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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff-Respondent, v. MAGDALENO SALAZAR, Defendant-Appellant.	)	Supreme Court No. S077524 Los AngelesCounty Superior Court No. BA 081 564

APPELLANT'S OPENING BRIEF

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

COPY

The Honorable Robert J. Perry, Judge Presiding

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	
	)	
Plaintiff-Respondent,	)	
	)	**Supreme Court**
v.	)	**No. S077524**
	)	
MAGDALENO SALAZAR,	)	**Los AngelesCounty**
	)	**Superior Court**
Defendant-Appellant.	)	**No. BA 081 564**

STATEMENT OF APPEALABILITY

This is an automatic appeal pursuant to Penal Code section 1239,[1] subdivision (b), from a conviction and judgment of death entered against appellant Magdaleno Salazar (hereinafter appellant), in the Los Angeles County Superior Court on March 12, 1999. (3 CT 518-523.) The appeal is taken from a judgment that finally disposes of all issues between the parties.

STATEMENT OF THE CASE

This case, originally filed as a non-capital murder case, originated on August 23, 1993,[2] when appellant was charged with the July 25, 1993, murder of Enrique Guevara. Count I alleged first degree murder, in

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[1]All further code section references are to the California Penal Code, sometimes referenced by the prefix PC, unless otherwise noted.

[2]The case was filed as an "Amended Felony Complaint For Arrest Warrant" in the municipal court on August 23, 1993, at which time an arrest warrant was issued for appellant Magdaleno Salazar. (1 CT 33.) The same complaint was filed in the superior court on October 4, 1993. However, the original complaint has never been located or made a part of the record on appeal. (See 4 Supp. CT 20-21.)

violation of section 187(a). It further alleged that appellant personally inflicted great bodily injury within the meaning of section 12022.7, and that he personally used a firearm within the meaning of sections 1203.06(a)(1) and 12022.5(a). Appellant was charged as a principal and armed with a firearm within the meaning of section 12022(a)(1).

Two years after the warrant issued, appellant was arrested, and on November 27, 1995, he was arraigned in municipal court. With appointed counsel John E. Meyers appearing on his behalf, appellant pled not guilty to all charges, allegations and enhancements. (1 CT 47; 51.) Following a brief preliminary hearing on May 19, 1997, appellant was held to answer on the murder charge and the great bodily injury enhancement was stricken. (1 CT 158-159.)

On June 2, 1997, an Information filed in the Los Angeles County Superior Court alleged one count of first degree murder, in violation of section 187(a), along with personal use and firearm allegations. (1 CT 166-167.) Appellant pled not guilty. (A-1 RT 2.) At that time, the prosecution informed the trial court:

> This case is a potential special circumstance case. It wasn't when it was filed, but since then Mr. Salazar has been convicted of another homicide.

(A-1 RT 2.) In fact, eight months earlier, in October of 1996, appellant had been convicted of being an aider and abettor in a felony-murder which took place in 1991 (6 RT 1078), when appellant was a juvenile.[3] Accordingly, on June 12, 1997, the prosecution amended the Information to include a single special circumstance, the prior murder conviction. (§190.2(a)(2); CT

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[3]The prior murder took place on November 6, 1991, while appellant was 17 years old. (3 CT 458; 466.)

171-172.) On July 11, 1997, appellant was arraigned on the amended information, pled not guilty to the murder charge and denied all of the allegations including the special circumstance allegation. (A-1 RT 9.)

Although the district attorney's office had made no penalty decision at the time of the arraignment, two months later, on August 21, 1997, it announced its decision to seek the death penalty. (A-1 RT 42.) On September 2, 1997, the trial court denied appellant's request for the appointment of second counsel to assist. (CT 987.2 Documents, 1-2.)

Over the next year, the defense made several attempts to persuade the prosecution to reverse the decision to seek the death penalty. (See, e.g., A-1 RT 23, 32, 36, 42.) The deputy district attorney explained his office was reconsidering whether it was appropriate to seek the death penalty in a case where, "the defendant doesn't appear to be the shooter." (A-1 RT 42.) In fact, the deputy district attorney was of the opinion that this case did not present "an overwhelming case for murder" (A-1 RT 84), much less capital murder. The trial court agreed, and noted that the case might well result in a voluntary manslaughter verdict. (A-1 RT 79.) Nevertheless, on July 18, 1998, the charging committee left in place the original decision to seek the death penalty. (1 CT 189; A-1 RT 42; A-1 RT 36.)

Jury selection began on January 25, 1999, before Judge Robert Perry. The trial court denied appellant's request to use written juror questionnaires during voir dire, on the grounds that the "case is not an overwhelming case for murder, apparently." (A-1 RT 84.) Judge Perry conducted the voir dire and on January 26, twelve jurors and four alternate jurors were selected and sworn. (2 RT 579.) The following day opening statements began (3 RT 596-605), and the next day, the prosecution completed its case-in-chief. (4 RT 851.) The trial court denied appellant's motion for a judgment of

acquittal under Penal Code section 1118.1. (4 RT 854.)

On February 1, 1999, the defense put on its entire guilt phase case in less than three hours. (5 RT 856- 943.) The jury was instructed and a second defense motion for acquittal under section 1118.1 was denied, all before noon. (5 RT 946-984.) That afternoon, both sides presented closing arguments (5 RT 985-1051) and jury deliberations began. (5 RT 1053.) On February 2, the second day of deliberations, the jury requested a readback of the testimony of witnesses Kathy Mendez, Enrique Echeverria and Patrick Turner. The readback continued through the afternoon. (2 CT 363; 5 RT 1055.) On the afternoon of February 3, 1999, the third day of deliberations, the jury sent a note to the trial judge asking what it should do if it was unanimous for a verdict of murder, but unable to agree on the degree of murder. The trial court's only response was to refer the jury back to CALJIC No. 8.71, an instruction which had already been given to the jury. (2 CT 365; 6 RT 1057.)

The following day, the jury found appellant guilty of murder in the first degree and found true both the personal use and the arming enhancements. (2 CT 444, 448; 6 RT 1058-1059.) Appellant waived his right to a jury trial on the special circumstance, and admitted his October 23, 1996, first degree murder conviction. (2 CT 449; 6 RT 1067-1069.) The trial court ordered the penalty phase to begin on February 8, 1999.[4]

The entire penalty phase of the trial, including both sides' closing arguments and jury instructions, took place on the morning of February 8, 1999. The prosecution presented testimony from the victim's mother and

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[4]The trial court took the testimony of the prosecution's first penalty witness, Deputy District Attorney Keri Modder, ahead of time, on February 4, 1999. (6 RT 1074-1079.)

sister; the defense presented testimony from appellant's mother, sister, and friend. Deliberations began before noon, (6 RT 1082-1141) and resumed the next day, at which time the jury sent a note to the trial court asking what would happen if the jury were deadlocked on the question of death versus life without possibility of parole. The trial court responded that it was not permitted to answer that question. (3 CT 470.) Deliberations continued until 10:50 a.m., on February 10, 1999, when the jury returned a verdict of death. (3 CT 484; 6 RT 1144-1146.)

On March 12, 1999, appellant's motion for a new trial was denied. (3 CT 525; 6 RT 1158.) The court also denied the motion to reduce the penalty, and pronounced the judgment of death. (6 RT 1164.) A ten-year sentence for violation of Penal Code section 12022.5(a) was stayed, pending execution of the death sentence. (3 CT 528.)

STATEMENT OF FACTS

A. Introduction

The victim in this case, Enrique Guevara ("Guevara") was killed in a gang-related shootout in the early morning hours of July 25, 1993, around 2:30 a.m. (3 RT 704.) The events leading up to this shootout took place in a small strip mall in south Los Angeles, and involved two adjacent restaurants. The first restaurant was a 24-hour fast food chain known as the Beef Bowl, located on the southeast corner of the strip mall. (4 RT 774.) The Beef Bowl was frequented by a number of gangs and was believed to be on the border of Harpys territory, the gang to which appellant and his friend Enrique Echeverria ("Rascal")[5] belonged. (3 RT 631.) The second

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[5]Enrique Echeverria was referred to by his nickname, "Rascal," throughout the record. To avoid confusion, that nickname will be used in appellant's brief, as well.

restaurant was a small coffee shop, adjacent to and just to the west of the Beef Bowl, called the Au Rendez-Vous. Guevara was killed and his body was found inside of the Au Rendez-Vous.[6] (3 RT 659.) The parties stipulated that 15 bullet casings were recovered from the scene, all of which were located inside and outside of the Au Rendez-Vous.[7] The parties also stipulated that 12 of the casings were from the same .9 mm weapon, and the remaining 3 casings were from the same .25 caliber weapon. (4 RT 816.) Guevara tested positively for gunshot residue on both of his hands (5 RT 942-943) and the prosecution conceded that Guevara shot and wounded Rascal in this shootout. (5 RT 1043.) In a prior proceeding, Rascal was convicted of killing Guevara.[8]

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[6]At trial, this restaurant was sometimes referred to as a donut shop or simply "the café." Both restaurants are depicted in People's Exhibits ("PX") 1A, 1B and 1C [photographs] and PX 2 [a diagram of the same area]. Both face north and share a common wall; a sidewalk runs east to west in front. From the parking area, and looking directly at the two restaurants, the Beef Bowl is the corner restaurant, on the left, and the Au Rendez-Vous is next door, to the right. (PX 2.)

[7]There was no testimony, photographs, diagrams or any other evidence as to the precise location of any of the casings, nor any evidence as to which casings were found where.

[8]Rascal was convicted of manslaughter, and the defense sought to so inform the jury. The prosecutor would only agree to informing the jury that he had been convicted of "killing" Guevara, without specifying that the jury had found manslaughter. Ultimately, the parties presented a stipulation to the jury that Rascal had been convicted of killing Guevara. (3 RT 602-603.) Prior to Rascal's testimony defense counsel sought to question Rascal about the nature of his conviction. The trial court refused to allow the defense to pursue the inquiry, over defense objection. (5 RT 857.)

The prosecution's theory was that appellant came to the Beef Bowl "to find someone to go after," that he was "mad-dogging" and seeking "quarrels" with other patrons inside the Beef Bowl, and that he had even expressed a purpose to gain control of this area for the Harpys. (5 RT 998-999.) The prosecution argued that appellant's alleged frame of mind established that he had shot and killed Guevara with malice and premeditation, the necessary elements of first degree murder.

B. The Prosecution's Guilt Phase Evidence

In the guilt trial, the prosecution presented the testimony of eleven witnesses, only six of whom were actually present in the area of the strip mall prior to the victim's death.[9] Of those six witnesses, all but Patrick Turner definitively testified that they were inside of the Beef Bowl at the time of the shooting, not inside the Au Rendez-Vous where the shooting occurred.

1. Arnold Lemus and Juan Salazar - "party crew" members inside the Beef Bowl

Arnold Lemus testified that at 2:30 a.m., he and his friends, Juan and Mario, were sitting at a table inside the Beef Bowl, eating. Two men came up and asked if they were in a gang; Arnold responded they were just in a

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[9]Those six witnesses present at the strip mall prior to the shooting were Arnold Lemus, Juan Salazar, Kathy Mendez, Emilio Antelo, Patrick Turner and the victim's cousin, Giovanni Guevara, whose testimony was presented through stipulation.

The other five witnesses all testified about events which took place *after* the shooting and/or as experts. Campus police office Randy Burba, secured the scene but provided no other relevant evidence. (3 RT 703-711.) Sabino Nungaray drove Rascal to the hospital after the shooting. (3 RT 712-719.) The testimony of the other three witnesses, Detective Michael McPherson, gang expert Freddi Arroyo and medical examiner Dr. Ogbonna Chinwak is discussed at length, *infra*.

"party crew." (3 RT 608.) Lemus believed the two men had identified themselves as Harpys gang members and Lemus told them "it was cool, because I didn't have nothing against nobody like that." (3 RT 608.) The person who spoke to Lemus was Hispanic and was wearing a white T-shirt. Then the men left and Lemus did not see them after that. (3 RT 608-610.) Sometime later Lemus heard gunshots and everyone inside the Beef Bowl ducked under their seats. Eventually Lemus went outside and into the cafe next door. There he saw a man with a cast on his leg, lying face down in a pool of blood. (3 RT 610-612.) Lemus was unable to identify either of the Harpys gang members who came up to his table. (3 RT 609, 613.)

Juan Salazar ("Juan")[10], who was with Lemus and Mario, only remembered that two men came up and spoke to Lemus, but because Juan was eating, he did not notice how the two were dressed. (3 RT 617, 619.) When one of them asked what neighborhood Lemus was from, Juan heard Lemus respond and the guy mumbled something back, but Juan was not paying attention. (3 RT 620.) After that Juan did not see where the two men went. Later, when he heard shots, Juan "tried to hit the floor." (3 RT 622.) He did not see anyone doing the shooting and was never able to identify any of the shooters. (*Id.*)

2. Kathy Mendez - Harpys gang member

Kathy Mendez testified that she and Rascal and appellant (whom Kathy referred to as "Toy") were all members of the Harpys street gang. (3 RT 631.) Several years prior to Mendez's testimony in appellant's case, she had been interviewed by the police. She had also testified in Rascal's trial,

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[10]To avoid confusion with appellant, whose last name is also Salazar, witness Juan Salazar is referred to by his first name, "Juan."

which ended in his conviction. (3 RT 603; 639-642; 651.) At Rascal's trial Mendez testified that she initially told the police only about half of what she saw because she did not want to involve Rascal. (3 RT 689.) At appellant's trial, although Mendez was repeatedly impeached by her prior statements and testimony, she testified somewhat consistently as to the following facts:

On the night in question, Mendez and her friend Cynthia were at the Jack-in-the-Box when appellant and Rascal picked them up in a car to get something to eat at the Beef Bowl. Appellant was wearing a white T-shirt and Rascal was wearing "everything dark," including a black shirt.[11] (3 RT 634-635.) After arriving at the Beef Bowl, they all went inside. The Beef Bowl was packed and most of the tables were filled. (3 RT 667.) Appellant gave Mendez money to buy food, told her what he wanted, and then sat down at a table with the other two. (3 RT 633.) Mendez stayed in line the whole time, initially to place the order and later to wait for the food. She never sat down at the table with the others. (3 RT 667.) While in line facing the counter, she had her back to her friends who were sitting by the front window of the restaurant, near the door. (3 RT 634; PX 2 and 3 RT 645.)

While Mendez was in line she overheard appellant and Rascal talking about being careful and not being "caught slipping." (3 RT 636.) Mendez had previously testified that she could not recall whether she heard Rascal or appellant making these comments. (3 RT 692-693). However, whoever made the statement, she understood them to be saying that they had to pay attention and keep an eye out, or else other gang members might

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[11]Mendez agreed that she may have told the police that Rascal was wearing a black shirt with white letters or numbers on it. She could not remember telling the police that appellant was wearing beige shorts. (3 RT 635.) However, she confirmed that appellant was wearing a white shirt.

come and shoot them. This was what being "caught slipping" meant. (3 RT 637-638.) Mendez also heard either appellant or Rascal, she could not recall which one, say they had to "take care of the neighborhood or take care of business, something like that." (3 RT 636.) In her opinion, this might be accomplished by "just hanging around" their territory and by "being protected," that is, by being armed.[12] (3 RT 637.)

About five or ten minutes after their arrival at the Beef Bowl, and while Mendez was still in line, appellant and Rascal went outside and were standing near the front door. (3 RT 668-669.) While the two of them were outside and Mendez was inside, she heard appellant ask Rascal to get the "cuete," a Spanish slang word for "gun." (3 RT 642-643; 670.) Mendez claimed she could hear this conversation, despite the noise from the crowded restaurant, because she was only three or four feet from the door, and Cynthia "kept on like opening the door." (3 RT 671-672.)

Mendez saw Rascal go to his car, and lean forward to get something, but testified she could not see a gun. (3 RT 643-644.) She later agreed, however, that the object Rascal put in the waist of his pants looked like a gun. (3 RT 654-655.) Although she could not remember the color of Rascal's gun, she later testified that she saw a "black object" which she assumed was a gun because "obviously, it had to be a gun because I heard Toy telling [Rascal] to go get the cuete." (3 RT 680.) Mendez agreed to her

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[12]Testifying in 1999, Mendez speculated that the Harpys street gang, six years earlier in 1993, "most likely" wanted to gain control of the territory that included the Beef Bowl. (3 RT 637; 676.) Mendez was not asked any foundational questions supporting this opinion nor did the prosecution present any evidence that either appellant or Rascal shared such a goal.

previous testimony in which she said, "It was too far to see, to really see. It just seemed like a gun." (3 RT 682.)

After Mendez saw Rascal retrieve the object from the car, she was watching what appellant and Rascal were doing outside because "Cynthia called me to show me what they were doing." (3 RT 682-683.) However, at Rascal's trial, Mendez had testified that after appellant's remark about the "cuete," she just turned around and faced the counter and continued to wait for the food. (3 RT 683.) After being reminded of this testimony, Mendez admitted she had not been paying attention to what was going on outside because Rascal being armed "was something normal," and she was not really worried that anything was going to happen. (3 RT 684.)

Still, Mendez testified that after Rascal retrieved the gun, and while she was still in line, she saw someone walking past the Beef Bowl, going in the direction of the café next door (i.e., walking westward). (3 RT 644.) Mendez drew an arrow on PX 2, indicating the direction the person was walking when she saw him. He looked like another gang member, was not wearing a shirt, and had a cast on his leg. (3 RT 646.)

Mendez claimed that she then saw appellant and Rascal outside "wrestling" with the shirtless man (3 RT 647; 693), however, Mendez was impeached on this point. The prosecution stipulated that at Rascal's trial, Mendez admitted that she had not actually observed anyone wrestling. Rather, when she had previously told the police that she saw wrestling, she "was lying to the police officers," and had only told them "what my friends had told me. I wasn't saying what I had seen." (3 RT 694.) [13] Mendez had

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[13]At 3 RT 694, defense attorney Meyers purports to read from the *Echeverria* trial transcript (page 661, line 19). However, what Meyers purports to read is slightly different from the actual *Echeverria* transcript.

also previously told the police that she *first* heard shots fired, and *then* saw wrestling, (3 RT 694) even though she repeatedly testified that as soon as she heard shots, she threw herself to the ground.[14] (3 RT 649.)

Mendez also testified inconsistently about seeing appellant with a gun. Initially, she said she only saw him with a gun as he and Rascal were leaving the Beef Bowl, following the shooting. (3 RT 638.) She thought it was a big gun, like a .9 millimeter, and dark in color. (3 RT 639; 657.) Consistent with this testimony, Mendez three times confirmed that, prior to hearing shots, *she did not see anyone with a gun*:

Q Prior to hearing the shots, could you see anyone draw a gun?
A No.
Q Did you see anyone with a gun?
A No, not at that moment.

This Court may take judicial notice of the records in Los Angeles Superior Court Case No. BA 081564, *People v. Echeverria*. (Evid. Code §452(d).) At page 661, lines 19-28, Mendez was examined as follows:

"Q After you heard the shots you also saw some wrestling; is that right?
A That's what I told the police officers. But like I said, I was lying to the police officers.
Q So you were –
A *I was telling him what my friends had told me. I wasn't saying what I had seen.* I told them that it was my friend who was wrestling between them." (Emphasis added.)

[14]This was consistent with Arnold Lemus's testimony that when the shooting began "everybody started ducking." (3 RT 610.) Also, if the shots came first, and then the wrestling, as Rascal testified (5 RT 870-872), then Mendez could not have witnessed wrestling since she testified that she threw herself to the ground and covered herself as soon as she heard shots, and did not get up until the shooting was over. (3 RT 649.) That the shots came first would also be consistent with the security guard's testimony. Antelo saw no wrestling but heard shots right after he turned to go inside. (4 RT 744-745.)

Q So between the time Toy and Rascal walked outside to the time you heard shots, you didn't see anyone with a gun?
A No.

(3 RT 649.) After this, however, Mendez testified that she did not remember when she "first" saw a gun. (3 RT 650.)

When confronted with her prior statement to Detective McPherson that she saw appellant "doing the shooting" (3 RT 651), Mendez did not deny making the statement but was never asked which was true, her prior statement to the detective or her current testimony, denying that she saw a gun prior to hearing the shots. Ultimately, Mendez only confirmed that she saw appellant pointing a gun in the direction of the Au Rendez-Vous cafe:

Q (By Mr. Esposito)
Miss Mendez, when you told . . . Detective McPherson that you saw Toy doing the shooting, where was Toy standing when you saw him pointing the gun shooting?
A I don't remember.
Q Was he outside the Beef Bowl?
A Yes.
Q Was he pointing it towards the Beef Bowl or away from the Beef Bowl?
A Like the arrow where I pointed at. That way. Pointing that way.
* * *
Q So on . . . People's 2 for identification.. . .Toy was pointing his gun in the same direction as the arrow already represented on there?
A Yes.
Q That would be towards the Au Rendez-Vous restaurant, right?
A Yes.

(3 RT 655.) When asked again what she did when she *heard the shots*, Mendez confirmed that "I threw myself down." When the shooting stopped she "got up" and went outside. Then she saw appellant and Rascal get in

their car and drive away. They both entered the driver's side of the car and appellant was driving. (3 RT 656; 686.)

Ultimately, Mendez testified that both appellant and Rascal had a gun. (3 RT 657.) She claimed she saw appellant with a gun twice, once when he was standing outside by the door, and then again as he was leaving with Rascal. (3 RT 678-679.)

