less than the federal Constitution requires.

B. The Instructions Pursuant To CALJIC Nos. 2.21.2, 2.22, 2.27, 2.51, And 8.20 Also Vitiated The Reasonable Doubt Standard

The trial court gave five other standard instructions which magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard – CALJIC Nos. 2.21.2 (witness wilfully false), 2.22 (weighing conflicting testimony), 2.27 (sufficiency of testimony of one witness), 2.51 (motive), and 8.20 (deliberate and premeditated murder). (X CT 2889, 2889, 2992, 2993, 3007-3008; 11 RT 1430-1433, 1440-1441.) Each of those instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and vitiated the

constitutional prohibition against the conviction of a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)[42]

The jury was instructed with former CALJIC No. 2.51 as follows:

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

(X CT 2993; 11 RT 1432.) This instruction allowed the jury to determine guilt based on the presence of alleged motive alone and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. As a matter of law, however, it is beyond question that motive alone, which is speculative, is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient]; see *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The motive instruction stood in contrast to CALJIC No. 2.62, which told the jury that appellant's failure to deny or explain the evidence against him was "not sufficient by itself to prove guilt." Containing no similar admonition, the motive instruction thus appeared to include an intentional omission allowing the jury to determine guilt based on motive alone.

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[42] Although defense counsel failed to object to these instructions, appellant claims are still reviewable on appeal. (See p. 150, fn. 36, *ante*, which is incorporated by reference here.)

Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase inclusio unius est exclusio alterius could mislead a reasonable juror as to the scope of an instruction]; *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [failure to instruct on effect of a reasonable doubt as between any of the included offense resulted in erroneous implication that rule requiring finding of guilt of lesser offense applied only as between first and second degree murder]; *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].) Here, the prosecution's heavy reliance on evidence of motive highlighted the omission in CALJIC No. 2.51, increasing the likelihood that the jury would have understood that motive alone could establish guilt.[43]

CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (X CT 2889; 11 RT 1430.) That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution

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[43] Although defense counsel requested CALJIC 2.51 (X CT 2860), the invited-error doctrine does not preclude review of this claim. Because the prosecution's case relied on motive evidence, the instruction would have been given even in the absence of the defense request. (See 1 Witkin and Epstein, Cal. Criminal Law (2d ed. 1988) § 100.) Thus, the defense request did not cause the error. (*People v. Graham* (1969) 71 Cal.2d 303, 317-319.)

witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness' testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided as follows:

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

(X CT 2890; 11 RT 1430-1431.) The instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard." As with CALJIC No. 2.21.2, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat

greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (X CT 2992; 11 RT 1431), was likewise flawed. The instruction erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any "fact." (*People v. Serrato* (1973) 9 Cal.3d 753, 766.)

Finally, CALJIC No. 8.20, which defines premeditation and deliberation, misled the jury regarding the prosecution's burden of proof. The instruction told the jury that the necessary deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation. . . ." (X CT 3007-3008, 11 RT 1440-1441 .) In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "'absolutely prevent'"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally- mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." In the face of so many instructions permitting conviction upon a lesser showing, no reasonable juror could

have been expected to understand that he or she could not find appellant guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

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

Although each of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.01, 2.02, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [circumstantial evidence instructions].) While recognizing the shortcomings of some of those instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*,

supra, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction which dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

D. Reversal is Required

Because the erroneous circumstantial evidence instruction required conviction on a standard of proof less than proof beyond a reasonable doubt, its delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 280-282.) At the very least, because all of the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Carella v. California; supra*, 491 U.S. at pp. 266-267.)

The prosecution cannot make that showing here, because its proof of appellant's guilt for the murders was weak for all of the reasons previously discussed. Given the dearth of direct evidence, the instructions on circumstantial evidence were crucial to the jury's determination of guilt. Because these instructions distorted the jury's consideration and use of circumstantial evidence, and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined.

Further, CALJIC No. 2.51 permitted the prosecution to only establish motive for the jury to conclude that appellant was guilty. The instructional error was particularly prejudicial in this case given that the prosecution's theory of appellant's guilt for the murders of Harding and Jackson was based on motive. (11 RT 1410-1412.) The instruction allowed the jury to convict appellant on the motive evidence alone and this error, alone or considered in conjunction with all the other instructional errors set forth in this brief, requires reversal of appellant's conviction.

The dilution of the reasonable-doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana, supra*, 498 U.S. at p. 41; *People v. Roder, supra*,

33 Cal.3d at p. 505.) Accordingly, appellant's murder convictions, special circumstance finding, and death sentence must be reversed.

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VIII

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 subd. (a) directs the jury to consider in aggravation the "circumstances of the crime." (CALJIC No. 8.85; X CT 3073-3074.) 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 repeatedly argued that the method of killing (16 RT 1877, 1879, 1886-1888) and appellant's alleged motivation for the killings (16 RT 1889) were aggravating factors.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner 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 (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (X CT 3073-3074, 3077-3078.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Ring v. Arizona* (2002) 536 U.S. 584, 604, now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: the jury had to determine whether any mitigating or aggravating factors were present; the jury had to decide whether the aggravating factors outweighed the mitigating factors; and the jury had to decide whether the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; X CT 3077-3078.) Because these additional findings were required before the jury could impose the death sentence, *Ring*,

Apprendi and *Blakely* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.)

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*, and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected 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. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled 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, the instructions given here (X CT 3973-3974, 3077-3078), 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 were permissible not to have any burden of proof,

the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

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

a. Aggravating Factors

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

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

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal

Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the 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. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; X CT 3076.) Consequently, any use of unadjudicated criminal activity by a

member of the jury as an aggravating factor, as outlined in Penal Code section 190.3 subd. (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].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant (12 RT 1510-1569; 13 RT 1572-1610, 1616-1633; 14 RT 1642-1731) and devoted a considerable portion of its closing argument to arguing these alleged offenses (16 RT 1879-1885, 1890-1895, 1908-1909).

The United States Supreme Court's recent decisions in *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury. Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

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

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating

circumstances that it warrants death instead of life without parole." (X CT 3078.) 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.) Appellant asks this 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 them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. 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 this Court to reconsider those rulings.

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

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

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the

balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

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

After the trial court instructed the jury at the penalty phase, appellant's counsel requested an additional, clarifying instruction. He asked that "the jury be told by the court that although they may find that the aggravating circumstances are substantial in comparison to the mitigating circumstances they can still impose a sentence of life without the possibility of parole." (16 RT 1940.) Ruling that the point was clear in the instructions, the trial court denied the request. (16 RT 1941.)

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." 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 when 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 (1980) 447 U.S. 343, 346).

The decisions in *Boyde v. California* (1990) 494 U.S. 370, 376-377 and *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 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. That, however, is *not* the 1978 California capital-sentencing standard under which appellant was condemned. Rather, this Court in *People v. Brown*, *supra*, 40 Cal.3d at p. 541, 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.) Appellant urges the Court to reconsider these rulings.

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

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v.*

California, supra, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

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

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

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., Amend. 14th), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. 8th & 14th), and his right to the equal protection of the laws. (U.S. Const., Amend. 14th.)

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

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

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth,

and Fourteenth Amendments to the federal constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

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); X CT 3073-3074) 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 rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but appellant urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (16 RT 1877 [district attorney notes that factors, d, e, f, g, h, I and j were inapplicable to this case].) The trial court failed to omit those factors from the jury instructions (X CT 3073-3074), 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* (2006) 36 Cal.4th 566, 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. (X CT 3073-3074.) 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 Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed,

i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

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; California 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 what 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 Penaty As A Regular Form Of Punishment Falls Short Of International Norms

This Court numerous times has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments to the federal constitution, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

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IX

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 *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"].)[44] Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *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

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[44] Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

the effect of cumulative errors.' [Citation]." (*Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883.) This is just such a case.

Aside from the erroneous termination of appellant's self-representation, which requires a per se reversal, the series of guilt phase errors doomed appellant's ability to fairly present his case to the jury, and denied him his right to a fair trial. Without overwhelming evidence of appellant's guilt, the jury's verdict turned on who it found more credible – the prosecution's witnesses or appellant. The trial court's errors had a cascading effect, undermining appellant's ability to present his defense and improperly bolstering the prosecution's case. Initially, the trial court's error in requiring appellant to wear a stun belt materially impaired his ability to testify and adversely affected his credibility with the jury, which was central to his defense. The erroneous admission of gang expert testimony further undermined appellant's credibility with the jury, encouraging the jury to see him as a violent, dangerous gang member who should not be trusted.

The prosecutor seized on appellant's demeanor while testifying, arguing that his nervousness showed his lack of credibility, and that "the undercurrent" present while he testified evinced his underlying culpability for the capital murder charges. The trial court's error in requiring appellant to wear a stun belt, which allowed the prosecutor to make this argument, was further amplified by the trial court's error in instructing pursuant to CALJIC No. 2.62, which, in the context of this case, encouraged the jury to draw an inference of appellant's consciousness of guilt from any portion of appellant's testimony that it rejected, without finding that appellant's statements were willfully false or deliberately misleading.

The trial court's error in precluding the introduction of relevant, exculpatory defense evidence was a further blow to appellant's already

impaired ability to present his defense. The excluded evidence of Vashaun's beating of Meekey would have cast the case in an entirely different light, presenting both an alternate theory of who was responsible for the murders and impeaching the prosecution's theory that appellant's anger at Harding arose from the theft of his drugs. The improperly-introduced gang evidence also served to bolster the prosecution's case, imbuing the prosecution's theory with the imprimatur of authority, while the defense was precluded from presenting any of the available evidence that would have impeached the prosecution's theory. Adding further weight to the prosecution's side of the scale was the trial court's erroneous admission of the improper and speculative expert testimony of forensic print specialist Wendy Cleveland.

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; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) Appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court

considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) Reversal of the death judgment is mandated here because it cannot be shown that 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.)

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

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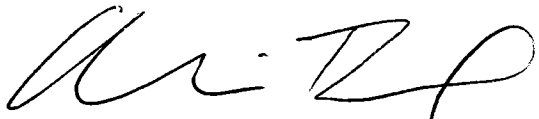
CONCLUSION

For all of the reasons stated above, the convictions, special circumstance finding and sentence of death in this case must be reversed.

DATED: January 10, 2007

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



ALISON BERNSTEIN
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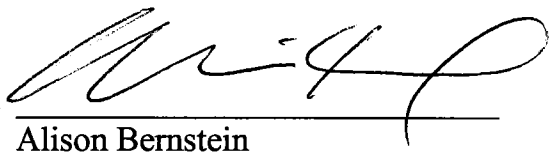
CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Alison Bernstein, am the Deputy State Public Defender assigned to represent appellant, Frank Kalil Becerra, 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 58,103 words in length, excluding the tables and certificate.

Dated: January 10, 2007



Alison Bernstein

DECLARATION OF SERVICE

Re: People v. Frank Kalil Becerra CA. Supreme Court No. S065573

I, ROSEMARY MENDOZA, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

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

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(Appellant)

Each said envelope was then, on January 10, 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 January 10, 2007, at San Francisco, California.

DECLARANT