3. Emilio Antelo - security guard

Emilio Antelo worked as a security guard at the Beef Bowl on the night of the shooting. He wore a uniform, and a gun, and was standing out on the sidewalk, in between the Beef Bowl and Au Rendez-Vouz next door,[15] when he witnessed "an armed face-off among three people." (4 RT 738-739.) It began when a car drove up and two people got out. (4 RT 740.) PX 2, a diagram of the area proffered by the State, shows that this car was parked directly in front of the Au Rendez-Vouz café. The passenger, who was younger, got out first and went into the Beef Bowl. After that, the driver of the car, a man wearing no shirt, got out of the car and started walking towards Antelo. (4 RT 740-741.) Antelo observed the shirtless man as he was in front of his car, just to the west of the Au Rendez-Vous entrance.[16] At that moment Antelo heard something metallic, and turned and saw someone had cocked a gun. Prior to that, he had not seen the shirtless man holding a gun. (4 RT 742-743.) Then, the person with the gun

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[15]See PX 2, the diagram on which Antelo placed his initials, "EA." He placed himself at the common wall which adjoins the two restaurants.

[16]Antelo placed an "x" on PX 2, to show where the shirtless man was when Antelo observed him. Antelo placed the "x" on the sidewalk near the door of the Au Rendez-Vous. This location was also in front of the parked gray car, designated as the one driven by Guevara. The car was parked directly in front of the Au Rendez-Vous café. (See PX 2.)

stopped in between Antelo and the shirtless man. Antelo heard another metallic sound, turned around again, and saw another man cocking a gun. When asked if the two men were going in the direction of the shirtless man or "the other direction," Antelo confirmed that the men were going in the direction of the shirtless man. Antelo thought there was going to be a problem so he went inside the Beef Bowl. As he was going inside, he heard the first shot. (4 RT 744.) When he was inside the Beef Bowl, he heard more shots. When the shooting stopped, Antelo asked the cook to call the police. Then he went next door and saw the shirtless man lying on the ground.

When asked if he knew the type of guns that he saw that night, Antelo was not certain, (4 RT 745) except that they were both semi-automatic pistols. Antelo demonstrated for the jury how the first man cocked the pistol. (4 RT 746.) Antelo saw the second man cock his gun as well, and when asked how the second man cocked his pistol, Antelo said, "The same as the previous man." (4 RT 747.) Antelo did not see anyone else with a gun, nor did he get a good look at either gunman. (3 RT 752.)

When this armed face-off took place, Antelo was standing in between the Beef Bowl and the coffee shop next door. (4 RT 740.) Antelo was asked to review PX 2, the diagram of this area, and mark his location with his initials. Antelo placed his initials just west of the common wall border between the Beef Bowl and the Au Rendez-Vous. (4 RT 749; PX 2.) Antelo then marked where the two men with guns were, as they passed in front of him. The first man was standing directly in front of Antelo, and was walking westward toward the coffee shop. (4 RT 750; PX 2.) The second man was just to the east of Antelo, and also walking westward. (4 RT 750.) The man with no shirt (Guevara) was standing to the west of the

coffee shop door (4 RT 750) which Antelo depicted with a rectangle on the building marked "Au Rendez-Vous Café." (PX 2.) Antelo thus placed Guevara on the far side of the café door, away from the two men with guns. All three participants in the "armed face-off" were thus to the west of the Beef Bowl door, and closer to the Au Rendez-Vous café.

4. Patrick Turner - passerby

Patrick Turner was a passerby who was walking in the area of the Beef Bowl around the time of the shootout. At the time of his testimony, Turner was serving time for robbery and drug convictions. (4 RT 791.)[17] When asked if he was out in front of the Beef Bowl on the night in question, Turner said he was. He agreed he was "just walking by" the Beef Bowl, and explained that he had "stopped at the donut shop" to buy cigarettes.[18] When asked if he observed a shooting, Turner said he had. (4 RT 783.) Asked what he had observed prior to the shooting, he said he saw "two guys arguing with each other." Asked whether he saw a car pull into the parking lot, Turner said it was a small car, and then added, "And then *I guess* two guys got into an argument *or something like that*." (4 RT 783, emphasis added.)

Asked who got out of the car, Turner said he only saw the passenger get out, and that the driver remained in the car. (The parties all agreed that

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[17]Turner remembered very little about what he actually saw that night. His testimony was tentative, and most of the details he provided were the result of leading questions.

[18]Presumably, Turner had already purchased his cigarettes, had left the café and was heading east past the Beef Bowl. However, because Turner answered "yes," to each of the leading questions about his locations, it is impossible to determine from this record where he was located when the shooting took place. (4 RT 783.)

the driver was the victim, Guevara, who had gotten out of the car.) When asked about whether he was interviewed by the police that night, Turner responded: "Yeah. This witness – it was he and a lot of other people. *We saw a shooting or something.*" (4 RT 784, emphasis added.) When prompted with leading questions, he changed his testimony and said that he *did* remember the driver getting out of the car, and that the driver was approached by two men who asked, "Don't I know you from somewhere?" Then "they got to arguing and scuffling" and went into the same donut shop.[19] (4 RT 785.) However, when asked if the guys were wrestling as they went into the donut shop, Turner said no, they were just talking. (4 RT 786.) He said they were "just arguing, that's all," and denied that there was any actual physical altercation at all. (*Id.*)

Nevertheless, when asked about his previous interview with the detective, Turner agreed with the report that the victim and the "guy with the white shirt pushed each other into the coffee shop." (4 RT 787.) Turner testified that both of the suspects were wearing white T-shirts, until the prosecutor told him that the police report said otherwise. Then Turner agreed that the second man wore a black Raiders jersey. (*Id.*)

Turner was then asked what happened after "the men started wrestling with each other." (*Id.*) He replied, "It was a shooting." (4 RT 788.) When asked if he saw someone with a gun, he replied, "*All we see [sic] is a guy running out of the donut shop after the shooting was over.*" (*Id.*, emphasis added.) When asked again if he saw anyone draw a gun or someone with a gun in their hand, Turner again replied, "*All we could see is*

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[19]Neither the prosecutor's questions to Turner, nor Turner's responses, make it clear who was wrestling with whom, and whether all three men went into the donut shop.

– *we didn't see the gun. They just ran out of the donut shop and left.*" (*Id.*, emphasis added.) When asked if he remembered telling the police detective that he saw the man in the white shirt pull a gun, Turner replied that he did not remember that. (*Id.*) He did remember a "guy with a black jacket [who] started shooting. Also he stepped in and just started shooting." (4 RT 788.) Asked if the man in the black jacket stepped into "the doorway of the coffee shop and start shooting inside," Turner said yes. (4 RT 789.)

When asked if he noticed anything about either of the suspects as they were running to their car, Turner said, "What was it – one looked like he was limping. They was just trying to get away as quick as possible." Turner said it was the man in black who was limping. (4 RT 789.) This testimony, that the injured man with the black shirt was the one he remembered being the shooter, conflicted with an earlier statement he had made. When told that he had previously said the man in the white shirt was limping, Turner confessed that he had no memory of which man was limping, the man in the white shirt or the man in the black shirt. (4 RT 790.) He also could not remember which man was shooting, the one in black or the one in white. (*Id.*)

Although Turner repeatedly denied that he saw any guns at all (4 RT 788), when asked in a leading question by the prosecutor whether he saw any guns *other than the guns held by the man in the white shirt and the man in the black shirt,* Turner replied that he did not. (4 RT 791.)

On cross-examination, Turner repeated his earlier testimony that when the gray car drove up, only the passenger got out *and the driver remained in the car.* (4 RT 796.) When shown the police report in which he had told the officers that the driver had also gotten out of the car (4 RT 797), Turner said that he remembered nothing about the driver of the car.

(4 RT 799.) However, he confirmed that he had previously reported the following to the police:

> The victim got out of the driver's side of the car. He started walking towards the Beef Bowl. He returned to the car for a few moments. He then started walking toward the Beef Bowl. As he approached the door, one of the suspects said, "Don't I know you from somewhere." And then the two suspects and the victim started wrestling. The victim and the guy with a white shirt pushed each other into the coffee shop. Several shots were fired by the suspect.

(4 RT 798-799.) When asked if the police report was correct in reporting that the man in the black shirt stood in the doorway and fired at the victim several times, Turner said yes, that was correct. (4 RT 799.)

Although it was also undisputed that the victim in this case wore no shirt, Turner testified *that he never saw anyone without a shirt.* (4 RT 800.) While Turner confirmed that the man with the black shirt was limping on his way to the car, on cross-examination Turner denied that he saw anyone limping. (4 RT 801.) When refreshed again with the police report, Turner agreed someone was limping, but denied that the limping man was being helped by anyone else. (4 RT 804.) Finally, Turner testified, contrary to his direct examination testimony, that he only walked past the Beef Bowl but never went inside of the Au Rendez-Vous. (4 RT 802.)

5. Freddi Arroyo - gang expert

Freddi Arroyo, a police officer with the Los Angeles Police Department ("LAPD") testified as an expert in the area of Los Angeles street gangs. (4 RT 769.) Arroyo was familiar with the Harpys gang and the boundaries of their territory. The Beef Bowl was on the "fringe" of Harpys' territory. (4 RT 774.) It was a place where members of several different gangs would go to eat. (4 RT 779.) Arroyo identified appellant,

whom he knew as "Toy," as being a member of the Harpys. Arroyo knew that appellant had gang tattoos on his right hand, on his elbow and on his back. In Arroyo's opinion, the tattoos signified that appellant was an active, hard-core gang member and meant "you draw a level of respect from the younger kids," and "at times you command some leadership." (4 RT 772.) Arroyo also identified PX 4 as a photograph of Enrique Echeverria, aka "Rascal," and confirmed that he was also a Harpys member. (4 RT 773.)

Arroyo said that for a gang member, "taking care of their neighborhood" meant protecting their boundaries "at all cost." That could mean writing on a wall, beating someone up or even killing someone. To get "caught slipping" meant that someone from another gang entered another gang's neighborhood, and got caught. Under those circumstances, a gang member would be feel the need to be especially attentive. (4 RT 775-776.) If someone were to say "I was hit up" by a gang member, and that "they were mad-dogging me," that would mean they had been confronted, or stared at in a negative way and it was not a friendly gesture. (4 RT 776-777.)

6. Detective Michael McPherson - investigating officer

In 1993, Michael McPherson was a detective with the LAPD, assigned to the South Bureau Homicide Division. He had primary responsibility for the investigation in this case. Since he was lead investigator, other officers would wait for his arrival at the scene before handling or removing the evidence. (4 RT 807-808.) McPherson was shown PX 1B, the photograph of the front of the strip mall where the crime took place, and he identified the victim's car as the small gray Toyoto in front of the Au Rendez-Vous restaurant. The blue circle drawn on PX 1B,

indicated the location of the restaurant door and also the victim's car, parked in front of that door. McPherson marked PX 1B with an arrow over the door of the Au Rendez-Vous and another arrow over the door of the Beef Bowl. He estimated the distance between the two doors to be about 20 feet. (4 RT 809; PX 1B.)

In the course of his investigation McPherson interviewed several witnesses, including Patrick Turner and Kathy Mendez. (4 RT 810.) Asked through a series of leading questions, Detective McPherson confirmed that Turner had given him the following account: (1) Turner witnessed the gray car pull up and saw the passenger go into the Beef Bowl; (2) the driver also got out of the same car; (3) two individuals, one with a black Raiders jersey and the other with a white T-shirt, approached the driver; (4) one of the two men asked the driver, "Don't I know you from somewhere?" (5) the two men then began to wrestle with the driver; (6) the man in the white T-shirt wrestled the driver/victim into the Au Rendez-Vous restaurant and Turner saw that person who was wrestling inside then pull out a gun; (7) as that was taking place, the man in the black shirt stood at the doorway of the Au-Rendez-Vous and began to shoot into the café; (8) after that, both men ran from the restaurant and left in a maroon vehicle. The man in black got into the driver's side and the man in white, who appeared to be limping, got into the passenger's side of the car. (4 RT 810-811.)

When McPherson first interviewed Kathy Mendez she said she knew nothing about the shooting but later said she saw "Toy shooting a gun at the Beef Bowl shooting." (4 RT 813.)

McPherson testified that a .25 caliber semi-automatic pistol is smaller than a .9 millimeter weapon, but they can look "real similar." Both

weapons eject casings when fired. The parties stipulated that a total of fifteen spent bullet casings were "recovered from the crime scene inside the Au Rendez-Vous and outside of the Au Rendez-Vous." (4 RT 816.) Of the fifteen recovered, twelve were .9 mm casings found to have been fired from the same .9 mm handgun. The remaining three were .25 caliber casings, all of which were fired from the same .25 caliber handgun. (4 RT 816.)[20]

7. Medical Examiner Ogbonna Chinwak

Deputy Medical Examiner Dr. Obgonna Chinwak testified that the victim died of multiple gunshot wounds. Dr. Chinwak determined that Guevara suffered nine separate gunshot wounds which were depicted in two diagrams, PX 6 and PX 7. His wounds included a chest wound on the left side; a wound to the top of the left shoulder; a wound to the back of the head (including an entry and exit wound); a wound to the right neck; a wound to the back; a grazing wound to the armpit; a wound to the left forearm; some small wounds grouped together on the left side of the back; and finally, a cluster of small wounds located on the left hand. (4 RT 823-831.) Guevara had a cast on his leg; Dr. Chinwak did not observe any tattoos on his body. (4 RT 832.)

Dr. Chinwak also testified about soot and stippling. Soot is a black smoke emitted from the muzzle of a gun when it is fired. Soot will appear

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[20]At the preliminary hearing Detective McPherson testified that "we recovered a .25 auto at the scene, but Mr. Guevara was shot with a nine millimeter." (1 CT 156.) At appellant's trial, neither party put on any evidence regarding the .25 caliber handgun found at the scene, nor was this weapon offered into evidence. Consequently, there was no way to know exactly where this weapon was found, whether it was checked for fingerprints or whether it matched the .25 caliber casings found inside the Au Rendez-Vous café.

on a victim's skin if the gun has been fired within six to eight inches of the body. Beyond that, soot will generally not be seen. Stippling is produced by burned and unburned particles of gunpowder which may cause small abrasions, and appear like tiny red dots. Beyond two feet, stippling generally will not appear on a body. (RT 833-834.) Because Dr. Chinwak found no soot or stippling on the victim, she concluded that he was shot from more than two feet away. (RT 835.)

Dr. Chinwak was unable to say how many of the victim's wounds were caused by a .9 millimeter gun. However, the parties stipulated that of the nine bullet fragments recovered from the victim's body, three were determined to be .9 millimeter fragments. The other six could not be categorized. (RT 851.)

8. Stipulated evidence in prosecution's case

Giovanni Guevara ("Giovanni"), the victim's cousin, died of cancer in 1994, several years before the trial. The parties stipulated that Giovanni would have testified as follows:

> Giovanni was the cousin of the victim Enrique Guevara; that in the early morning hours of July 25, 1993, Giovanni and his cousin went to the Beef Bowl at Figueroa and 30th Street.
>
> On this date, Giovanni was 16 years old; when they arrived at the Beef Bowl, Enrique parked the car in front of the Au Rendez-Vous café next door to the Beef Bowl; Enrique was not wearing a shirt and had a broken leg; he was wearing a cast; Giovanni went inside the Beef Bowl to order food for both of them; *Enrique walked to the car*. As Giovanni walked into the Beef Bowl, *he saw two gangster-looking guys walk into the Beef Bowl*; moments later he heard gunshots.
>
> He did not see who was shooting; after the shooting ceased, he heard his cousin Enrique Echeverria [sic] had been shot to death.

(3 RT 730-731, emphasis added.)

C. The Defense's Guilt Phase Evidence

The defense called just two witnesses, appellant's friend Rascal, and private investigator Richard Lonsford.

1. Enrique ("Rascal") Echeverria

Rascal testified that on July 25, 1993, he shot and killed Enrique Guevara, and that he was convicted and currently serving time for that killing.[21] (5 RT 861.) At the time of the shooting, Rascal had been a member of the Harpys street gang for about six years, since the age of 12. On the night in question, Rascal was driving his mother's burgundy 1978 Chevy Caprice. (5 RT 863.) Appellant was with him when they picked up two girls, Kathy Mendez and her friend Cynthia, at the Jack-in-the-Box. Mendez was under the influence of PCP and Cynthia was "coming down from something." (5 RT 864.) The four of them drove to the Beef Bowl to buy food. Rascal was wearing a black Raider's shirt and appellant was wearing a white T-shirt. (5 RT 905.)

After Rascal parked the car, they all went into the Beef Bowl. At first they were all in line to order food, but then "some of us sat back down." The restaurant was "packed" with customers. (5 RT 866.) While they were inside, Rascal and appellant "talked to the [customers] in the place." (5 RT 866; 899.) After that, Rascal went outside and saw a gray car drive by with two people inside who were "checking us out," and "staring us down." (5 RT 868.) After seeing them, Rascal went to his car, got his gun and stuck it in his waistband. (5 RT 871; 885.) He also asked appellant

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[21]Rascal was tried and convicted of manslaughter in an earlier proceeding. (5 RT 856.)

to come outside with him and they stood on the sidewalk together. (5 RT 933.)

The two people in the gray car looked like "gang-bangers," and after driving by, they pulled into the parking lot and parked. The passenger, a "short guy," got out first and went into the Beef Bowl. (5 RT 869.) As the passenger walked passed them and into the Beef Bowl, appellant said, "Harpys," (5 RT 898) and followed the passenger inside. (5 RT 885; 887.) Moments later the driver also exited the car. (5 RT 886.) The driver (i.e., the victim Guevara) wore jeans and no shirt, and appeared to be under the influence. (5 RT 869.) After the driver got out, he stayed just a few feet to the left of Rascal, looking out towards the street and facing the same way Rascal was looking. (5 RT 870.) Then, the driver "just got a gun and he said something and he started shooting at [Rascal]." (5 RT 870; 908.) Rascal thought he said something like "Trece," which he was believed was a reference to a gang. Guevara was about six feet away from Rascal when he started shooting. (5 RT 871.) The driver took the gun out of his left pocket with his left hand, transferred it to his right hand, and began shooting. (5 RT 890.)

Guevara shot Rascal first in his neck, and then his chest, then on both hands and in his stomach. (5 RT 891, 909.) The defense stipulated, however, that Rascal had initially told the police he had been shot first in his right arm. (5 RT 893.) After several shots, Rascal grabbed Guevara and started wrestling with him, until they were both inside the Au Rendez-Vous restaurant. (5 RT 907.) When Rascal went for his weapon, a .9 millimeter handgun in his waistband, the driver shot Rascal three more times. (5 RT

871-872.) He said Guevara's gun was a ".25 auto."[22] Guevara was aiming for Rascal's head, but Rascal grabbed the man's hand and tried to grab his gun. The man ran out of bullets and that is when Rascal fired all of the bullets in the clip at the man. (5 RT 873.) Rascal continued shooting while the man was down. After being wounded, Rascal fell on top of the man. (5 RT 874.)

When Rascal shot the man, he was "pretty close" to him. In his previous testimony Rascal said the man was "right next to him" when he shot him. When asked if he put the gun right up next to his skin, Rascal said, "Yeah." (5 RT 925.) After Rascal and the man had fallen to the floor, appellant came into the Au Rendez-Vous and helped Rascal to the car. Appellant got in the driver's side and Rascal got in the passenger's side, and the two of them drove away. Rascal testified he shot the man because the man shot him, and Rascal was in fear for his life. (5 RT 875-877.) At some point during the struggle, Rascal had dropped his gun which was "like nickel-plated, kind of chrome." (5 RT 877.)

The entire incident happened quickly, within about three minutes. The next thing Rascal remembered was stopping by someone's house before being taken to the hospital, and then passing out. He regained consciousness after he was in the hospital. (5 RT 878-879.)

On cross-examination, Rascal testified that both he and appellant were members of the Harpys and that it was a violation of the gang code to "rat on a homeboy." (5 RT 880.) He admitted that when the police first talked to him, he denied knowing appellant or the girls, and that it was only

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[22]Although the evidence was not presented to the jury, at the preliminary hearing lead homicide detective Michael McPhearson testified that a .25 mm handgun was left at the scene. (1 CT 156.)

after the police said they knew Rascal had been shot at the Beef Bowl that he admitted the truth. At first he told the police that neither he nor appellant had a gun, and that the man who pulled a gun on him "didn't even look like a gang-banger." (5 RT 883.) However, in a second interview Rascal told the police that appellant had a .9 millimeter gun just like his except that appellant's gun was black. (5 RT 913; 915.) When asked how many shots appellant fired, Rascal said he did not remember because he passed out once he was shot. (5 RT 914.) Although Rascal almost always carried a gun for protection, that night when they went into the Beef Bowl he had initially left his gun in the car. (5 RT 895.)

Rascal testified that appellant said, "Harpys" after the other guy pulled out his gun. (5 RT 897.) However, Rascal later clarified that appellant said "Harpys" at the time the younger man walked into the Beef Bowl, when appellant followed him in. (5 RT 898.)

Although Rascal told the police, "There was a lot of .25 [caliber] gunshots. . . . but I didn't see him," at trial he testified that the only shots fired were from his own gun and the victim's gun. (5 RT 904.) When he told the police about hearing other gunshots, that was not true: "That was just to save my ass." (5 RT 905.) The defense stipulated that in a previous statement to the police Rascal said that after he was hit in the arm, he and the other man were wrestling for the gun, but that Rascal could not do anything because "my hands were already messed up." (5 RT 901.) However, Rascal said he was lying to the police when he said that. The defense also stipulated that at Rascal's previous trial he had agreed with the prosecutor's statements: "You felt you could carry this case all on your own . . . And in carrying this case all by yourself, you figured that you'd assume responsibility for whatever happened. . . .You didn't want Toy to have to

get involved in this?" (5 RT 927.) Rascal admitted that appellant had a .9 millimeter weapon but that Rascal did not know how many shots appellant fired. (5 RT 928.)

Although Rascal said he could not recall whether appellant had a black .9 mm at the Beef Bowl that night, (5 RT 914), the defense stipulated that Rascal had previously told detectives that both he and appellant carried .9 mm guns that night. (5 RT 915-916.) The prosecution read Rascal's previous testimony into the record, in which he eventually admitted that *both he and appellant carried .9 millimeter guns that night.* (5 RT 928.)

After the shooting, appellant picked up the .9 mm gun that Rascal dropped, and never returned it to Rascal. Rascal did not know what happened to the gun after that. (5 RT 919.) Although Rascal believed he had been shot by the victim six times because he "felt" the bullets (5 RT 939), there was no expert testimony or other evidence as to the type or number of bullets that struck Rascal,[23] and only three .25 caliber casings were recovered from the scene. (4 RT 816.)

2. Investigator Richard Lonsford

The second and final witness for the defense was private investigator Richard Lonsford. He testified that on January 25, 1999, just two days before Kathy Mendez testified for the prosecution, Lonsford interviewed her in the deputy district attorney's office. Detective McPherson was also present at the interview. At that time, Mendez said that she did not actually see anyone firing a gun on the night of the shootout, but that she did see

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[23]At the preliminary hearing Detective McPhearson testified that Rascal had "three bullets in his chest area, and they were never removed." (1 CT 156.) Three .25 caliber casings were also recovered from the crime scene. (4 RT 816.)

appellant helping Rascal to the car and saw that appellant had a gun in his hand at that time. Mendez said it was her friend Cindy who told her who was doing the shooting. Mendez confirmed in this interview that she had not yet reviewed the police reports of her interview years earlier, and that her memory was probably better before than it was five or six years later. (5 RT 940-942.) Mendez's friend, Cindy, did not testify.

3. Gunshot residue on victim's hands - stipulation

The parties stipulated that the victim's hands were swabbed for gunshot residue and that residue was found on both hands. The prosecutor read the following stipulation into the record:

> A gunshot residue test was taken from the hands of the victim, Enrique Guevara, and that the test that was used to swab on his hands was analyzed by a specialist in a forensic laboratory for gunshot residue. It was determined that Mr. Guevara had . . . several unique particles of gunshot residue on the right hand adhesive lift sample, and many consistent gunshot particles of residue on the left hand adhesive. Therefore, the analyst determined that the decedent, Mr. Guevara, discharged the firearm or had his hand otherwise in an environment of gunshot residue.

(5 RT 942-943.) Following this stipulation, the defense rested.

Appellant waived his right to a jury trial for establishing the sole special circumstance – a prior murder conviction. Appellant admitted that he was convicted of first degree murder on October 23, 1996, in Los Angeles County. (6 RT 1071.)

D. Penalty Phase Evidence

Deputy District Attorney Keri Modder, had been the trial deputy in the prior murder conviction case, that formed the basis of the special

circumstance in the present case.[24] (6 RT 1074.) Modder testified that appellant was one of three defendants involved in an attempted robbery of a man who lived in the same apartment complex as some of appellant's friends. After the victim left, the plan was made to rob him when he returned. When he came back, shots were fired and the victim was killed. On cross-examination, Ms. Modder confirmed her opinion that appellant was not the shooter, but had been an aider and abettor. (6 RT 1078.)

The prosecution's evidence in aggravation was victim-impact testimony from the victim's mother and sister. His mother, Rosa Guevara, testified that her son was 20 years old and about to turn 21. He used to help her in her job cleaning houses and he was caring and affectionate. She missed him very much. His sister, Ana, said that she and her brother had a very close relationship. Since his death, her life has been bitter and difficult. Ana heard her mother crying every night, but did not know how to console her. Ana also developed epilepsy since her brother's death, and falls to the ground when she hears her brother's name. (6 RT 1091-1095.)

In mitigation, appellant called three witnesses: his mother Maria Elena Salazar, his older sister, Guillermino Juarez, and his friend of many years, Loretta Corral. (6 RT 1097-1120.) Appellant's mother and sister testified about his sweet and loving nature and their efforts to discourage him from spending time with gang members. His mother said she was very

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[24]It was not entirely clear whether Ms. Modder was a witness for the prosecution or the defense. Initially, the defense had said it wanted her penalty phase testimony to establish that appellant had not been the shooter in the prior robbery-murder. (6 RT 1062.) However, Ms. Modder was called by the prosecution to explain the circumstances of the attempted robbery and murder, as she remembered them from the trial. (6 RT 1074-1078.)

sad about what had happened, was not sure that appellant had done this crime and still loved him very much. Both said he did not deserve the death penalty.

Ms. Corral testified that appellant always counseled her to stay away from gangs and helped her turn her life around. Had it not been for appellant's encouragement and counsel, she believed she would probably be dead or pregnant. (6 RT 1116-1117.)

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ARGUMENT

I

THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE THAT APPELLANT COMMITTED FIRST DEGREE MURDER.

A. Introduction

The only theory of first degree murder on which the jury was instructed was premeditation and deliberation. (2 CT 411-413; 5 RT 969-970.) To convict appellant, the prosecution was required to prove all of the elements of first degree murder beyond a reasonable doubt, including the elements of deliberation and premeditation. (*In re Winship* (1970) 397 U.S. 358, 364).

The theory advanced by the prosecution was that the victim, Enrique Guevara, was unarmed and that appellant and Enrique ("Rascal") Echeverria Rascal confronted him outside the Beef Bowl with guns drawn. To explain why Guevara had gunshot residue on both hands, and how Rascal had been shot, the prosecution further theorized that Guevara grabbed Rascal's loaded gun out of his hand, even as it was supposedly trained on Guevara and ready to be fired, and began firing shots at him, whereupon appellant fired at least nine shots at Guevara and killed him. The prosecution relied on the fact that none of the State's witnesses had seen Guevara with a gun in his hand; but none of them had actually witnessed the shootout between Guevara and Rascal, so none was able to refute Rascal's testimony that he, not appellant, shot Guevara after Guevara fired first. Since the State had no witnesses who were actually present to see what happened, the prosecution's case against appellant was entirely speculative. The prosecution relied heavily on appellant's gang membership and gun possession to turn what was a spontaneous eruption of

violence fueled by gang rivalries, into an unsupportable claim of premeditated murder.

The State had the burden of proving, first of all, that appellant, rather than Rascal, fired the fatal shots. Even if that could be established, the State also had to prove, beyond a reasonable doubt, that appellant acted with malice, rather than in response to a sudden, life-threatening attack upon Rascal. Finally, even assuming that each of these elements could be proven, there was still no evidence at all that the killing of Guevara was deliberate or premeditated.

The jury may not have credited all of Rascal's testimony, but it was not free to convict appellant of first degree premeditated murder and sentence him to death, based solely on the prosecutor's speculation, rather than evidence that was "reasonable, credible and of solid value." (*People v. Solomon* (2010) 49 Cal.4th 792, 811.)

B. The Standards for Assessing Sufficiency of Evidence

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt every element of the crime with which the defendant is charged. (*In re Winship* (1970) 397 U.S. 358, 364.) A criminal defendant's state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations are violated when criminal sanctions are imposed based on legally insufficient proof of guilt. (U.S.Const., 5th, 6th, 8th & 14th Amends. & Cal. Const. art. I, §§ 1, 7, 12, 15, 16, & 17; *Beck v. Alabama* (1992) 447 U.S. 625, 637; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.) A conviction will be sustained on appeal only where a review of the entire record discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) Only if a rational trier of

fact could find the essential elements of the crime proved beyond a reasonable doubt are the requirements of due process, a fair trial and reliable guilt and penalty determinations satisfied. (U.S. Const., 5th, 6th, 8th & 14th Amends. & Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *Herrera v. Collins* (1993) 506 U.S. 390, 401-402; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

This Court recently described the reviewing court's task in deciding a sufficiency of the evidence claim:

> [W]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence - that is, *evidence that is reasonable, credible, and of solid value* - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same. [Citations.]

(*People v. Solomon*, *supra*, 49 Cal.4th at p. 811 (emphasis added), quoting *People v. Thomas* (1992) 2 Cal.4th 489, 514.)

In making this assessment an appellate court "looks to the whole record, not just the evidence favorable to the respondent, to determine if the evidence supporting the verdict is substantial in light of other facts." (*Ibid.*, emphasis added.) Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence. (*People v. Marshall* (1999) 15 Cal.4th 1, 35.) Thus, "a finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed." (*People v. Rowland* (1982) 134 Cal.App.3d 1, 8-9.)

In a death penalty case, both the conviction and the sentence are subject to an even higher level of scrutiny because the Eighth Amendment

requires heightened reliability. This requirement for heightened reliability applies equally to the guilt and penalty phases of a capital case. In *Beck v. Alabama* (1980) 447 U.S. 625, the Supreme Court held that the federal due process clause requires jury instructions on lesser included offenses in all capital trials when a reasonable view of the evidence would have supported such conviction. The Court noted that rules governing the guilt determination in a capital crime, like those involving the sentencing determination, must assure reliability:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. [Footnote omitted.] The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

(*Id.* at p. 638, emphasis added.)

The Supreme Court also has required a heightened standard of reliability in the fact-finding processes of a capital case. For example, in *Ford v. Wainwright* (1986) 477 U.S. 399, the Court invalidated a state's post-conviction procedures for determining the sanity of a death row prisoner. The *Ford* decision stated:

> In capital proceedings generally, this Court has demanded that fact finding procedures aspire to a heightened standard of reliability. (See, e.g., *Spaziano v. Florida* (1984) 468 U.S. 447, 456.) This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (opinion of Steward, Powell and Stevens, JJ.).)

(*Id.* at p. 411-412.) In *Ford*, the Court applied a heightened standard of due process to proceedings occurring after the conclusion of the sentencing phase. Both the *Beck* and the *Ford* decisions show that the Eighth Amendment requires a heightened standard of reliability in capital cases.

In the present case, the evidence presented by the State to prove appellant's guilt and to obtain a death sentence must be assessed in light of this need for heightened reliability. As discussed herein, the State failed to meet its burden. The State presented no credible or competent evidence[25] that appellant shot and killed Guevara, or that, if he did, the shooting was not a reasonable response to Guevara's sudden lethal attack.

C. The Evidence Was Insufficient To Prove Beyond A Reasonable Doubt That Appellant Killed Guevara As An Act Of Premeditated Murder.

In order to convict appellant of first degree murder, the State had the burden of proving beyond a reasonable doubt that appellant unlawfully killed Guevara, with express malice aforethought, deliberately, and with premeditation. (Pen. Code § 187, subd. (a); Pen. Code § 189. Appellant's jury was so instructed. (2 CT 411; CALJIC No. 8.10; 2 CT 413; CALJIC No. 8.20.) The State failed to meet its burden of proving each of these elements beyond a reasonable doubt.

1. Insufficient Evidence That Appellant Killed Guevara

The State failed to prove the very first element of murder, that appellant killed Guevara. Although three persons were involved in this

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[25] Evidence Code section 702 provides, in relevant part, that except for expert opinion testimony, "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter."

armed face-off, Rascal, Guevara and appellant, the State's ballistics evidence conclusively established that only *two* weapons were fired that night. (4 RT 816.) One was the .9 millimeter semi-automatic used to kill Guevara; the other was a .25 caliber semi-automatic (4 RT 816), which Guevara used to shoot Rascal.[26] Guevara tested positively for gunshot residue on both hands, (5 RT 942-943) and the State did not dispute that Guevara shot Rascal with this weapon.[27]

Rascal, who testified for the defense, was the only eyewitness to the entire sequence of events that led to Guevara's death. During cross-examination Rascal admitted that both he and appellant had .9 millimeter semi-automatics, but consistently maintained that he alone shot and killed Guevara, after Guevara opened fire on him. (5 RT 860-861.) Given the undisputed evidence that the victim was one of the two shooters – and Rascal's admission that he was the other – the State needed solid evidence, not just speculation and hearsay, that appellant, and not Rascal, shot Guevara.

However, all of the State witnesses,[28] with the exception of passerby,

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[26]At the preliminary hearing Detective McPherson testified that "we recovered a .25 auto at the scene." (1 CT 156.) However, this evidence was never presented at appellant's trial.

[27]Contrary to Rascal's testimony that both he and appellant had .9 millimeter weapons, it was the State's unproven theory that Rascal carried a .25 (5 RT 1004-1006) and that Guevara used Rascal's own weapon to shoot Rascal, another unproven theory, which was refuted by the evidence.

[28] Mendez, Lemus, Juan Salazar and Antelo were all inside of the Beef Bowl when they heard shots. (3 RT 610, 621; 4 RT 744.) Mendez was waiting for her food order and when she heard shots, she threw herself to the ground. (3 RT 667-668; 677-678.)

Patrick Turner, testified that they were inside of the Beef Bowl, the restaurant next door to the Au Rendez-Vous, when all of the shots were fired. It is unclear from Turner's testimony exactly where he was located, but it appears he had left the café, and was walking away from it, when the shooting began. Kathy Mendez admitted she was inside the entire time and was only relating what "my friends had told me." (3 RT 694.) As discussed below, neither Mendez nor Turner presented evidence that was "reasonable, credible and of solid value," sufficient to establish beyond a reasonable doubt that appellant, rather than Rascal, killed Guevara.

a. Mendez's testimony:[29] conjecture and hearsay

Despite the fact that Kathy Mendez never left the inside of the Beef Bowl until the shooting was completely over (3 RT 656), the State presented Mendez as its primary witness that appellant, and not Rascal, killed Guevara. However, an analysis of Mendez's testimony demonstrates that she did not observe Guevara "walking past the Beef Bowl" (3 RT 646), did not see the three men wrestling outside (3 RT 693), and did not see anyone shooting. Moreover, Mendez's testimony is completely undermined by the State's other witnesses, particularly Antelo, the security guard.

On the night of the shooting, Mendez and her friend, Cynthia, went with Rascal and appellant to the Beef Bowl to get food. Rascal was wearing "everything dark" and appellant was wearing a white T-shirt. (3 RT 634-635, 694.) During the car ride, Mendez never saw any guns. (3 RT 632, 634.) Neither did she observe either appellant or Rascal with guns when they got out of the car. (3 RT 644.) As soon as they entered the Beef

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[29]The complete testimony of Kathy Mendez is summarized at pages 8 through 14, *supra*. Rather than repeat that summary, appellant incorporates it by reference and limits this argument to an analysis of her testimony.

Bowl, Mendez and appellant got in line to place a food order. After appellant gave Mendez money for the order he joined Rascal and Cynthia at a table near the door. (3 RT 633.) The restaurant was crowded and most of the tables were taken. (3 RT 667.)

While in line, Mendez heard either Rascal or appellant, she did not recall which one, comment that they had to protect the neighborhood and did not want to get "caught slipping." (3 RT 636.) Mendez understood this to mean that they had to be vigilant to protect themselves from other gang members who might come there and shoot them. (3 RT 637-638.) A few minutes after their arrival, and while Mendez was in line, appellant and Rascal went outside and were standing near the front door. (3 RT 668-669.)

When asked whether, at any time after arriving at the Beef Bowl, she ever saw someone with a gun, Mendez testified that she saw appellant with a dark .9 millimeter gun "when they were leaving." (3 RT 638.) From the time she entered the Beef Bowl, until after the shootout next door was over, Mendez remained in just one location, standing inside of the Beef Bowl, either waiting in line to place an order, or waiting for the food to arrive. (3 RT 633, 635, 667, 669.) However, Mendez received reports from her friend Cynthia. "[Cynthia] kept on going out and in. But she was talking." (3 RT 672.) Although Mendez claimed to have seen what was going on outside from her position inside, when viewed in the context of the rest of the evidence, it is clear Mendez's testimony on this point was not credible.

For example, Mendez claimed that she saw Guevara walking past the Beef Bowl.[30] (3 RT 644-648.) However, there is no evidence that Guevara

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[30]Mendez described Guevara as "another gang member" who wore no shirt and had a cast on his leg. (3 RT 646.)

ever came near the Beef Bowl, or within Mendez's line of vision. Antelo, the security guard, testified that Guevara parked his car in front of the Au Rendez-Vous and was standing in that location, near the Au Rendez-Vous door (4 RT 750-751), just as Antelo turned to go inside the Beef Bowl. The ballistics evidence confirmed that the shots were fired inside and in the immediate vicinity of the Au Rendez-Vous, and not in front of the Beef Bowl. (4 RT 816.) There was no evidence that Guevara ever got any closer to the Beef Bowl than the door of the Au Rendez-Vous café next door. Although Mendez left the Beef Bowl after the shooting and observed Guevara as he lay on the café floor, (3 RT 659), Mendez could not have observed him passing in front of the Beef Bowl.

Antelo observed Guevara from the time he exited his car, until just seconds before Guevara heard shots. (4 RT 741-745.) Guevara did not walk past the Beef Bowl, as Mendez testified. Mendez certainly could have heard the shots, but from her position inside of the Beef Bowl, she would not have been able to observe what took place between Rascal and Guevara in the café next door. It is readily apparent that Mendez conflated what she heard from others with what she saw after the shooting.

Mendez testified that she saw the three men wrestling outside (3 RT 647-648; 693), but that testimony was also unlikely and another example of Mendez's reliance upon information she had received from others, rather than what she had actually observed. At Rascal's trial, Mendez testified that after she heard some shots she also "saw some wrestling." (3 RT 694.) While Rascal testified that he and Guevara were wrestling after Guevara started shooting (5 RT 901), Mendez could not have seen this struggle, as it took place inside of the Au Rendez-Vous café, outside of Mendez's view. In fact, Mendez admitted at Rascal's trial, and the parties so stipulated, that

she lied to the police when she told them she had seen them wrestling. She admitted that she was only saying "what my friends had told me. I wasn't saying what I had seen." (3 RT 694.)

Mendez could not have observed the men wrestling out on the sidewalk. Had the wrestling taken place outside, within her view, then Antelo, standing at his post in between the Beef Bowl and the Au Rendez-Vous (see PX 2), would have also seen wrestling, but he did not. Antelo saw Guevara, who had parked his car in front of the Au Rendez-Vous, get out of his car and begin walking in his direction. (4 RT 741-742.) Antelo saw Guevara standing on the sidewalk directly in front of the café. (PX 2.) Antelo then heard something metallic, saw two people with weapons pass in front of him,[31] and believed he heard two guns being cocked. (4 RT 742-744.) The first person with a gun "stopped on my left side between me and the young man without a shirt." (4 RT 743.) At this point, as soon as Antelo saw guns, he "immediately . . . went inside the Beef Bowl." (4 RT 744. It was as he "was going into the Beef Bowl when [he] heard the first shot." (*Ibid.*) Antelo saw no wrestling at all. In fact, the first man with a gun had "stopped." As Antelo turned to go inside, he heard the first shot.

Antelo's account corroborates Rascal's testimony that the shooting began first, and the wrestling came later, inside the Au Rendez-Vous and outside of Mendez's view. Mendez's testimony that she saw all three men

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[31]Although Antelo believed that both men with guns remained outside, the prosecution stipulated that Guevara's cousin, Giovanni, saw two "gangster-looking guys walk into the Beef Bowl at the same time he did; moments later he heard gunshots." (3 RT 730-731.) Rascal also testified that when the passenger (i.e., Giovanni), went into the Beef Bowl, appellant went inside the Beef Bowl as well. (5 RT 908.) This account creates further doubt about the reliability of the State's witnesses.

wrestling (3 RT 693) simply cannot be credited. By the time there was any scuffling, Guevara had already fired shots,[32] and he and Rascal were already inside of the Au Rendez-Vous. When the shooting started, Mendez threw herself to the ground and covered herself. (3 RT 649, 656.) Even if the scuffle had been outside, rather than inside the café, Mendez had already ducked for cover and would not have been in a position to see what was going on outside.

From Mendez's vantage point inside of the Beef Bowl, she was only competent to testify about seeing appellant and Rascal go outside (3 RT 635), hearing gunshots and throwing herself to the ground (3 RT 649), and observing appellant and Rascal leaving the scene. (3 RT 685.) Her testimony relating to the confrontation between Rascal, Guevara and appellant had been based upon hearsay and conjecture. She admitted she was "not paying attention" to what was going on outside (3 RT 683-684), that she lied to the police about what she had seen, and that she had only related what her friends had told her. (3 RT 694.) Mendez did not provide testimony that was "reasonable, credible or of solid value." It certainly was not sufficient to prove beyond a reasonable doubt that appellant had committed premeditated first degree murder.

When asked whether she saw anyone with a gun, *three times Mendez confirmed that prior to hearing the shots she did not see anyone draw a gun*:

Q: Prior to hearing the shots, could you see anyone draw a gun?

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[32] The only evidence as to who fired first was Rascal's testimony that Guevara pulled the .25 pistol from his pocket and fired upon Rascal. The prosecutor, in his opening statement, also conceded that Guevara began the shooting. (3 RT 599.)

A: No.
Q: Did you see anyone with a gun?
A: No, not at that moment.
Q: So between the time Toy and Rascal walked outside [until] the time you heard shots, you didn't see anyone with a gun?
A: No.
(3 RT 649.)

Mendez then said she could not remember when she first saw someone with a gun. (3 RT 650.) While admitting that she had previously told Detective McPherson that she had seen appellant shooting (3 RT 651), Mendez continued to testify that she did not remember seeing appellant with a gun. (3 RT 652.) Ultimately, she testified that she saw appellant "pointing his gun" in the direction of the Au Rendez-Vous restaurant (3 RT 655) but she did not know where appellant was standing, only that he was outside. (3 RT 655.)

Although Mendez had initially testified that she fell to the ground only after *hearing* the shots, in response to the prosecutor's compound question, "When you *saw* Toy start shooting, when you *heard* the shots, what did you do," Mendez responded, "I threw myself on the ground." (3 RT 656.) She did not get up until the shooting stopped (3 RT 656), which is when she saw that appellant and Rascal were leaving. According to her testimony, that was the first she saw appellant with a gun, which she described as "like a nine," that is, a .9 millimeter handgun. (3 RT 638-639.)

Mendez testified to things that she did not actually observe, but that she inferred from leading questions, from what others had told her, or from other observations. For example, when asked if she saw "at some point in time that evening Rascal being shot at by somebody," Mendez said she had. (3 RT 695.) However, when pushed for the details, it was apparent that Mendez only *knew* Rascal had been shot and wounded, but had not actually

seen the shooting take place: "I didn't see where Rascal got shot. I saw him when he was driving [sic] to the car, but Toy was carrying him. I know he was shot because I saw blood drops on the ground." When pressed, she admitted she "didn't really . . . see anybody shooting at him." (*Ibid.*)

Mendez's testimony that she could tell who was doing the shooting, and that she "saw Toy" was inconsistent with her previous, and repeated, claims that the only time she saw appellant with a gun was when he was leaving the scene. (3 RT 638-639.) Because her testimony was replete with examples where she claimed to have seen events she could not have seen, but had only heard or inferred, her statements about seeing appellant shooting simply cannot be credited. At the conclusion of her testimony Mendez conceded that if there was wrestling going on between Rascal and the victim, it took place "out of my view." She continued to maintain, that she saw appellant "pointing his gun." (3 RT 701.)

Mendez did not personally observe what happened inside the Au Rendez-Vous, where most of the shooting took place, and thus was not competent to testify about the shooting. While Guevara fired at least one shot while he was standing in front of the Au Rendez-Vous, Mendez admitted that she did not see who shot Rascal and thus could not have witnessed any part of the shooting that night. She was impeached by prior inconsistent statements and admitted that she lied both to the police and on the witness stand at Rascal's trial. Her testimony on the critical issues in this case was neither reasonable, credible or of solid value.

b. Turner's testimony: incompetent and unreliable

The prosecution's only other witness on the subject of the shooting was Patrick Turner. Like Mendez, Turner could confirm little more than

that a shooting had taken place inside the Au Rendez-Vous. (4 RT 784 ["We saw a shooting *or something*."], emphasis added.) Turner testified that he had gone to the Au Rendez-Vous to purchase cigarettes.[33] However, by the time of the shooting, he was "out in front of the Beef Bowl Restaurant," and "just walking by." (4 RT 783.) Given that Turner had already purchased the cigarettes and was walking *away from* the location of the shooting, his inability to describe what happened inside was understandable: "*I guess* two guys got into an argument *or something like that*." (*Id.*) When the prosecutor attempted to draw out some of the details, such as who had a weapon, who was wearing the black shirt or the white shirt, whether Turner saw anyone without a shirt, or even whether Turner had actually witnessed a scuffle – Turner never took a consistent position and was a completely unreliable witness. (See, e.g., 4 RT 784, 786-788; 796-800.)

Turner gave inconsistent answers with respect to virtually all of the relevant details. For example, the prosecutor began by asking about the victim's gray car that Turner had apparently described on the night of the crime. When asked who got out of this car, Turner testified that only the passenger got out, and the driver remained in the car. (4 RT 784.) When Turner was told that he had previously said that both men had gotten out, Turner then remembered seeing the driver get out. (4 RT 784.) However, a few minutes later, Turner continued to insist, and stated four times, that the driver had *never* gotten out of the car:

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[33] Turner said he bought cigarettes at "the donut shop," (4 RT 783) and later testified that the men who were arguing "went into the same donut shop." (4 RT 785.) It may reasonably be assumed that "the donut shop" was the Au Rendez-Vous, where the shootout took place. (See 4 RT 785.)

Q Did the driver then later get out of the car?
A No.
Q The driver did not get out of the car?
A No.
Q Did somebody get out of the car besides the passenger?
A No.

(4 RT 796.) When asked whether he had told the police back in 1993 that the victim had gotten out of the driver's side of the car, Turner again said, "No. I told them just like I just said. You know, passenger got out of the car." (4 RT 796.) Even after the report was read to him and he confirmed that he had initialed the report, Turner said he only remembered the passenger getting out. "I don't remember nothing about the driver." (4 RT 798-799.) While Turner's ability to recall whether the driver or the passenger (or both) got out of the car was, in one sense, not critical to the case since the victim obviously *had* gotten out of the car, what was important was the quality of Turner's testimony.

Not only was Turner's present memory extremely poor, it was not refreshed with his prior recorded statements. There was also good reason to question the quality of his prior statement to the police since, as was true with Kathy Mendez, Turner's statements about what took place were based on what others had said.[34] It was only through the use of leading questions, and referencing the police report, that the prosecution was able to prompt Turner to give consistent answers. (See 4 RT 784-785.) However, as soon as Turner was off-script, and asked to explain what he saw without prompting, his account fell apart.

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[34] When asked whether he was interviewed by the police that night, Turner responded: "Yeah. This witness – it was he and a lot of other people. *We saw a shooting or something.*" (4 RT 784, emphasis added.)

For example, Turner testified that the three men "got to arguing and scuffling." (4 RT 785.) When asked if they were wrestling as they went into the donut shop next door, Turner said they were not. (4 RT 786.) They "just started arguing. That's all." (*Id.*) When asked if they ever got into "an actual physical altercation," Turner said, "No. No." (*Id.*) After Turner's prior statement was read to him, however, Turner confirmed that "the victim and the guy with the *white* shirt pushed each other into the coffee shop." (4 RT 787.) With that in mind, he then testified that *both* of the men who confronted the victim, were wearing white T-shirts. Turner withdrew that testimony, however, after hearing that in his prior statement he said that "the second guy" was wearing a black Raider's jersey. (*Id.*)

Since it was well-established that Rascal was wearing the dark clothing and appellant was wearing a white T-shirt (3 RT 634-635; 5 RT 875; 3 RT 609), being able to describe the clothing of those involved in this incident was paramount. However, on this point Turner repeatedly gave conflicting answers. (4 RT 787-790; 799.) He could never keep the color of the clothing straight, and gave inconsistent answers with respect to virtually all of the relevant details.

When asked what happened next, Turner stated: "It was a shooting. You know, me and a few other people were standing there. Just started shooting and - - " (4 RT 788.) While it was obvious there had been a shooting, and the shots would have been heard by anyone in the immediate area, Turner admitted that he did not see a gun: "*All we see is a guy running out of the donut shop after the shooting was over.* They took off. And one guy was laying in the middle of the donut shop floor. *That's all.*" (4 RT 788, emphasis added.) The prosecutor asked again whether Turner saw anyone "draw a gun" or "with a gun in their hand." He repeated: "All we

could see is – *we didn't see the gun*. They just ran out of the donut shop and left." (*Ibid,* emphasis added.)

When asked if he remembered telling the detective that the "suspect in the white shirt pull[ed] out a gun," Turner did not remember that. When asked whether he remembered that someone with a black shirt also pulled out a gun, Turner said, "Guy with the black jacket, he – he started shooting." (*Id.*) Since Turner twice confirmed that he never saw anyone with a gun, his testimony about who was doing the shooting was not credible. But even if the jury could have concluded that Turner could "see" someone shooting without ever actually *seeing a gun*, Turner's inability to testify consistently as to which man was doing the shooting, the man in the white shirt or the man in the "black jacket," rendered Turner's testimony useless in terms of establishing which man actually fired a weapon.

Turner also testified that when the two men left the scene, the one in the *black* shirt looked like he was limping. (4 RT 789.) However, Turner admitted that on the night of the crime he told the detective the opposite, i.e., that the man with the *white* shirt was the one limping to the car. (4 RT 790.)

On cross-examination Turner testified that "several shots were fired," and that, as he had told the police, "the guy with the black shirt then pulled out his gun" and fired several times from the doorway. (*Id.*) However, Turner emphasized that the man who was shooting from the doorway did not have a black shirt, but rather a black "sports jacket." (4 RT 799.) "I said jacket all the time. That's what they put down." (4 RT 800.) When asked if he remembered which man, the one in white or the one in black, was standing in the door shooting, he admitted he could not remember. "To be honest, I can't even remember that. . . . *I just remember*

one of them was standing there." (4 RT 790, emphasis added.) Although Turner made no mention of seeing the man in the white shirt shooting, when asked what the man in the white shirt was doing, he answered, "Started the car. And he *got through shooting* and he took off." (4 RT 800, emphasis added.) Turner's responses demonstrated how poorly he was able to recall even his own in-court statements, minutes after making them, and how easily he was influenced by suggestions from the prosecutor's leading questions.

Turner's inability to recall details applied to information about the victim as well. The victim was found wearing no shirt, and Emilio Antelo confirmed that the victim was bare-chested. (4 RT 758.) However, Turner was certain that he never saw anyone that night without a shirt. (4 RT 800-801.) From all indications Turner only became aware of his surroundings after the shots were fired. He was clear about seeing two men leave the scene, but was confused about their clothing, and inconsistent about whether he saw a gun. Viewing Turner's testimony in its entirety, it is obvious he was being led throughout and continuously contradicted himself.

Turner missed more than he observed and in the end could only confirm that a verbal argument (or a scuffle, he did not know which), and a shooting had occurred. What he was certain about was that he saw two people leaving the café. Turner's inability to consistently distinguish between Rascal (in black) and appellant (in white), and his inability to describe with any degree of certainly what he saw either of these two people doing, rendered Turner's testimony absolutely useless with respect to the most critical issues in this case. Since Turner repeatedly changed his testimony on critical points, including whether he saw anyone at all with a gun, Turner's testimony was simply too uncertain for the jury to have relied

upon it for any of the significant, contested issues in this case. Under no circumstances could Turner's testimony be characterized as reasonable, credible or of solid value.

Although Turner had twice testified that he saw *no guns at all that night* (4 RT 788), the prosecutor used leading questions to establish the contrary, as well as establish that the victim did not have a gun: "Other than the man with the black shirt having a gun, the man with the white shirt having a gun, you didn't see any other guns there, did you? Turner replied, "No. I didn't." (4 RT 791.) Since Turner said he saw no guns that night, having not seen the victim with a gun either, did not establish that the victim had no gun.

The prosecutor attempted to paint Turner as a credible and reliable witness by arguing to the jury that Turner had simply confused the man in the *white shirt* with the man in the *black shirt*. (5 RT 1003.) However, establishing that Turner's testimony was reliable by showing that Turner had the clothing of the two men confused from the inception, hardly established that Turner was a reliable witness, either in terms of his powers of observation or his ability to accurately recount what he had observed.

The prosecution failed to establish that either Turner or Mendez was present to witness what took place in the moments leading up to Guevara's death. While the State established that Guevara used a .25 caliber semi-automatic to fire upon Rascal, and that Guevara was shot and killed with a .9 millimeter semi-automatic, who fired that weapon was simply not established. Rascal testified that he alone shot and killed Guevara. Rascal was charged and convicted of that killing and was serving time for manslaughter at the time of appellant's trial. Assuming a scuffle or wrestling match took place inside of the Au Rendez-Vous café, after the

first shots were fired, there simply was no evidence that Guevara came to the scene unarmed and grabbed a loaded weapon out of Rascal's hand. Had this scuffle taken place *before* the shooting, Antelo would have observed it.

The State had no witnesses to provide any of the details necessary to establish that appellant, rather than Rascal, shot Guevara. Because the evidence was insufficient to establish this crucial element, appellant's conviction must be reversed. However, even assuming that appellant was the one who shot Guevara that shooting was justified to stop his sudden deadly attack upon Rascal.

2. Insufficient Evidence That Shooting Guevara Was Not Justified

In order to establish premeditated first degree murder, the State had the burden of proving beyond a reasonable doubt that the killing of Guevara was unlawful. If Guevara was armed and shot Rascal first, then the fatal shooting of Guevara, by either Rascal or appellant, was a justifiable homicide. (Penal Code § 197, subd. 2 [homicide is justified when "committed in defense of . . . person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, . . ."].) Because the State's own evidence established that Guevara was armed and used a weapon to shoot Rascal, the prosecution had the burden of proving beyond a reasonable doubt that the shooting was not justified. (*People v. Rios* (2000) 23 Cal.4th 450, 462 .)

Just as the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion or sudden provocation (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704), so too must the prosecution prove the absence of justification. (*People v. Banks* (1976) 67 Cal.App.3d 379, 384.) Here, the trial court instructed appellant's jury as

follows:

> Upon a trial of a charge of murder, a killing is lawful if it was justifiable. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful, that is, not justifiable. If you have a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty.

(5 RT 963; CALJIC No. 5.15; 2 CT 399.) The jury was also instructed with CALJIC No. 5.13 [Justifiable Homicide – Lawful Defense Of Self Or Another][35] and CALJIC No. 5.14 [Homicide In Defense Of Another].[36] Although the jury received the proper charge, there was insufficient evidence, and the prosecution failed to prove, that the shooting of Guevara was not justified. Because not a single prosecution witness was present at the scene of the shootout, the prosecution was unable to meet its burden of proof beyond a reasonable doubt.

The prosecution presented evidence that appellant and Rascal were Harpys gang members, that both were armed on the night of Guevara's death, and that various gangs frequented the Beef Bowl, a restaurant on the

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[35]"Homicide is justifiable and not unlawful when committed by any person in defense of himself or another if he actually and reasonably believed that the individual killed intended to commit a forcible and atrocious crime and that there was imminent danger of that crime being accomplished. A person may act upon appearances whether the danger is real or merely apparent." (2 CT 397; 5 RT 961.)

[36]"The reasonable ground of apprehension does not require actual danger, but it does require (1) that the person about to kill another be confronted by the appearance of a peril such as has been mentioned; (2) that the appearance of peril around in his mind an actual belief and fear of the existence of that peril; (3) that a reasonable person in the same situation, seeing and knowing the same facts, would justifiably have, and be justified in having, the same fear; and (4) that the killing be done under the influence of that fear alone." (2 CT 398; 5 RT 961.)

edge of Harpys territory. (3 RT 632; 679-680.) The prosecution, however, presented no credible or competent evidence about what actually took place in the moments after the security guard, Emilio Antelo, turned his back to head into the Beef Bowl. Since Rascal had stopped, and was merely standing on the sidewalk, and Guevara reacted with lethal force, it was the prosecution's burden to establish that shooting Guevara, under those circumstances, was not justified. (*People v. Randle* (2005) 35 Cal. 4th 987, 994 [one who kills in the actual and reasonable belief in the necessity of defending oneself or another from imminent danger of death or great bodily injury, commits neither murder nor manslaughter; it is justifiable homicide], overruled on other grounds in *People v. Sarun Chun* (2009) 45 Cal. 4th 1172.) The prosecution failed to prove that the shooting of Guevara did no arise out of the actual and reasonable belief that it was necessary to stop Guevara's deadly attack.

None of the prosecution's witnesses were in a position to observe what actually took place when the first shots were fired. The only witness who *was* in a position to see exactly what happened, was the defense witness, Rascal. He testified that Guevara not only came armed, but also that he was the first to fire a weapon.

Appellant was guilty of an unlawful shooting only if the prosecution could establish that what appellant witnessed did not justify him shooting in order to spare the life of his friend Rascal, who clearly was in the process of being shot multiple times. The burden was on the prosecution to show that appellant had no right to come to Rascal's aid by shooting the person who was firing multiple shots at Racal. The prosecution failed to meet its burden of proving that the homicide was unlawful, that is, unjustified. In fact, there simply was no evidence from which the jury could find, beyond a

reasonable doubt, that the shooting did not take place just as Rascal had described. Even assuming that appellant was the person standing in the doorway of the café, firing a .9 mm weapon, then it follows that the scuffle and shootout inside of the café took place as Rascal described.

Rascal was the only witness who testified as to his exact whereabouts when these events unfolded, and his testimony alone, of all who testified, established that he was in a position to see and observe what took place. Rascal testified that Guevara was just a few feet away from him when the shootout began. (5 RT 870.) He estimated that Guevara was just five or six feet away. (5 RT 870.) Rascal admitted wrestling with Guevara, struggling over the gun, and moving back and forth until eventually they ended up inside of the Au Rendez-Vous café. (5 RT 874.) Ultimately, Rascal was shot multiple times by Guevara with a .25 caliber weapon. Rascal required medical attention for his wounds and passed out on the way to the hospital. (5 RT 878.) None of these facts were disputed by the prosecution. The prosecution argued, but did not prove, that Guevara came unarmed and that appellant shot Guevara *before Guevara was able to get off a shot.* However, there was no evidence at all that this was the case. All of the evidence was that Guevara, the victim, shot first, and that if he was killed by appellant, then he was killed as a result of his own aggressive, violent conduct.

The fact that Antelo, the security guard, *did not see* Guevara with a weapon was not determinative of whether Guevara in fact had a gun in his pocket. Antelo testified that he turned his back and went into the Beef Bowl as soon as became aware that two individuals had drawn weapons. As Antelo testified, all of the shooting which took place that night happened after Antelo was inside the Beef Bowl. (4 RT 744.) Nor could Arnold

Lemos or Juan Salazar, the party crew members who were eating inside, provide any evidence about whether or not the victim pulled a gun from his pocket. After their brief conversation with Rascal and appellant, they paid no more attention to what was going on until after they heard shots fired. (3 RT 609; 621.)

Kathy Mendez ultimately admitted that both Rascal and appellant had weapons that night, but could offer no evidence one way or the other as to whether Guevara carried a .25 caliber weapon in his pocket. Mendez's failure to notice anyone else carrying a gun that nightdid not establish that others were not armed at the scene. For example, Mendez admitted seeing the security guard, who testified he was wearing a gun that night. (4 RT 739.) However, when asked about who she saw with guns that night, Mendez testified that other than appellant and Rascal, she saw no one else with guns that night. (3 RT 657.)

The one witness who might have been able to establish whether Guevara came armed with the .25 caliber weapon was Guevara's cousin, Giovanni. However, Giovanni's testimony was silent on this issue. Absent from Giovanni's testimony is any mention of whether or not his cousin was carrying a weapon. (3 RT 730-731.)

The State had a considerable burden to prove that appellant shot Guevara and that he did so as an act of premeditated murder. Assuming that appellant fired the shots which killed Guevara, there was no evidence that appellant's action was not justified, in light of the undisputed attack upon Rascal by Guevara. Without establishing that the shooting was not justified, the State cannot meet its burden of proving murder. However, if this Court should conclude that the State met its burden of proving that the shooting of Guevara was not justified, as discussed below, the State failed

to establish that appellant acted with malice.

3. Evidence Was Insufficient That Appellant Acted With Malice

To establish murder, the prosecution must prove that the perpetrator acted with malice. Generally, the intent to unlawfully kill constitutes malice. (Pen. Code § 188; *In re Christian S.* (1994) 7 Cal.4th 768, 778-780.) However, one who intentionally and unlawfully kills nonetheless lacks malice when he acts in a "sudden quarrel or heat of passion" or kills in "unreasonable self-defense." (*People v. Barton* (1995) 12 Cal.4th 186, 199.) Moreover, a defendant who kills while engaged in mutual combat is entitled to raise self defense if "the counter assault is so sudden and perilous" that the defendant has no opportunity to safely withdraw. (*People v. Quach* (2004) 116 Cal.App.4th 294, 303.) (See Argument IV, *infra.*) If the issue of provocation or imperfect self-defense is "properly presented" in a murder case, due process requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion or sudden provocation. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.)

In appellant's case, it was undisputed that Guevara, the victim, fired one of the two weapons used that night. The evidence was unrefuted that Guevara shot first, and that Rascal was seriously wounded from this sudden, unprovoked attack. Rascal testified that only he and Guevara were engaged in the scuffle or wrestling match, inside of the Au Rendez-Vous. Both Giovanni Guevara (the victim's cousin) and Rascal testified that appellant had gone into the Beef Bowl at the same time Giovanni entered. If appellant exited the Beef Bowl and came upon Rascal and Guevara next door at the café, with Guevara shooting Rascal multiple times, appellant may well have believed that killing Guevara was the only option to save

Rascal's life.

On the other hand, if appellant was out on the sidewalk at the time Rascal and Guevara were engaged in a confrontation, it is possible that appellant became involved at that point and engaged in the mutual combat. If appellant shot Guevara because he witnessed Rascal under attack by Guevara, the State cannot establish that appellant acted with malice. Malice, "that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand" (*People v. Flannel* (1979) 25 Cal.3d 668, 675) or the imminent serious bodily harm of another. (*People v. Randle* 35 Cal. 4th 987, 730-733.) Under the circumstances, the State could not prove, beyond a reasonable doubt, that appellant acted with malice, that is, with an absence of heat of passion or sudden provocation, or the absence of the belief that shooting Guevara was necessary to stop the sudden, lethal attack on either himself or Rascal.

Even if the Court should conclude that appellant acted with malice under these circumstances, the State failed to establish that he acted with deliberation and premeditation sufficient to prove first degree murder beyond a reasonable doubt.

4. Evidence Was Insufficient That Appellant Acted With Deliberation And Premeditation

In order to establish that a murder is deliberate and premeditated, the prosecution must show more than the defendant had an intent to kill. (*People v. Solomon, supra*, 49 Cal.4th at p. 812.) Deliberation means the "careful weighing of considerations in forming a course of action" and premeditation requires that something be "thought over in advance." (*Id.*, quoting *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) However,

premeditation and deliberation can take place in a short period of time and the issue is not the amount of time but whether there has been a period of reflection on the part of the defendant. "Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." (*People v. Harris* (2008) 43 Cal.4th 1269, 1286–1287; *People v. Sanchez* (2001) 26 Cal.4th 834, 849.)

In the present case, the evidence was not sufficient to support a rational inference – as opposed to speculation – that the killing of Guevara was the product of the kind of "careful thought and weighing of considerations" necessary to constitute deliberation. (*People v. Mayfield* (1997) 14 Cal.4th 668 767.)

This Court has cautioned that, in reviewing a first degree murder conviction, a court may not conclude that a reasonable juror properly could have inferred premeditation and deliberation in reliance on "highly ambiguous" evidence. (*People v. Anderson* (1968) 70 Cal.2d 15, 31.) Rather, the court must be able to point to a "reasonable foundation for [such] an inference. . . ." (*Id.* at p. 25, emphasis in original.) "' Mere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof.' [Citation.]" (*Id.* at p. 24; accord, *People v. Velasquez* (1980) 26 Cal.3d 425, 435.) If a juror had to rely on "speculation, supposition, surmise, conjecture, or guess work" to make a finding, the finding would be constitutionally inadequate. (*People v. Morris* (1988) 46 Cal.3d 1, 19; see *People v. Garceau* (1993) 6 Cal.4th 140, 179 [impliedly agreeing that if "the probative value of ... testimony hinge[s] upon unreasonable speculation," its admission "abridg[es the defendant's] right to due process"].)

The question here is whether there was "reasonable, credible, and solid" evidence to support the jury's finding that the killing of Guevara was deliberate and premeditated. It plainly was not.

1. The Mens Rea For First-Degree Intentional Murder Must Be Clearly Distinguished From That Necessary For Second-Degree Intentional Murder

a. Deliberation and premeditation: legislative intent and due process

The first murder statute enacted in California followed the common law model: there was but one category of murder, for which there was but one penalty - death. (Stats. 1850, c. 99, secs. 19-21, p. 231.) In 1856, the common law classification was abandoned in favor of the Pennsylvania model, dividing murder into two degrees. (Stats. 1856, c. 134, sec. 2, p. 219.) The purpose of the division was to reserve the death penalty only for those murders involving the greatest "degree of atrociousness." (Revised Laws of the State of California - Penal Code (Sacramento 1871) sec. 189, Code Commissioners' Note, pp. 47-48 [hereafter, Revised Laws (1871)].) As this Court has emphasized in construing Penal Code section 189, it is important to recognize that the phrase, "deliberate and premeditated killing," was intended from its inception as a description of a state of mind so culpable that it authorized the State to "put ... a person to his death." (*People v. Bender* (1945) 27 Cal.2d 164, 185.)

The legislative history has led this Court to distill several related principles from the construction of section 189.[37] First, the statute

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[37] When the offenses alleged in this case were committed in 1993, section 189 read as follows:

All murder which is perpetrated by means of a destructive

embodies a legislative presumption that a murder is of the second degree. A defendant can only be convicted of deliberate and premeditated murder if the prosecution overcomes the presumption by proof beyond a reasonable doubt of the additional elements. (*People v. Anderson* (1968) 70 Cal.2d 15, 25; accord, *People v. Martinez* (1987) 193 Cal.App.3d 364, 369; *People v. Rowland* (1982) 134 Cal.App.3d 1, 9.)

Second, since section 189 first identifies particularized methods of killing as first-degree murders (e.g., killing by poison and torture) and then provides that a first-degree murder is also committed "by any other kind of willful, deliberate, and premeditated killing," elementary principles of statutory construction compel the conclusion that the Legislature intended that the category of deliberate and premeditated killings be reserved for those "equal [in] cruelty and aggravation" to killings by poison and torture. (*People v. Sanchez* (1864) 24 Cal. 17, 24; *People v. Thomas* (1945) 25 Cal.2d 880, 899-900; *People v. Holt* (1944) 25 Cal.2d 59, 70, 87, 90-91; *People v. Fields* (1950) 99 Cal.App.2d 10, 13; accord, Revised Laws (1871), *supra*, Code Commissioners' Note, at p. 48.)

The third principle derived directly from the statutory language goes

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> device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree. [Definitions of "destructive device" and "explosive" omitted.] To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

to the heart of this case. The legislature has established that the *mens rea* of second-degree murder is express malice and has equated the latter with intent to kill. (Pen. Code §§ 187-188.) Consequently, as this Court has repeatedly held:

> the legislative classification of murder into two degrees would be meaningless if "deliberation" and "premeditation" were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill.

(*People v. Anderson, supra*, 70 Cal.2d at p 26; accord, *People v. Koontz* (2002) 27 Cal.4th 1041, 1080; *People v. Wolff* (1964) 61 Cal.2d 795, 821; *People v. Caldwell* (1955) 43 Cal.2d 856, 869; *People v. Thomas, supra,* 25 Cal.2d at p. 898.) Thus, one who formulates in his mind a specific intent to kill and then acts on it has committed a second-degree murder. Intentional first-degree murder requires something more: "the intent to kill must be the result of deliberate premeditation." (*People v. Sanchez, supra*, 24 Cal. at p. 30.)

Maintaining a clear distinction between the states of mind necessary for conviction of first and second degree intentional murder is not simply a matter of logic or statutory construction. It is a requisite of due process. (See, e.g., *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109 [due process requires clarity in the penal statutes that "policemen, judges, and juries" must enforce]; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 159 [blurring of distinction between *mens rea* necessary for implied-malice murder and involuntary manslaughter violates due process].) Such clarity is necessary so that a jury's verdict-choices – as well as the punishment that hinges on those choices – are based on reason and are not the result of arbitrary and random decisionmaking. (*Godfrey v. Georgia* (1980) 446 U.S.

420, 428 [failure of state to provide jury with "clear and objective standards" creates an unacceptable "risk of wholly arbitrary and capricious action"]; *Maynard v. Cartwright* (1988) 486 U.S. 356, 362 [same].)

The statutory distinction between intentional murder that is not the product of premeditation and deliberation (second-degree) and intentional murder that is (first-degree) is meant to be "clear and objective" as required by *Godfrey*. As this Court has held, "the Legislature meant to give the words 'deliberate' and 'premeditate' ... their common, well-known dictionary meaning." (*People v. Bender, supra*, 27 Cal.2d at p. 183; accord, *People v. Anderson, supra*, 70 Cal.2d at p. 26.) As used in section 189, therefore:

> The word . . . "deliberate" (as an adjective) means "formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as, a deliberate judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; . . . Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; ... slow in action; unhurried; . . . Characterized by reflection; dispassionate; not rash." [Citation.]
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> * * *
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> The verb "deliberate" means "to weigh in the mind; to consider the reasons for and against, to consider maturely; reflect upon; ponder; as, to deliberate a question . . . to weigh the arguments for and against a proposed course of action." It has been judicially declared that "Deliberation means careful consideration and examination of the reasons for and against a choice or measure." [Citation.]

People v. Thomas, supra, 25 Cal.2d at pp. 898-899; *People v. Bender, supra*, 27 Cal.2d at 183. Moroever, "The verb 'premeditate' means 'To think on, and revolve in the mind, beforehand; to contrive and design

previously.'" (*Id.*)

The foregoing definitions are still the controlling ones. (*People v. Velasquez* (1980) 26 Cal.3d 425, 435; *People v. Anderson*, *supra,* 70 Cal.2d at p. 26; *People v. Martinez*, *supra*, 193 Cal.App.3d at p. 369; *People v. Rowland*, *supra*, 134 Cal.App.3d at p. 7; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 767; CALJIC No. 8.20.)

In short, the question presented here is whether there was "reasonable . . . , credible, and solid" evidence from which the jury could conclude not only that the perpetrator formed the intent to kill but did do so "as a result of careful thought and weighing of considerations; ... [and] carried on coolly and steadily ... according to a preconceived design." (*People v. Bender*, *supra,* 27 Cal.2d at p. 183.)

b. <u>Evidence from which premeditation and deliberation may be inferred</u>

Considerable case law has been devoted to identifying the sort of evidence that permits a jury to infer the kind of cold-blooded reflection that transforms a crime from second-degree intentional murder to that "degree of atrociousness" sufficient to subject the perpetrator to the possibility of being found eligible for the death penalty. (Revised Laws (1871), *supra*, Note at pp. 47-48; *People v. Bender, supra*, 27 Cal.2d at p. 185.)

In *People v. Koontz*, this Court reiterated the analysis originally set forth in *People v. Anderson*:

> Anderson identified three factors commonly present in cases of premeditated murder: "(1) [F]acts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing — what may be characterized as 'planning' activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill

> the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)."

(*Koontz, supra*, 27 Cal.4th at p. 1081; *Anderson, supra*, 70 Cal.2 at pp. 26-27.) This Court has cautioned that the "*Anderson* factors, while helpful for purposes of review, are not a *sine qua non* to finding first degree premeditated murder, nor are they exclusive." (*Koontz, supra*, 27 Cal.4th at p. 1081.) Thus, a defendant's post-offense statements may provide direct evidence of his thought processes at the time of the killing. (See *People v. Mayfield supra*, 14 Cal. 4th at p. 768.) There also may be cases in which the manner of killing – as in an execution-style slaying – so unequivocally indicates planning and reflection that it can show premeditation and deliberation on its own. (*People v. Hawkins* (1995) 10 Cal. 4th 920, 956-957.)

Those qualifications aside, however, *Anderson* has stood the test of time. This Court has not identified any categories of evidence other than planning, motive, or manner-of-killing that a jury might rely on to find premeditation and deliberation. With that in mind, appellant will now demonstrate all such evidence that was presented to the jury was insufficient to establish beyond a reasonable doubt that the killing of Guevara was an act of deliberate, premeditated murder.

2. Substantial Evidence Did Not Support A Rational Inference – As Opposed To Speculation – That The Victim Was Killed Following A Process Of Premeditation And Deliberation.

a. No evidence of planning

Despite the prosecutor's attempt to establish that appellant and Rascal came to the Beef Bowl with a preconceived plan to find victims upon which to "prey," the prosecutor's interpretation of the evidence was unreasonable. In his closing argument, the prosecutor asserted that appellant's own statements illustrated that he had already "sought quarrels" before the victim arrived and was looking for trouble at the Beef Bowl. (5 RT 999.) Any sentence less than first degree murder, he argued, would be "completely and wholeheartedly an unreasonable" verdict. (5 RT 996.) The prosecutor pointed, first of all, to the fact that appellant and Rascal had approached Arnold Lemus and Juan Salazar at their table and asked them what neighborhood they were from. Lemus described this as "hit[ting] us up," and said said "it was cool, because I didn't have nothing against nobody like that." (3 RT 608.) Neither Lemus nor Juan Salazar gave the slightest indication that appellant behaved in a threatening manner or did anything that caused them any concern. They remembered little about the interchange, and Juan could only recall that they had "mumbled something." Nothing about the exchange suggested that appellant was being aggressive. Nevertheless, the prosecutor pointed to this simple exchange, appellant's speaking to Lemus and Salazar at their table, as evidence that appellant and Rascal, "went there that night with loaded guns with the intent to mad-dog and hit somebody up, to find themselves prey." (5 RT 1009; see also 5 RT 1017 [they "went there that night with doing this – having this in mind. This is what they decided to do."].)

The prosecutor argued that the testimony of Lemus and Juan Salazar showed "[appellant and Rascal] wanted to find someone to go after." (5 RT 999.) [38] He described this interpretation of the interaction with the two diners as one of the "threads of truth" that makes premeditated murder "what really happened . . . what makes sense . . . what is reasonable." (5 RT 997.)

In addition to the interaction with the two diners, the prosecutor pointed to Kathy Mendez's testimony as further proof that appellant had premeditated the killing of Guevara. Mendez had testified that she overheard either appellant or Rascal – she could not recall which one – say something like we "have to take care of the neighborhood," or take care of business. (3 RT 636.) Mendez also remembered hearing appellant say something about not getting "caught slipping." *(Id.)* Mendez defined "caught slipping" as meaning that if they were unarmed and not paying attention and keeping an eye out they could be shot by rival gang members. To avoid getting "caught slipping," members of a gang would keep an eye out "on each other." (3 RT 638.) Taking care of the neighborhood meant to protect it by being armed. (3 RT 637.) When asked whether the Beef Bowl was part of Harpys territory, Mendez offered the opinion that the Harpys "most likely" wanted to gain control of that territory. Without any evidence that this was in fact appellant's purpose in coming to the Beef Bowl that night, the prosecutor used Mendez's statement to argue that this

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[38]Although the prosecutor told the jury that Lemus had said, "They were mad-dogging us," and argued that this was "a sign of disrespect," (5 RT 998), in fact neither Lemus or Juan Salazar so testified. Lemus testified only that "some guys came over and they hit us up," (3 RT 607) and he responded that "it was cool, because I didn't have nothing against nobody like that." (3 RT 608.)

was in fact his purpose. Without any more evidence than Mendez's unsolicited and unsupported opinion that the Harpys "most likely" wanted to expand their territory, the prosecutor imputed this speculative intent of the gang to the specific intent of appellant. In argument to the jury, the prosecutor claimed that "Kathy Mendez hears them talking about . . . gaining control of this particular area for Harpys." (5 RT 998.) However, there was no evidence that either appellant or Rascal ever made this statement to Mendez or anyone else.

The prosecutor also argued that appellant and Rascal demonstrated their intent by coming to the Beef Bowl armed. However, Mendez testified that Rascal had left his weapon in the car, and the prosecutor admitted this in his closing argument. (5 RT 998 ["They see a car pulling up. They go outside. Toy tells Rascal, 'Go get your gun, which he does. Now, they both have guns."].) Despite acknowledging this evidence, the prosecutor argued to the jury that it did not "make any sense" that either of them would simply leave their weapons in the car. (5 RT 997.) "They don't want to be caught on the fringe of their territory without their guns." (*Ibid.*)

The evidence presented by the State's own witness, Kathy Mendez, was that Rascal had indeed left his weapon in the car. (3 RT 642-643.) If appellant and Rascal came to the Beef Bowl with a pre-arranged plan to "find themselves prey," (5 RT 1009) as the prosecutor claimed, then they would not have gone into the Beef Bowl unarmed. They would have been armed and ready to attack. When Rascal saw the gray car pass by with people "staring" at them (5 RT 686), appellant and Rascal decided they needed to take precautions and be prepared in case they were confronted. In fact, that is what happened after Guevara arrived. This was not unreasonable behavior, particularly for persons who might be readily

identified as gang members. There is no evidence, however, that either appellant or any of his friends came to the Beef Bowl that night looking for trouble, acting aggressively or trying to expand Harpys territory.

b. No evidence of prior relationship showing motive

There was also no evidence that appellant had a prior relationship or conduct with the victim. Every indication was that this incident was simply a random explosion of violence in an area frequented by many different gang members. The prosecution never suggested otherwise.

c. No evidence of a "particular and exacting manner of killing"

The manner in which Guevara was killed does not support a finding of premeditation and deliberation. The sudden eruption of violence, which began when Guevara fired the first shots at Rascal (3 RT 599), ended with a hale of gunfire. The shooting, from all indications, was a response to a sudden lethal attack on Rascal. This type of killing is not akin to acts such as beating or strangulation which suggest that the killing was the product of reflection. (See, e.g., *People v. Bonillas* (1989) 48 Cal.3d 757, 792 ["Ligature strangulation is in its nature a deliberate act."].)

In sum, there simply is no evidence that appellant and his companions drove to the Beef Bowl for any other purpose than to eat. Appellant had given Kathy money to buy food, and she was standing in line waiting to order. (3 RT 633-634.) While there is no solid evidence as to what any of the three participants were thinking just prior to the situation exploding into violence, what is clear is that all of the events happened very quickly, probably within a matter of seconds. All of the evidence suggested that the confrontation was simply a sudden, unplanned, random interaction, which might have ended in words had it not been for the fact that all three

of the participants were armed with loaded weapons. Rascal's wounds, which included a chest wound, were serious enough that he easily could have been killed in the exchange. (5 RT 891.)

If the area were prone to gang activity and violence then it would not have been unreasonable for appellant and Rascal to assess the situation before deciding to sit down and eat. If there were other gang members present who might do them harm, it would have been reasonable to determine that in advance. However, there was no evidence that appellant made any threatening statements to anyone inside the restaurant. Nevertheless, the prosecution built its case around the notion that appellant went to the Beef Bowl on an aggressive mission to gain control of this area for the Harpys gang. There was no evidence, much less substantial evidence, that such was the case.

The jury deliberated on the question of guilt for four days (February 1, 2, 3 and 4) (2 CT 360-366; 448-449), longer than the time it took to try the case. The jury was divided about how to interpret the evidence and asked the court for assistance. It sent a note asking what they should do if they were unanimous for a verdict of murder, but unable to agree on first or second degree murder. (2 CT 365.) Had it not been for the multiple instructional errors in this case,[39] it is reasonable to assume that the jury would not have returned a verdict of first degree murder. There was no evidence that was reasonable, credible and of solid value to support a finding that the killing of Guevara was deliberate and premeditated murder. Appellant's conviction and death sentence must be reversed for insufficiency of evidence.

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[39]See Arguments II, III, IV, V and VI, *infra*.

II

THE UNANIMITY OF DOUBT LANGUAGE IN CALJIC NO. 8.71 AND CALJIC NO. 8.72 UNCONSTITUTIONALLY LOWERED THE STATE'S BURDEN OF PROOF FOR MURDER AND FIRST DEGREE MURDER.

A. Introduction and Factual Background

Appellant was charged with first degree murder on the single theory of premeditation. Despite the weakness of the evidence that appellant was the shooter or that he committed premeditated murder, see Argument I, *supra,* the jury returned a verdict of first degree murder. This verdict was almost certainly the result of instructional errors that lowered the prosecution's burden of proof by confusing the jurors about their duties in the event that they had a doubt about whether the crime was murder or manslaughter, or a doubt as to the degrees of murder. Because the instructions violated the federal Constitution and were not harmless, the judgment must be reversed.

Although appellant was charged with premeditated murder, the case against appellant was extremely weak. Even before the trial began, the trial prosecutor revealed that the case had been delayed because appellant did not "appear to be the shooter." (A-1 RT 42.) The prosecutor also had conceded that the case involved a shooting between two criminal street gangs, "the Harpies and MS." (A-1 RT 81.) Indeed, appellant's friend Rascal, who the State admitted had been shot and seriously wounded by Guevara, had already been tried and convicted of manslaughter for killing Guevara.[40] (3 RT 601-602; A-1 RT 77.) The trial court never treated this

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[40] The parties agreed to inform appellant's jury only that Rascal had been convicted of killing Guevara, but not that he had been convicted of

case as a serious capital murder case: not only did the trial judge deny appellant's request for *Keenan*[41] counsel (CT 987.2 Documents, 2), but also denied his request for written jury questionnaires, because "the People are of the opinion that . . . the case is not an overwhelming case for murder, apparently." (A-1 RT 84.) The prosecutor's uncertainty about appellant's role in this shooting was also reflected in his very brief and toned-down penalty argument, in which he never asked for, or even mentioned, the death penalty. (6 RT 1123-1127.)

At the close of the guilt phase, the trial court gave instructions on justifiable homicide, voluntary manslaughter, and first and second degree murder, reflecting the various possible theories of culpability and defense which the evidence, or lack thereof, suggested. (2 CT 395-425.) The court also gave the 1996 revised versions of CALJIC No. 8.71 and CALJIC 8.72.

CALJIC 8.72, entitled "Doubt Whether Murder or Manslaughter" provides:

> If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but *you unanimously agree that you* have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder.

(2 CT 427, emphasis added.)

CALJIC 8.71, entitled "Doubt Whether First or Second Degree Murder," provides:

> If you are convinced beyond a reasonable doubt and

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manslaughter. (3 RT 603.)

[41] *Keenan v. Superior Court* (1982) 31 Cal.3d 424, gives trial judges the discretion to appoint second counsel in a capital murder case.

> unanimously agree that the crime of murder has been committed by a defendant, but you *unanimously agree that you* have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(5 RT 976; 2 CT 426, emphasis added.) These instructions together told the jurors that the defendant was entitled to receive the benefit of any doubt over whether the crime was manslaughter or murder, or whether it was first or second degree murder *only* if the jury as a whole "unanimously agree[d]" that there was reasonable doubt as to the crime or degree of murder.

The jury struggled to reach a verdict, with the guilt phase deliberations taking longer than the trial itself.[42] On the second day of deliberations, the jury asked for a read-back of the testimony of three witnesses – Kathy Mendez, Patrick Turner, and Rascal Echeverria (5 RT 1055) – and on the third day, the jury sent the following note to the trial judge: "Clarification from the Court: What happens if jury is unanimous for verdict of murder but cannot agree on 1st or 2nd degree?" (2 CT 365.) The trial court's only response, in writing, was as follows:

> Answer: The jury's attention is directed to Instruction 8.71 on page 57 of the instructions.

(2 CT 365; 6 RT 1057.) The next day, the jury returned a verdict of first degree murder. (2 CT 444, 448; 6 RT 1058-1059.)

As discussed below, the trial court committed reversible error when it instructed appellant's jury with the 1996 revised versions of CALJIC No.

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[42]The prosecution and defense of the guilt phase trial took only two and one half days (January 27, 28 and February 1) (3 RT 597-4 RT 851), while guilt deliberations lasted more than three days (February 1-4). (5 RT 1053-6 RT 1057.)

8.71 and 8.72. These instructions contained an erroneous unanimity of doubt requirement that, singly and together: (1) lowered the prosecution's burden of proving all of the elements of murder and first degree murder beyond a reasonable doubt; (2) skewed the verdict first towards murder and then towards first degree murder; and (3) negated the benefit of a juror's doubt, which the law says must go to the defendant. The error was then compounded when, in response to the jury's question, the trial court simply referred the jury back to the same erroneous instruction that effectively made first degree murder the "default" verdict.[43]

B. Requiring Jurors To "Unanimously Agree" As To The Nature Of The Crime Or The Degree Of Murder Before The Defendant Is Entitled To The Benefit Of That Doubt Impermissibly Relieved The State Its Burden Of Proof.

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law.'" (*In re Winship*, *supra*, 397 U.S. at p. 363.) It also is central to the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to

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[43]The trial court's inadequate response to the jury's note is the subject of Argument III, *infra*.

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.)

In California, it has long been the rule that when the evidence supports a finding of guilt of both the offense charged and a lesser included offense, the trial court has a *sua sponte* duty to instruct jurors that "if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty of the lesser offense." (*People v. Lee* (2011) 51 Cal.4th 620, 656, quoting *People v. Dewberry* (1959) 51 Cal.2d 548, 555 [citations omitted].) This requirement reflects the State's burden of proving murder and negating manslaughter beyond a reasonable doubt. It is unconstitutional for a state to impose on an accused the burden of negating an essential element of the crime charged, such as malice. (*Mullaney v. Wilbur* (1975) 421 U.S. 684.) Hence, "under modern constitutional doctrine requiring the prosecution to prove all the elements of the charged offense, the People cannot obtain a murder conviction without submitting evidence which would permit a finding beyond reasonable doubt that the homicide was malicious." (*People v. Rios* (2000) 23 Cal.4th 450, 466, fn. 12.)

This requirement was correctly conveyed by the 1979 version of CALJIC No. 8.72[44], which provided:

> If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant

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[44]In *People v. Aiken* (1971) 19 Cal.App.3d 685, the court held there was a *sua sponte* duty to instruct jurors that "if they had a reasonable doubt whether the offense was manslaughter or murder in the second degree their verdict should be for manslaughter." (*Id.* at p. 703.)

> the benefit of such doubt and find it to be manslaughter rather than murder.

(CALJIC No. 8.72, 5th ed. 1988).

Similarly, when the jury entertains a reasonable doubt as to the degree of the crime, they must find the defendant guilty of the lowest of such degrees. (Penal Code section 1097.)[45] Thus, in *People v. Morse* (1964) 60 Cal.2d 631, the Court approved the following instruction:

> When, upon the trial of a charge of murder, the jury is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether such murder was of the first or second degree, the jury must give to such defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(*Id.*, at p. 657.) The *Morse* instruction, set forth above, became the original version of CALJIC No. 8.71, adopted in 1970.[46]

The 1970 and 1979 versions of both CALJIC Nos. 8.71 and 8.72, quoted above, were directed at the singular "you," that is, *the individual*

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[45] Cal. Penal Code section 1097, provides, in relevant part:

> When it appears that the defendant has committed a public offense . . . and there is reasonable ground of doubt in which of two or more degrees of the crime . . . he is guilty, *he can be convicted of the lowest of such degrees only.*
> (Penal Code section 1097, emphasis added.)

[46] The original version of CALJIC No. 8.71 (3d ed., 1970) provided: "If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give to such defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree."

juror.[47] This prior version of 8.72 required that if an individual juror was in doubt about whether the crime was murder or manslaughter, then a finding of manslaughter, the lesser crime, was the juror's only option. In the same way, the 1971 version of 8.71 required an individual juror who was in doubt about whether the crime was first or second degree murder to return a verdict of second degree murder, the lesser crime.

However, in 1996, both instructions underwent a seemingly minor revision, which nonetheless substantially changed their meaning.[48] The revisions require, as a predicate to finding the defendant guilty of the lesser offense, *unanimous agreement that there is a reasonable doubt* as to whether the defendant is guilty of the greater offense. Rather than *requiring* that jurors find the lesser offense of manslaughter when there is a reasonable doubt that the State has met its burden of proving murder, the new language *only* requires jurors to find for the lesser offense if the jury *unanimously agrees,* collectively, that there is a doubt about the whether the crime is murder or manslaughter.[49] In the same way, the 1996 version of CALJIC 8.71 *only* requires jurors to find for the second degree murder, the lesser offense, if the jury *unanimously agrees,* collectively, that there is a

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[47]See, e.g., *People v. Moore* (2011) 51 Cal.4th 386, 409, fn. 7 [unanimity had not previously been required "in order for *a juror* to give the defendant the benefit of such a reasonable doubt." (Emphasis added.)].

[48]Between 1979, when CALJIC 8.71 was revised, and 1996, it remained substantially the same (see CALJIC 4th and 5th editions). In *People v. Frye* (1998) 18 Cal.4th 894, 963-964, and *People v. Dennis* (1998) 17 Cal.4th 468, 536-537, this Court approved the earlier version of the instruction.

[49]This language was *not* the language approved in *People v. Aiken* (1971) 19 Cal.App.3d 685. (See fn.44, *supra.*)

doubt whether the crime is murder of the first or second degree. By placing these substantial limitations on what would otherwise be unconditional mandates to find for manslaughter or for second degree murder when a juror is in doubt, these instructions reverse the State's burden of proof and make the greater offenses the "default" verdicts.

The insertion of the unanimity of doubt requirement in these instructions not only makes them illogical and self-defeating, but actually negates the benefit of the doubt to which the defendant is statutorily and constitutionally entitled. Apart from the obvious problem – how jurors would actually assess whether they "unanimously agreed" they were in doubt – the instructions literally tell jurors who are in doubt, that unless the doubt among jurors is also unanimous, the duty to give the defendant the benefit of the doubt would not apply. As written, the instruction states that jurors must find the defendant guilty of the *greater* offense if even one juror is *without* doubt – that is, if even one juror is convinced that the greater offense has been proven beyond a reasonable doubt.

The instructions are confusing because most jurors would understand that if they, individually, experienced doubt about a particular finding, then logically they should reject that finding. However, the instruction says just the opposite. In other words, if just one juror is convinced the crime is the greater offense, then the other eleven jurors, who do have doubt that it is murder or first degree murder, would have no obligation to vote for the lesser offense.

Without direction on what to do in the case of non-unanimous doubt, "the jury will likely fail to give full effect to the reasonable doubt standard, resolving its doubts in favor of conviction." (*Keeble v. United States* (1973) 412 U.S. 205, 212-213.) Indeed, the lack of clear direction in this

case "reasonably may be taken to have distorted the fact-finding process." (*Villafuerte v. Lewis* (9th Cir. 1996) 75 Cal.3d 1330, 1339 [failure to include lesser offense in charge to the jury]; *Cool v. United States* (1972) 409 U.S. 100, 104 [instruction that reduces burden of prosecution is "plainly inconsistent with the constitutionally rooted presumption of innocence").] Accordingly, it resulted in the kind of juror confusion that implicates constitutional standards. (See *Smith v. Texas* (2007) 550 U.S.297, 316 [recognizing that instructions can create "jury-confusion error"].)

In *People v. Moore* (2011) 51 Cal.4th 386, this Court recently was asked to rule on the constitutionality of the 1996 versions of CALJIC 8.71 and CALJIC 8.72. The Court summarized Moore's argument as follows:

> [A] juror who believed that [defendant] was guilty of some offense but not necessarily first degree murder, would also believe that first degree murder must apply in the face of any disagreement. In other words, first degree murder became the default verdict.[50]

This Court noted that similar challenges to this instruction had been considered and rejected in two decisions out of the Third District Court of Appeal, *People v. Gunder* (2007) 151 Cal.App.4th 412, 425 and *People v. Pescador* (2004) 119 Cal.App.4th 252, 257-258.

Those cases held that, because of other instructions that had been given in each case in conjunction with CALJIC Nos. 8.71 and/or 8.72, the challenged unanimity language would not have confused or misled the

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[50] The same can be said of CALJIC No. 8.72, as given in appellant's case. A juror who had doubt as to whether the homicide was murder or manslaughter, would believe that murder must apply, if the jurors did not *unanimously agree* about their doubt, that is, in the face of any disagreement.

jury.[51] (*Pescador, supra* [giving of 17.40, 17.11 and 8.50]; *Gunder, supra* [giving of 17.40].) Despite this, *Moore* held that:

> the better practice is not to use the 1996 revised versions of CALJIC Nos. 8.71 and 8.72, as *the instructions carry at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter.* The references to unanimity in these instructions were presumably added to convey the principle that the jury *as a whole may* not return a verdict for a lesser included offense until it first reaches an acquittal on the charged greater offense. [Citation omitted.]

(*Moore, supra*, 51 Cal.4th at pp. 411-412, emphasis added.) This Court also correctly noted that when the Judicial Council approved the new CALCRIM instructions dealing with this subject matter, it eliminated "the same potentially confusing unanimity requirement as the 1996 revisions of CALJIC Nos. 8.71 and 8.72." (*Id.*, at p. 412, fn. 8.)

Although it found the 1996 versions of these two instructions confusing, citing *Chapman v. California* (1967) 368 U.S. 18, 24, this Court in *Moore* found that any instructional error there would have been harmless beyond a reasonable doubt because Moore had been charged with both premeditated murder and felony murder. Since the jury found Moore had

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[51]It important to note that in *Gunder* and *Pescador* the court of appeal mistakenly believed that this Court had previously upheld the revised version of CALJIC No. 8.71 (6th ed.), citing *People v. Dennis, supra*, *People v. Frye, supra,* and *People v. Morse, supra,* in support. (*See Pescador, supra*, 119 Cal.App. 4th at p. 257, and *Gunder, supra*, 151 Cal.App.4th at p. 425.) However, in *Dennis*, *Frye* and *Morse*, this Court addressed only the validity of the pre-1996 version of the instruction, before the objectionable "unanimity of doubt" language had been added. (*Dennis* was tried in 1988 [17 Cal.4th at p. 523]; as to *Frye*, see *Moore, supra*, 51 Cal.4th at p. 410; *Morse* was decided in 1964.)

killed the victim in the commission of a robbery and burglary, it would have necessarily found first degree murder on those same felony-murder theories. Thus, the *Moore* Court held, any error in giving CALJIC Nos. 8.71 or 8.72 would have had no bearing on Moore's felony-murder conviction.

> The lesser offenses of second degree murder and manslaughter *were not legally available verdicts* if defendant had killed [the victim] in the commission of burglary and robbery, as the jury unanimously determined he had.

(*Moore, supra*, 51 Cal.4th at p. 412, emphasis added.) It cannot be said however, that the instructional error in appellant's case was harmless.

C. The Other Instructions Given In This Case Could Not And Did Not Cure The Confusion Caused By Revised CALJIC Nos. 8.71 and 8.72.

1. CALJIC No. 17.40 Did Not Cure The Confusion Caused By Revised CALJIC Nos. 8.71 and 8.72.

In *Moore*, this Court declined to decide whether *Gunder, supra*, was correct in its conclusion that CALJIC No. 17.40 "adequately dispelled" any confusion which might have been caused by the unanimity of doubt language of CALJIC No. 8.71.[52] (*Moore, supra*, 51 Cal.4th at p. 412.) Since *Moore* held that any error in giving the challenged instruction would have been harmless under the circumstances, it had no reason to pass on the correctness of *Gunder*. However, the same is not true in appellant's case.

The unanimity of doubt language of CALJIC Nos. 8.71 and 8.72 went directly to the most critical issues in appellant's case. Appellant's

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[52]In *People v. Pescador, supra*, 119 Cal.App. 4th at p. 258; the court of appeal relied on both CALJIC Nos. 17.40 and 17.11 for its holding that these additional instructions would have clarified the meaning and application of CALJIC No. 8.71. However, as was true in *Gunder* and *Moore*, appellant's jury was not given CALJIC No. 17.11.

eligibility for the death penalty was dependent upon whether or not the jury returned a verdict of first or second degree murder. Since premeditated murder was the only basis for the first degree murder charge, the error in giving 8.71 and 8.72 was not harmless. Furthermore, simply instructing the jury with CALJIC No. 17.40 could not possibly have "cured" the confusion caused by the unanimity language of the revised instructions.

CALJIC No. 17.40 [Individual Opinion Required - Duty to Deliberate] is a pattern instruction which tells jurors that they are not bound by the decisions of other jurors, but should each individually decide the case for themselves. It provides:

> The People and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision. [¶] Do not decide any issue in this case by the flip of a coin, or by any other chance determination.

(CALJIC No. 17.40, 6th ed. 1996.) While each juror would have understood that his or her individual decision was his or her own, the juror would have also understood, per CALJIC Nos. 8.71 and 8.72, that without unanimity of doubt, he or she was not required to find the defendant guilty of the lesser crime.

CALJIC 17.40 is a general instruction that applies to all issues upon which the jury deliberated. It was not meant to deal with any specific situation, but simply to inform jurors that they were to consider the evidence, discuss it with the other jurors, and either change or keep their

opinion based upon their own views, informed by the views of other jurors. As this Court has made clear, "Where two instructions are inconsistent, the more specific charge controls the general charge." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878, citing *Cummings v. County of Los Angeles* (1961) 56 Cal.2d 258, 267.) The United States Supreme Court has likewise noted that a general instruction which contradicts an otherwise erroneous specific instruction will not remedy the infirmity. (*Francis v. Franklin* (1985) 471 U.S. 307, 322.)

Unlike CALJIC 17.40, the general instruction, CALJIC Nos. 8.71 and 8.72 pertain to very specific situations – the duty of individual jurors when they believe a crime has been committed but are in doubt as to whther it is murder or manslaughter, or in doubt about whether first or second degree murder applies. In that situation, individual jurors are supposed to give the defendant the benefit of their doubt, by voting for the lesser offense. However, the revised instructions directs them to do just the opposite. Both instructions tell jurors that the benefit of the doubt is only applicable when there is unanimous agreement about the doubt. These two very specific instructions would not have been understood by the jury to be meaningless simply because of the general guidelines set forth in CALJIC No. 17.40. To suggest that the jury would read CALJIC No. 17.40. together with CALJIC 8.71 and 8.72 and then totally discount or ignore the very specific provisions of the latter instructions, strains reason and is contrary to well-settled legal principles.

It is fair to expect that jurors will apply the literal language of an instruction and that

> jurors, conscious of the gravity of their task, attend closely [to] the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and

follow the instructions given them.

(*Francis v. Franklin, supra,* 471 U.S. at p. 324, fn. 9.) Thus, CALJIC No. 17.40 would not have overridden the erroneous language of 8.71 and 8.72. Moreover, an instruction which is generally correct cannot cure an instruction that incorrectly states the law on a specific point. (*People v. Westlake* (1899) 124 Cal. 452, 457; *People v. Kainzrants* (2006) 45 Cal.App.4th 1068, 1075.) "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Francis v. Franklin, supra,* 471 U.S. at p. 322; *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 823.)

2. CALJIC No. 8.50 Could Not and Did Not Cure The Confusion Caused By Revised CALJIC No. 8.72.

While the trial court correctly instructed the jury regarding the State's burden of proving that the killing was murder and not manslaughter (2 CT 424; CALJIC No. 8.50),[53] that instruction could not cure the confusion and misdirection caused by the unanimity of doubt requirement in

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[53]CALJIC No. 8.50 [Murder and Manslaughter Distinguished], provides: "The distinction between murder and manslaughter is that murder requires malice, while manslaughter does not. [¶] When the act causing death, though unlawful, is done in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel or in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury." (2 CT 424.)

revised CALJIC No. 8.72.[54] The jury is not permitted to apply one instruction on point, while ignoring another. "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." (*Cupp v. Naughten, supra*, 414 U.S. 141, 146-47.) Here, the jury was specifically instructed:

> If any rule, direction or idea is repeated or stated in different ways in these instructions, no emphasis is intended and you must not draw any inference because of its repetition. Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and in light of all the others. The order in which the instruction are given has no significant as to their relative importance.(2 CT 372; CALJIC No. 1.01.)

The jury would have viewed CALJIC No. 8.72 and CALJIC No. 8.50 together. CALJIC No. 8.50 sets out the State's burden of proof generally, while CALJIC No. 8.72 states with greater specificity how the burden is applied. Because the jury is instructed not to ignore any instruction, the jury would not ignore the specific unanimity instruction of CALJIC No. 8.72 even though CALJIC No. 8.50 does not contain a unanimity requirement. Where two instructions are inconsistent, the more specific charge controls the general charge. (*LeMons v. Regents of University of California, supra*, 21 Cal.3d at p. 878; *see Francis v. Franklin, supra*, 471 U.S. at p. 322.) Here, CALJIC No. 8.72 is the more specific instruction in that it tells jurors

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[54] In *People v. Pescador*, the court of appeal found that, when "considered in context" with CALJIC Nos. 8.50, 17.11 and 17.40, the revised version of 8.72 did not incorrectly instruct the jury. (*Pescador, supra*, 119 Cal.App. 4th at pp. 257-258.) In this case, appellant's jury was not instructed with CALJIC No. 17.40, rendering *Pescador* inapplicable. Moreover, this Court has not yet addressed whether CALJIC no. 8.50 could ameliorate any of the harm, or clear up any of the confusion caused by the revised version of 8.72.

what they must do when they are in doubt between particular greater and lesser crimes.

Applying the more specific instruction, the individual juror would afford appellant the benefit of the doubt *only* if all twelve jurors unanimously agreed that there was a reasonable doubt as to whether the killing was murder. Because there is a reasonable likelihood that the jury applied the challenged instruction in this way, the instruction appellant's constitutional rights were violated. (*Boyde v. California* (1990) 494 U.S. 370.)

D. Use Of The Revised Versions Of CALJIC Nos. 8.72 And 8.71 In This Case Requires Reversal Of Appellant's Conviction And Death Sentence

1. Lowering The State's Burden Was Structural Error

Instructing the jury with CALJIC No. 8.71 and 8.72 violated due process and lightened the prosecution's burden of proof. The errors affected the fundamental framework of appellant's trial and require reversal. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) In *Sullivan v. Louisiana* (1993) 508 U.S. 275, the trial court erroneously instructed the jury on the definition of reasonable doubt. The high court explained that there are certain errors that defy traditional harmless error review. These are errors that cannot be measured by weighing the strength of the evidence.

> [W]here the instructional error consists of a misdescription of the burden of proof . . . . a reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty."

(*Id.* at p. 281, quoting *Rose v. Clark* (1986) 478 U.S. 570, 578.) Thus, a deprivation of an important right "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural

error.'" (*Id.* at pp. 281-282.)

Here, there is no way to know from the record whether all twelve jurors were firm in their decision in voting for murder or manslaughter, or whether they were all undecided on this question. If even one of those jurors was undecided, however, that undecided juror needed to be told that s/he must give the benefit of the doubt to appellant, and vote for manslaughter. That is the purpose of Penal Code section 1097, and was supposed to be the purpose of CALJIC Nos. 8.71 and 8.72. As the instructions were originally drafted, they properly instructed the jury on the law. However, as they were revised in 1996, the instructions turned the law on its head. The instructional error was especially prejudicial for appellant, where it literally meant the difference between life and death.

While it is impossible to measure the impact these two erroneous instructions had on the guilt phase deliberations in this case, jurors who made an effort to discern their meaning, would have likely applied them literally – a disastrous result for appellant. Thus, for those jurors who were in doubt as to whether the crime was murder or manslaughter, CALJIC No. 8.72 would have directed them to find murder; for jurors who were in doubt as to whether the murder was first or second degree, CALJIC No. 8.71 would have directed them to find first degree murder. The benefit to which appellant was otherwise entitled would have been entirely negated by the unanimity language in each instruction.

Under the challenged instructions, a rational juror could have concluded that s/he had a reasonable doubt about whether appellant had the requisite mental state for murder, or for first degree murder, but that s/he had to abandon that position for lack of unanimous support. As in *Sullivan*, a harmless error analysis would require this Court to speculate about the

verdict, a factor outside the role of appellate review. Accordingly, this Court should find that the error was structural and that reversal is required. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.)

2. Instructing The Jury With The Revised Version Of CALJIC No. 8.72 Was Not Harmless Beyond A Reasonable Doubt.

Even if this Court does not find the error here to be structural, the instructional error in giving revised CALJIC 8.72 was not harmless beyond a reasonable doubt. Unlike the defendant in *People v. Moore*, *supra*, 51 Cal.4th 386, appellant was not charged with felony-murder, but was only charged with first degree murder on the single theory that the killing was deliberate, premeditated and carried out with malice. Thus, unlike in *Moore*, the jury here did not find that appellant committed felony-murder, a crime that requires no showing of malice. The erroneous instruction here had a direct bearing on the only charged offense and the only offense for which appellant was convicted and sentenced to death.

It is the State's burden to prove the instructional error harmless beyond a reasonable doubt under the *Chapman* test.[55] Here, the erroneous "unanimity of doubt" language in CALJIC 8.72 invited the individual jurors to ignore any doubt they had that the prosecutor had proven the elements of murder *unless* all the other jurors were also in doubt. Given the weakness of the evidence of murder, the State cannot meet its burden to show that the erroneous instruction was harmless.

In this case, as previously argued, the evidence was insufficient to prove appellant committed murder beyond a reasonable doubt. (See Argument I, *supra*.) Even before trial, both the prosecutor and the judge

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[55]See *supra*, at p. 79.

acknowledged that this case might well result in a manslaughter verdict. (A-1 RT 84.) During the trial, no evidence was presented to support the prosecution's claim that Guevara came unarmed, that the gun he used was only one that he managed to grab from Rascal, or that Guevara only shot in self-defense. In fact, the State presented no evidence of what happened in the brief moments leading up to the killing of Guevara, because the only witness present at that moment was Rascal, a defense witness. Rascal testified that Guevara shot him first, with a gun that Guevara pulled from his pants pocket. Rascal further testified that he alone shot and killed Guevara, in self-defense. (5 RT 873, 875.) Even without Rascal's testimony, the ballistics evidence established conclusively that if appellant shot his weapon at all, he did so in response to the sudden and unexpected repeated shooting of his friend Rascal by Guevara. (4 RT 816.) This evidence strongly suggested that, if appellant fired his gun at Guevara, it was in the course of mutual combat or due to provocation, circumstances which should have resulted in a verdict of manslaughter. (*See People v. Lee* (1999) 20 Cal. 4th 47, 60, fn. 6, citing *People v. Sanchez* (1864) 24 Cal. 17, 27.)

It is reasonable to assume that if the jurors understood that they were *obligated* to return a verdict of manslaughter if they had any doubt as to whether the crime was murder, the outcome would have been different. However, because they were misled to believe they need not individually vote for manslaughter unless all twelve agreed that the prosecution had not met its burden of proving murder, there is a substantial likelihood that appellant was deprived of his right to the benefit of each juror's doubt. Thus, "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*Boyde v. California, supra*, 494 U.S. 370, 380; *Estelle v. McGuire* (1991), 502 U.S.

62, 72, fn. 4; *People v. Frye, supra,* 18 Cal.4th 894, 957.)

Consequently, there is more than a reasonable possibility that at least one juror would have had a reasonable doubt that appellant committed murder rather than manslaughter, but due to the misleading instruction, would have erroneously believed that he or she could not vote for the lesser crime because other jurors disagreed. For these reasons, the State cannot sustain its burden of proving that instructing the jury with the revised version of CALJIC 8.72 in this case was harmless beyond a reasonable doubt. Reversal of the conviction and death sentence is required on this basis alone.

3. Instructing The Jury With The Revised Version of CALJIC No. 8.71 Was Not Harmless Beyond A Reasonable Doubt.

In *Moore,* this Court correctly recognized that the unanimity language of CALJIC 8.71 and 8.72 was *potentially* confusing, but found no harm to Moore. (*Moore, supra*, 51 Cal.4th at p. 412.) In appellant's case, the harm was more than just potential. The jury was *actually* confused, as demonstrated by the foreperson's note to the judge.[56] The note indicated that, despite the jury instructions, the jury did not know what they were supposed to do if one or more of them had a reasonable doubt as to whether the murder was of the first or second degree. Had the instructions at issue here not actually caused confusion, the jury would have had no need to send the note.

This Court can have no confidence about the jury's application of CALJIC Nos. 8.71, particularly in light of the trial court's failure to give any clarifying instructions to the jury, even after it was apparent that they were confused. By simply referring the jury back to the same incomprehensible

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[56] See Argument III, *supra.*

instruction, the first degree murder conviction was all but assured.[57] The challenged instruction undoubtedly affected how the jury viewed the evidence and led directly to the verdict of first degree murder.

This was an extremely close case, with no evidence of premeditated murder. (See Argument I, *supra*.) The jury deliberations at the guilt phase lasted longer than the presentation of the evidence and arguments. There was no evidence to support the prosecution's argument that Rascal and appellant "wanted to find someone to go after and they did," (5 RT 999) or that prior to the shooting they talked about "gaining control of this particular area for the Harpys." (5 RT 998.) The jury's note demonstrates that some of the jurors did not believe the prosecutor had established premeditation beyond a reasonable doubt.

The State cannot prove this error was harmless beyond a reasonable doubt. Reversal of the first degree murder conviction, the prior murder special circumstance finding, and the sentence of death is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

* * * * *

[57] See Argument III, *infra*.

III

THE TRIAL COURT'S FAILURE TO CORRECTLY RESPOND TO THE JURY'S WRITTEN QUESTION WAS REVERSIBLE CONSTITUTIONAL ERROR.

A. Introduction And Factual Background

As discussed in Argument II, *supra,* the trial court instructed appellant's jury with revised versions of CALJIC Nos. 8.71 and 8.72 which, in combination, directed jurors away from a finding of manslaughter or second degree murder, and towards a finding of first degree murder.

In *People v. Moore, supra*, 51 Cal.4th at p. 411, this Court concluded that, because these instructions are potentially confusing, the "better practice" is to refrain from using the 1996 revisions of these instructions. In *Moore,* however, there was no harm from the use of the revised instructions because Moore had been charged with both premeditated murder and felony murder. The *Moore* Court thus held any confusion caused by giving the 1996 revisions to CALJIC Nos. 8.71 or 8.72 would have had no bearing on Moore's felony-murder conviction. (*Ibid.*)

Here, not only was appellant convicted solely of premeditated murder, but the record plainly shows that the jury was, in fact, confused by the instructions. The jury was having difficulty in deciding between first and second degree murder, the very situation CALJIC No. 8.71 was meant to address. On the third day of deliberations the jury sent the following note to the trial judge:

> Clarification from the Court: What happens if jury is unanimous for verdict of murder but cannot agree on 1st or 2nd degree?

(2 CT 365.) The trial court, after a brief phone consultation with counsel,

sent back the following written response:

> Answer: The jury's attention is directed to Instruction 8.71 on page 57 of the instructions.

(2 CT 365; 6 RT 1057.) The trial court's response provided no further explanation or clarification. The court simply sent the jury back to continue struggling with the meaning of this unquestionably confusing instruction. Despite the fact that the jury's note indicated that the jury could not decide between first and second degree murder, the following day the jury returned a verdict of first degree murder. (2 CT 444, 448; 6 RT 1058-1059.)

B. Repeating The Same Erroneous Instruction Only Exacerbated The Jury's Confusion

"[W]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (*Bollenbach v. United States* (1946) 326 U.S.607, 612-13.) *Bollenbach* places on the trial court a duty to respond to the jury's question with sufficient specificity to clarify the jury's problem. (*McDowell v. Calderon* (9th Cir, 1987) (en banc) 130 F.3d 833, 839, cert. denied, (1998) 530 U.S. 1103; see also *People v. Beardslee* (1991) 53 Cal.3d 68, 97 [trial court has duty to help jury understand legal principles it must apply.].) When constitutional requirements are implicated, the proper execution of the trial court's duty is a matter of insuring due process of law as guaranteed by the Fourteenth Amendment. (See *Estelle v. McGuire, supra,* 502 U.S. at p. 72 [jury instruction violates Due Process Clause if it affects an identifiable constitutional right].) Here, because CALJIC Nos. 8.71 and 8.72 placed considerable limitations on an individual juror's ability to find for the lesser crime, even if the juror had reasonable doubt about the greater crime, the instructions significantly lowered the State's burden to prove every element of a crime by proof

beyond a reasonable doubt, in violation of the Fourteenth Amendment to the United States Constitution.

Moreover, under California Penal Code section 1138,[58] the trial court must attempt "to clear up any instructional confusion expressed by the jury." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) Although this Court has held that the trial court has discretion to determine what further explanations are sufficient when the original instructions are themselves full and complete (*Beardslee, supra*, 53 Cal.3d at p. 97), when the original charge is defective, as it was here, the trial court must do more than simply refer the jury back to the same problematic instruction. This is especially important in a criminal trial, where "the judge's last word is apt to be the decisive word." (*Bollenbach, supra*, 326 U.S. at p. 612.) Moreover, when the instruction is misleading on a vital issue, "the error is not cured by a prior unexceptional and unilluminating abstract charge." (*Id.*)

CALJIC No. 8.71, as originally given, was confusing, erroneous, and lowered the State's burden of proof. After the jury asked for clarification, the trial court had a special obligation to see that the jury was provided with an accurate statement of the law so that appellant was given every benefit to which he was legally entitled. This was particularly true here, where the confusion involved the most vital issue in this case, whether appellant would be convicted of first degree murder, for which he could be sentenced to death, or whether he would be convicted of some lesser non-capital crime. Appellant's jury notified the trial court that it had come to this most

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[58]Penal Code section 1138 provides, in relevant part, that "After the jury have retired for deliberation, if . . .they desire to be informed on any point of law arising in the case. . . the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

critical juncture in its difficult deliberations. Responding to the jury's inquiry with total accuracy and clarity was paramount.

The instruction the trial court told the jury to re-read is impossible to understand, much less apply. It provides:

> DOUBT WHETHER FIRST OR SECOND DEGREE MURDER - If you are convinced beyond a reasonable doubt *and unanimously agree* that the crime of murder has been committed by a defendant, but you *unanimously agree that* you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(CALJIC No. 8.71 [6th ed. 1996], emphasis added; 2 CT 426.) Although 8.71 is meant to direct *individual* jurors when they are in doubt about the degree of the crime (see *People v. Moore, supra*, 51 Cal.4th at p. 409, fn. 7 [unanimity had not previously been required "in order for *a juror* to give the defendant the benefit of such a reasonable doubt" (emphasis added)]), the italicized unanimity language, *supra*, obviously addresses the jury as a whole. But for these italicized sections, added in 1996, the instruction would have been perfectly logical and understandable. With the added unanimity of doubt requirement, the instruction is incomprehensible at best, but, more likely, simply reverses the intended meaning, and gives the advantage – the benefit of the juror's doubt – to the State.

Had the trial court stricken the confusing unanimity language before sending it back for the jury to read again, those jurors who were in doubt – struggling with the decision of whether to find first or second degree murder – would have immediately understood that it was their duty to give appellant the benefit of their doubt and find for second degree murder. Instead, the court directed the jury to *focus* on this one particular, and now

disfavored, instruction. After being told that CALJIC No. 8.71, confusing as it was, provided the sole answer to their dilemma, they undoubtedly followed the trial court's directive and did their best to apply the literal meaning of this instruction. (*Francis v. Franklin* (1985) 471 U.S. 307, 324, Fn. 9 [Court "presumes that jurors, conscious of the gravity of their task, attend closely [to] the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them."].)

Construed literally, 8.71 tells individual jurors that they may not give the defendant the benefit of the doubt in reaching their own individual determinations as to the degree of the offense, but may do so only if the jury *collectively and unanimously agrees* upon the existence of reasonable doubt. If but one juror finds the elements of first degree murder proven beyond a reasonable doubt, then there is no unanimity of doubt, and by the terms of the instruction, the remaining jurors are precluded from giving defendant the benefit of the doubt in reaching their determinations.

The jury's note indicated that at least some of the jurors were in doubt as to whether the prosecutor had met the burden of proving first degree murder beyond a reasonable doubt. However, in order to meet the conditions set forth in the revised version of CALJIC 8.71, the jury had to also "unanimously agree" that they were in doubt about whether it was first or second degree murder. This condition likely caused much confusion for the jury. Without unanimous agreement, the final directive of the instruction did not apply. In the end, even though the jury's note revealed that all jurors had agreed that appellant was guilty of at least second degree murder, after the trial court specifically directed the jury to CALJIC No. 8.71, it predictably returned a verdict of first degree murder the next day. (2

CT 444, 448; 6 RT 1058-1059.)

Had the original instruction been complete and accurate, the trial court's perfunctory response might have been acceptable. However, where the original instruction was itself deficient, the trial court had an obligation to review it carefully, making sure that it was both understandable and accurate. In sending the jury back to deal with this patently confusing instruction, while appellant's life hung in the balance, the trial court failed in its duty to clear away the jury's difficulties "with concrete accuracy." (*Bollenbach, supra,* 326 U.S. at p. 613.)

As one court of appeal has noted:

> Nothing results in more cases of reversible error than mistakes in jury instructions. And if jury instructions are important in general, there is no category of instructional error more prejudicial than when the judge makes a mistake in responding to a jury's inquiry during deliberations,"

(*People v. Thompkins* (1987), 195 Cal.App.3d 244, 252). The trial court's failure to correctly respond to the jury's question was prejudicial here and requires reversal of appellant's conviction and sentence.

C. The Trial Court Had A *Sua Sponte* Duty To Instruct The Jury With CALJIC No. 17.11.

CALJIC No. 8.71 is inherently confusing because it gives jurors a mixed message. On the one hand it says jurors "must give defendant the benefit of [their] doubt," if they have a reasonable doubt about the degree of the crime. On the other hand, it qualifies that directive and effectively takes away any possible benefit to the defendant, by first requiring that the jury "*unanimously agree* that you have a reasonable doubt" between first and second degree murder. Even before the trial court sent back its response to the jury, this instruction would have prejudiced appellant by creating a

default verdict of first degree murder.[59] However, once the jury informed the trial court that they had reached agreement on murder, and that their only difficulty centered on deciding between first and second degree murder, the trial court had a *sua sponte* duty to give the correct instruction – one that would have unequivocally given appellant the benefit of the doubt to which he was legally entitled.

Since a finding of first degree murder made appellant eligible for the death penalty, while a finding of second degree murder eliminated the possibility of a death sentence, the trial court's response to the jury's inquiry was, for appellant, quite literally a matter of life and death. Every juror who sat on appellant's case needed to understand, without confusion, reservation, or limitation, that if they entertained a reasonable doubt that appellant was guilty of first or second degree murder, *then they had to find for second degree murder*. If any juror did not understand that principle, then appellant was deprived of his right to a fair trial, and to a reliable penalty determination, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and its state constitutional counterparts. Reversal of appellant's conviction and death sentence is required.

In response to the jury's note, the trial court had two alternatives. As mentioned earlier, it could have struck the unanimity of doubt language, challenged by appellant, and explained that the confusing language was to be disregarded. While trial judges are "understandably reluctant" to stray far from standard pattern instructions for fear of generating reversible error (see, e.g. *Beardslee, supra*, 53 Cal. 3d at pp. 96-97), the trial court had

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[59]See Argument II, *supra*.

another alternative. It could have simply instructed the jury with CALJIC No. 17.11:

> CONVICTION OF LESSER DEGREE
> If you find the defendant guilty of the crime of [murder], but have a reasonable doubt as to whether it is of the first or second degree, you must find him guilty of that crime in the second degree.

(CALJIC No. 17.11 [6th ed. 1996].) According to the use notes, if proper, this instruction must be given *sua sponte*. (*People v. Dewberry, supra*, 51 Cal. 2d 548, 555-557.) Since the jury's note to the trial court indicated that it had found the defendant guilty of murder, but that it was having difficulty determining the degree, CALJIC No. 17.11 addressed the precise situation described in the note. This was the instruction the jury needed, and the one to which appellant was entitled. The trial court failed to give this instruction in the first instance, but when confronted with the jury's note indicating that it had arrived at the very situation which CALJIC No. 17.11 addresses, the trial court obviously had a duty to finally clarify matters for the jury so that appellant reaped the benefit of this critical instruction.

Appellant was entitled to have his jury properly instructed with either the former version of CALJIC No. 8.71, which excludes the objectionable language, or to have the jury instructed with CALJIC No. 17.11, which conveys the same meaning as 8.71, prior to its revision. The trial court's failure to give the correct instruction *sua sponte* was reversible constitutional error. The case against appellant was extremely weak and there was no evidence of premeditated murder. It cannot be said beyond a reasonable doubt that the failure to correct CALJIC No. 8.71 did not affect the jury's verdict. Appellant's conviction and death sentence must be reversed. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

IV

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT APPELLANT HAD NO DUTY TO WITHDRAW IF GUEVARA RESPONDED WITH SUCH SUDDEN DEADLY FORCE THAT WITHDRAWAL WAS NOT POSSIBLE

At the close of the guilt phase, the trial court instructed the jury with CALJIC No. 5.56 [Self-Defense-Participants in Mutual Combat], which provides:

> The right of self-defense is only available to a person who engages in mutual combat if he has done all the following:
>
> 1. He has actually tried, in good faith, to refuse to continue fighting;
> 2. He has clearly informed his opponent that he wants to stop fighting;
> 3. He has clearly informed his opponent that he has stopped fighting; and
> 4. He has given his opponent the opportunity to stop fighting.
>
> After he has done these four things, he has the right to self-defense if his opponent continues to fight.

(2 CT 408; 5 RT 967.) In closing argument, the prosecutor re-read this instruction to the jury and argued that even if the jury concluded that appellant and Guevara were engaged in mutual combat and "both drew guns at the same time," appellant was not entitled to claim self-defense unless he had first communicated his desire to stop fighting, by completing all four of the steps set out in the instruction. (5 RT 1011-1012.) However, the trial court's instruction was incomplete, did not fully and accurately state the law and, as given, deprived appellant of his right to claim self-defense. This error deprived appellant of his right to present a defense, his right to due process, a fair trial, and to a reliable penalty determination, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the

United States Constitution, and their state constitutional counterparts. Under *Chapman v. California* (1967) 368 U.S. 18, the error was not harmless beyond a reasonable doubt. (*People v. Quach* (2004) 116 Cal.App.4th 294, 303.)

While, in general, the standard CALJIC instruction is a correct statement of the law, when there is evidence that the victim fired a weapon first and the defendant simply responded to the provocation, the defendant is entitled to an instruction that tells the jury "[W]here the counter assault is so sudden and perilous that no opportunity be given to decline further to fight and [the defendant] cannot retreat with safety, he is justified in slaying in self defense." (*People v. Quach* (2004)116 Cal.App.4th 294, 303, quoting *People v. Gleghorn* (1987) 193 Cal.App33d 196, 201.) A similar instruction was given and approved in *People v. Sawyer* (1967) 256 Cal.App. 66, 75, fn.2.[60]

The trial court has a *sua sponte* duty to instruct the jury on a particular defense if it "appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Barton (*1995) 12 Cal.4th 186, 195, citing *People v. Sedeno*

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[60] The instruction given in *Sawyer* provided: 'Where a person seeks or induces a quarrel which leads to the necessity in his own defense of using force against his adversary, the right to stand his ground and thus defend himself is not immediately available to him, but instead he first must decline to carry on the affray, must honestly endeavor to escape from it, and must fairly and clearly inform his adversary of his desire for peace and of his abandonment of the contest *unless the attack is so sudden and perilous that he cannot withdraw*. Only when he has done so will the law justify him in thereafter standing his ground and using force upon his antagonist." (Emphasis added.)

(1074) 10 Cal.3d 703, 716.) Here, because the trial court agreed to give CALJIC No. 5.56, there was no question that appellant sought to argue that he had acted in self-defense. Moreover, as discussed previously, there was substantial evidence to support such a defense. Guevara, the victim, had tested positively for gunshot residue on both hands, there was no question he had seriously wounded Rascal, and the prosecution had all but conceded that Guevara had shot first. (See prosecution's opening statement, 3 RT 599 [Guevara took gun and fired it at Rascal. "As this was occurring, the defendant . . .pointed [his gun] at the two of them. . . and opened fire."].)

The trial court has a duty to instruct on doctrines of law when they are established by authority. (*People v. Michaels* (2002) 28 Cal4th 486, 529; *People v. Flannel* (1979) 25 Cal.3d 668, 680-683.) In this case the doctrine in question had been recognized for more than thirty years at the time appellant's case was tried in 1999. (See discussion in *People v. Quach*, *supra*, 116 Cal.App.4th at p. 301-303.) The trial court thus had a duty to instruct appellant's jury that appellant had no obligation to communicate to Guevara a desire to withdraw from the fight if the attack by Guevara was "so sudden and perilous" that appellant could not withdraw. (*People v. Quach* (2004) 116 Cal.App.4th 294, 302 [citations omitted.].)

In *Quach*, *supra,* members of two rival gangs left a bar around 2:00 a.m., and eventually engaged in a "shootout" in which the victim was injured; Quach was charged with attempted murder. At trial, the eyewitness accounts as to Quach's role in the shooting were conflicting and inconclusive. The detective who had investigated the case testified that he had interviewed the witnesses and had received accounts which varied both amongst themselves and from those testified to at trial. All of the witnesses agreed, however, that the victim had fired a gun; and some said that Quach

had only used a weapon *after* the victim had fired. (*Id.* at p. 228.)

As was true in appellant's case, Quach's jury was told, per CALJIC No. 5.56, that the defendant could only claim that he shot in self-defense if he could establish that he had first notified the victim of his desire to withdraw by following the four specific steps outlined in the instruction. Since there was no evidence at all that Quach attempted to withdraw from the fray, but only that he had reacted suddenly to the victim's show of force, the jury had no factual basis for finding self-defense. Ultimately, the jury convicted Quach of attempted murder.

On appeal, Quach argued that the jury should have been told that, in a case of mutual combat, "when the opponent responds with deadly force so suddenly that the person cannot withdraw, a defendant may immediately use deadly force in self-defense." (*Id.* at p. 301.) The court of appeal agreed. It held that, since there was sufficient evidence for the jury to have found mutual combat, the jury would have likely relied upon CALJIC No. 5.56 in deciding where *Quach* was also entitled to claim self-defense. That instruction, however would have "misinformed [the jury] on the crucial test to be applied to such facts." (*Id.*) Thus, the court concluded:

> we cannot be convinced beyond a reasonable doubt that no jury could have adopted Quach's version of the facts. Several accounts of the fray indicate the initial confrontation was escalated when a TRG [gang] member pulled or fired a gun and that Quach may have responded to that provocation. At least one version had the gun fired *at Quach* before he took out his own pistol. He was entitled to an instruction that would have enabled the jury to render a verdict in accordance with such facts.

(*Id.*, at p. 303, emphasis in original.) Finding that the *Chapman* harmless error test was the appropriate test, the court reversed the defendant's

conviction. (*Id.*)

Applying *Quach,* appellant's conviction must be reversed as well. As in *Quach*, the evidence against appellant was inconsistent and inconclusive at best, with nearly every prosecution witness contradicting themselves and each other. With much of the prosecution's case based upon speculation, the prosecutor admitted in closing argument that the jury could have reasonably concluded that appellant and the victim were involved in mutual combat. Although the prosecutor speculated that the two might have drawn their guns "at the same time" (5 RT 1011), in fact there was only one witness who actually observed the shooting, and that was Rascal. He presented unrefuted testimony that Guevara shot first. The prosecution conceded as much in its opening statement. (3 RT 599.) [Guevara shot Rascal and "as this was occurring,"the defendant opened fire].) As was true in *Quach*, "at least one version" (and here, the *only* version) of the facts had the victim firing his weapon first. As with the defendant in Quach, "[appellant] may have responded to that provocation." (*Quach, supra*, 116 Cal.App.4th at p. 303.) Finally, as was true in *Quach*, the trial court *did* instruct upon the defense, "but its instructions were erroneous." (*People v. Quach*, *supra*, 116 Cal.App.4th at p. 303.)

Moreover, the 1996 version of CALJIC No. 5.56 (6th ed.) which was used in appellant's case, has since been amended to included the language that appellant argues should have been given in his case. (See CALJIC No. 5.56 (Fall 2008 Revision) ["If the other party to the mutual combat responds in a sudden and deadly counterassualt, that is, force that is excessive under the circumstance, the party victimized by the sudden excessive force need not attempt to withdraw and may use reasonable necessary force in self-defense."].) CALCRIM No. 3471 contains similar language, and both sets

of instructions cite *People v. Quach*, *supra*, 116 Cal.App.4th 294, in support. As explained above, however, the relevant language predates *Quach*.

Under the circumstances, appellant was entitled to argue to the jury that, if it did find that appellant had fired a weapon, he did so as a matter of self-defense, in response to the victim's sudden, lethal attack. It cannot be said, beyond a reasonable doubt, that no juror could have accepted appellant's version of the facts. As such, he was entitled to an instruction that would have enabled the jury to render a verdict in accordance with such facts. The trial court's failure to give this instruction, *sua sponte*, deprived appellant of his right to present a crucial defense, his right to a fair trial, to due process and to a reliable guilt and penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.) The error was not harmless and appellant is entitled to reversal of his conviction and death sentence. (*Chapman v. California*, *supra*, 386 U.S. 18.)

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V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY TO VIEW WITH CAUTION EVIDENCE OF PRE-OFFENSE STATEMENTS ATTRIBUTED TO APPELLANT.

A. Factual Background

In order to prove that appellant committed first degree murder, the prosecution had to prove that appellant killed the victim, Guevara, and that he committed the act deliberately and with premeditation. The prosecution's theory of premeditation and deliberation was that appellant and Rascal armed themselves with handguns and went to the Beef Bowl looking to engage in conflict with rival gang members. (5 RT 999.) The prosecution accordingly presented testimony regarding statements appellant allegedly made before the shooting began in an effort to establish a factual basis to support its theory of premeditation and deliberation.

Arnold Lemus and Juan Salazar were customers eating at a table inside the Beef Bowl restaurant when appellant and Rascal arrived. Lemus testified that "some guys" came to their table and asked Lemus "something like" where he was from and whether he was in a gang. (3 RT 607.) Lemus stated that he told the men he was not in a gang, but could not recall what the men said in response. Lemus subsequently recalled one of the men stated that he and his companion were members of the Harpys gang. (3 RT 608.)

Juan Salalzar testified that the individual who approached the table and spoke to Salazar and Lemus "was just mumbling." (3 RT 620.) Salazar stated that he did not see either man and did not hear what was said other than the men asking Lemus where he was from. (3 RT 620.) Neither

Salazar nor Lemus could identify appellant as one of the men who approached them. (3 RT 613, 622.)

Kathy Mendez , who accompanied appellant and Rascal to the Beef Bowl, testified regarding statements made by appellant prior to the shooting. Her initial testimony was that either appellant or Rascal – she could not recall which one – said something like we "have to take care of the neighborhood," or take care of business, but neither one said anything else. (3 RT 636.) Upon further questioning by the prosecutor, Mendez acknowledged having told police officers that she also heard appellant say something about not getting "caught slipping." *(Id.)* Mendez defined "caught slipping" as meaning that if they were unarmed and not paying attention and keeping an eye out they could be shot by rival gang members. To avoid getting "caught slipping," members of a gang would keep an eye out "on each other." (3 RT 638.) Taking care of the neighborhood meant to protect it by being armed. (3 RT 637.)[61]

Mendez testified that she subsequently heard appellant tell Rascal to get the "cuete," which she explained was Spanish slang for gun. (3 RT 642, 643.) On cross-examination, Mendez conceded she was inside the Beef Bowl, and appellant and Rascal were outside of the restaurant when she heard appellant tell Rascal to get the "cuete." (3 RT 670.) Mendez claimed that she heard this statement over the conversations of approximately twenty people inside the restaurant, while she stood inside and appellant and Rascal were outside, and as the door to the restaurant opened and

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[61] Officer Freddi Arroyo of the Los Angeles Police Department's gang unit testified for the prosecution, as a gang expert, that gang members will kill to protect their neighborhood. He also testified that statements about "slipping" and protecting the neighborhood are commonly understood phrases in gang culture. (4 RT 774-77.)

closed. (3 RT 672.) However, Emilio Antelo, the security guard, testified that there were about forty customers inside the Beef Bowl (4 RT 755), and stated that a person just inside the door of the Beef Bowl could not hear a conversation that was taking place outside the restaurant. (4 RT 763.) Antelo further testified that he was outside before the shooting began (4 RT 740), and contradicted Mendez's testimony that appellant told Rascal to get the "cuete." Antelo, who testified through a Spanish interpreter, also stated that the people outside the Beef Bowl were speaking English, not Spanish. (4 RT 762.)

Patrick Turner testified that he witnessed Rascal and appellant leaving the area, and also claimed that prior to the shooting he heard the two men ask the victim, "Don't I know you from somewhere?" (4 RT 785.) Rascal testified as a witness for the defense that Kathy Mendez was still sobering up from taking PCP when their group was en route to the Beef Bowl. (5 RT 864.) He recalled speaking to Arnold Lemus and Juan Salazar, but maintained that he and appellant did not question the men about where they lived or whether they were in a gang. (5 RT 866, 898, 899). Rascal testified that appellant said "Harpys" after the victim arrived at the Beef Bowl. (5 RT 897, 898.)

Despite admission of testimony regarding appellant's alleged pre-offense statements, the trial court did not give CALJIC No. 2.71.7, which states:

> Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant before the offense with which [he] is charged was committed. It is for you to decide whether the statement was made by [the] defendant. *Evidence of an oral statement ought to be viewed with caution.*

(Emphasis added.) The use note following the instruction states that, "[i]f

applicable, this instruction must be given *sua sponte*." (*People v. Beagle* (1972) 6 Cal.3d 441, 455.) As will be demonstrated below, CALJIC 2.71.7 was indeed applicable to this case, and the trial court's failure to give it constitutes reversible error, in violation of appellant rights to due process of law, his right to a fair trial and to a reliable guilt and penalty verdict. (U.S. Const., 5th, 6th, 8th, 14th Amends; Cal. Const., art. I, §§ 1, 7, 15, 16, 17.)

B. The Trial Court Erred In Failing To Give CALJIC 2.71.7

"'It is a familiar rule that verbal admissions should be received with caution and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used.'" (*People v. Ford* (1964) 60 Cal.2d 772, 800, citing 2 Jones, Commentaries on the Law of Evidence, 620.)

Therefore, when the jury has received evidence of a defendant's pre-offense statements of intent, plan, motive, or design, "the court must instruct the jury *sua sponte* to view evidence of a defendant's oral admission or confession with caution." (*People v. Jackson* (2009) 45 Cal.4th 662, 694; *People v. Williams* (2008) 43 Cal.4th 584, 639; *People v. Dickey* (2005) 35 Cal.4th 884, 905; *People v. Quach* (2004) 116 Cal.App.4th 294, 298-299; *See also* CALJIC 2.71.7.) "The courts of this state have not distinguished between actual admissions and damaging pre-offense statements of the accused relating to the crime." (*People v. Lopez* (1975) 47 Cal.App.3d 8, 12, *citing People v. Beagle* (1972) 6 Cal.3d 441, fn. 5; *People v. Ford, supra*, 60 Cal.2d at pp. 799-800.) The cautionary instruction is to be applied broadly to all damaging statements made by the

defendant. (*People v. Carpenter* (1977) 15 Cal.4th 312, 392-393.) The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made. (*People v. Williams,* 43 Cal.4th at p. 639.)

Appellant's alleged statements as described above were introduced as evidence of premeditation and deliberation, as well as of malice aforethought. As such, they constitute "damaging pre-offense statements relating to the crime." Accordingly, the trial court had a *sua sponte* duty to give CALJIC 2.71.7, and its failure to do so was error.

C. Because Of The Importance To The Prosecution's Case Of The Testimony Regarding Appellant's Alleged Pre-Offense Statements, And Because That Testimony Was Conflicting And Inconsistent, The Trial Court's Failure To Guide The Jury's Evaluation Of The Evidence Was Prejudicial And Requires Reversal

In *People v. Pensinger* (1991) 52 Cal.3d 1210, 1268, this Court explained the standard of prejudice for the failure to give a cautionary instruction, as follows:

> Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately.

In the present case, the testimony of the various witnesses regarding the circumstances surrounding the shooting, including what statements, if any, appellant made prior to the shooting, was conflicting. Indeed, as summarized above, there was no consistent testimony regarding who said what to whom in the moments prior to the shooting.

Kathy Mendez testified that she overheard either appellant or Rascal say something about protecting the neighborhood, but she had previously

told a police officer that appellant said something about not getting caught "slipping." (3 RT 636.) Mendez also claimed to have overheard, from inside the Beef Bowl, appellant telling Rascal to go to the car to get the "cuete," but the security guard Emilio Antelo, contradicted her by testifying that only English was spoken between appellant and Rascal. (4 RT 762.) Antelo further testified that their conversation could not have been audible from inside the Beef Bowl, where Kathy was standing. (4 RT 763.) Morever, Rascal testified that he retrieved his gun from the car, on his own initiative, after he saw the guys in the grey car staring at him. (5 RT 871; 885.)

Similarly, Arnold Lemus testified that some men approached the table where he and Juan Salazar were eating and asked them where they were from and whether they belonged to a gang. He also testified that one of the men told Lemus and Salazar that they were members of the Harpy's gang. On the other hand, Salazar's testimony was that he heard a man ask Lemus where he was from, but nothing more.

Appellant's alleged statements were the lynchpin of the prosecution's case for first degree murder. In his closing argument, the prosecutor asserted that any sentence less than first degree murder would be "completely and wholeheartedly an unreasonable" verdict (5 RT 996), because appellant's own statements illustrated that he had already "sought quarrels . . ." before the victim arrived and was looking for trouble at the Beef Bowl. (5 RT 999.) The prosecutor argued that the testimony of Lemus and Salazar showed "[appellant and Rascal] wanted to find someone to go after . . . ." (5 RT 999.) He described this interpretation of the interaction with the two diners as one of the "threads of truth" that makes premeditated murder "what really happened . . . what makes sense . . . what

is reasonable." (5 RT 997.) The prosecutor postulated that appellant's statements thus supported findings of malice and premeditation, both of which were required in order to establish first degree murder.

As in *People v. Ford, supra*, 60 Cal.2d at 779, appellant's alleged oral statements "constituted a substantial part of the evidence introduced to establish the prosecution's theory that the shooting of [the victim] was deliberate and premeditated." (*Id.* at p. 800.) Moreover, as in *Ford*, the witness' testimony concerning the statements was replete with conflicts and inconsistencies. (*Ibid.*)

In holding that the failure of the trial court to give a cautionary instruction was prejudicial error requiring reversal, this Court in *Ford*, stated as follows:

> "Defendant's admissions were vitally important evidence in this case; it was likewise vitally important that the jury be guided as to the manner in which it was to view that evidence." In this state of the record the error of the trial court in failing to discharge its statutorily declared duty to give a cautionary instruction could well have tended to prejudice defendant.

(*Ibid,* quoting *People v. Deloney* (1953) 41 Cal.2d 832, 840.)

The alleged statements made by appellant in the instant case were also vitally important evidence. Furthermore, the decision as to whether appellant committed first or second degree murder was extremely close. During guilt phase deliberations the jury informed the judge that it was having difficulty reaching a verdict on the degree of murder committed. (6 RT 1057.) Under the circumstances, given the state of the record, the importance of the evidence to the guilt determination and the fact that the jury was on the fence with respect to whether first degree murder was proven, the trial court's "failure to discharge its statutorily declared duty to

give a cautionary instruction" was highly prejudicial. (See also *People v. Lopez, supra*, 47 Cal.App.3d at p.14 [where defendant's admissions were vitally important and the evidence of such admissions was conflicting, failure to give a cautionary instruction to guide jury in its evaluation of evidence held prejudicial error. Court could not find different verdict would have been improbable had cautionary instructions been given].)

Given the critical role the evidence played in the prosecution's case for first degree, capital murder, the failure of the trial court to guide the jury in its evaluation of the evidence, and instruct the jury to view the evidence with caution, the error so infected the entire trial that it violated appellant's rights to due process of law and a reliable verdict, under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. *Estelle v. McGuire, supra,* 502 U.S. at p. 72; *Henderson v. Kibbe* (1977) 431 U.S. 145, 154;*Cupp v. Naughten* (1973) 414 U.S. 141, 147.) For all of the reasons discussed above, the state cannot prove beyond a reasonable doubt that violation of appellant's constitutional rights was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

For all of the foregoing reasons, appellant's conviction and death sentence must be reversed.

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VI

CHARGING APPELLANT WITH CAPITAL MURDER WHEN THE SOLE SPECIAL CIRCUMSTANCE WAS A JUVENILE CONVICTION, IN WHICH APPELLANT WAS NOT THE SHOOTER, WAS FEDERAL CONSTITUTIONAL ERROR.

A. Introduction

The sole special circumstance alleged in this case was a prior murder conviction arising out of an attempted robbery-murder that took place in November of 1991, while appellant was still a juvenile.[62] (3 CT 451-467; 6 RT 1083; 1089.) As testified to by the district attorney who tried that case, appellant was not the shooter. (6 RT 1078.) Although the crime took place in 1991, appellant was not arrested until November of 1995, four years later. (1 CT 33.) By that time, appellant was nearly twenty-two years old. Although the appellate record in the capital case establishes that appellant was tried and convicted in superior court for the prior juvenile offense (see "priors packet," 3 CT 451-467), the record provides no details regarding the process by which appellant was transferred from juvenile to adult court.

Under prevailing precedent from the United States Supreme Court (*Graham v. Florida* (2010) __ U.S. __, 130 S.Ct. 2011; *Roper v. Simmons* (2005) 543 U.S. 551), it is constitutionally impermissible to sentence an individual to death for a murder committed while he was under the age of 18. (PC §190.2 (a)(2).) For the same reasons, it is constitutionally impermissible to use a prior murder conviction, which arose out of an act committed while appellant was still a juvenile, as the sole special circumstance which renders him eligible for the death penalty. Further, the

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[62] The prior murder took place on November 6, 1991, when appellant was 17 years old. (3 CT 456; 3 CT 466.)

use of appellant's juvenile conviction to prove the prior murder special circumstance infected his death eligibility determination with unreliability because the juvenile conviction arose from case charging and transfer procedures that denied appellant his rights to substantive due process and equal protection under the law.

Consequently, appellant's special circumstance finding and penalty verdict are unlawful and were obtained in violation of his rights to be free from cruel and unusual punishment, to equal protection, to due process and to reliable and appropriate determinations of death eligibility and penalty, as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article 1, sections 1, 7, 13, 15, 16 and 17 of the California Constitution. (*Graham v. Florida, supra, 130 S.Ct. 2011; Roper v. Simmons, supra*, 543 U.S. 551; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Hayes v. Superior Court* (1971) 6 Cal.3d 216, 223.)

B. Factual Background

The killing in this capital case arose out of a 1993 gang-related shooting. More than two years later, in November of 1995, appellant was arrested and arraigned on a charge of first degree murder for his role in the shooting. Initially, no special circumstances were alleged because, in the prosecutor's words, this gang-related homicide "as it stood on its own facts, was not a special circumstance" case. (A-1 RT 5.) However, on October 23, 1996, prior to the Guevara murder case going to trial, appellant was convicted of an earlier felony-murder that had taken place in 1991 (3 CT 456), while appellant was still a juvenile.

In the earlier case, appellant was one of three defendants who were convicted of shooting a man during an attempted robbery in an apartment building. According to Deputy District Attorney Keri Modder, the prosecutor who tried that case, appellant was not the shooter, but had participated in the robbery and had been convicted of special circumstance felony murder, as an aider and abettor. (6 RT 1076-1077.) In light of that prior murder conviction, the prosecutor in the instant case, commented that "[the present case] is now – technically it becomes a special circumstance case." (A-1 RT 5.) Thus, on June 12, 1997, the prosecution amended the Information to include the single special circumstance – that appellant had been previously convicted of first degree murder within the meaning of section 190.2(a)(2). (CT 171-172.)[63] After being found guilty of first degree murder in the shooting death of Guevara, appellant waived his right to a jury trial on the special circumstances, and admitted his October 23, 1996, prior conviction of first degree murder. (2 CT 449; 6 RT 1068.) Appellant was sentenced to death following a brief penalty phase trial. (6 RT 1144.)

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[63] That the present case should even be charged as a capital case was subject to debate for quite some time. For over a year the charging committee of the district attorney's office contemplated the propriety of seeking the death penalty in a case where, in the words of the prosecutor, "the defendant doesn't appear to be the shooter." (A-1 RT 42.) In fact, the prosecutor was of the opinion that this case did not present "an overwhelming case for murder" (A-1 RT 84), much less capital murder. The trial court agreed, and noted that the case might well result in a voluntary manslaughter verdict. (A-1 RT 79.) Nevertheless, on July 18, 1998, the charging committee left in place the initial decision to seek the death penalty. (1 CT 189; A-1 RT 42; A-1 RT 36.)

C. The Federal Constitution Bars the Use Of A Juvenile Murder Conviction As A Death Penalty Eligibility Factor.

1. *Roper v. Simmons* Bars California From Seeking The Death Penalty Solely On The Basis Of A Crime Appellant Committed While Still A Minor

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the infliction of cruel and unusual punishments. (U.S. Const., 8th Amend.) This amendment guarantees individuals the right not to be subjected to excessive sanctions, a right which "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense." (*Roper v. Simmons*, *supra,* 543 U.S. at p. 560, *quoting Atkins v. Virginia* (2002) 536 U.S. 304, 311.) "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." (*Id.* at p. 568, *citing Thompson v. Oklahoma* (1988) 487 U.S. 815, 856 (conc. opn. of O'Connor, J.).) This means the death penalty must be limited to "those offenders who commit a narrow category of the most serious crimes" and whose "extreme culpability makes them the most deserving of execution." (*Ibid, quoting Atkins*, 536 U.S. at p. 319). "This principle is implemented throughout the capital sentencing process" where "[s]tates must give narrow and precise definition to the aggravating factors that can result in a capital sentence." (*Ibid, citing Godfrey v. Georgia* (1980) 446 U.S. 420, 428-29(plurality opinion); see also *Tuilaepa v. California* (1994) 512 U.S. 967, 971, emphasis added ["To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a *proportionate* punishment."].)

In *Roper v. Simmons, supra*, the United States Supreme Court made clear that, because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," it is "the age at which the line for death eligibility ought to rest." (*Id.* at p. 574; see also *id.* at p. 587 (O'Connor, J., dissenting) ["The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense"]; *id.* at p. 608 (Scalia, J., dissenting)[the *Simmons* majority "determin[ed] that capital punishment of offenders who committed murder before age 18 is 'cruel and unusual' under the Eighth Amendment[.]"].)

The *Simmons* majority set forth three reasons why individuals who commit murder while they are under 18 years of age should not, then or later, be made death eligible based upon that offense. First, the Court found that, in persons under age 18, a "lack of maturity and . . . underdeveloped sense of responsibility. . . . often result in impetuous and ill-considered actions and decisions." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 569 [internal citations omitted].) The Court also recognized that juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." (*Ibid.*) Juveniles "have less control . . . over their own environment [and therefore] . . . lack the freedom that adults have to extricate themselves from a criminogenic setting." (*Ibid* [internal citations omitted].) Additionally, the Court acknowledged that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." (*Id.* at p. 570; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 834, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116 ["But youth is more than a chronological fact. It is a

time and condition of life when a person may be most susceptible to influence and to psychological damage"]; see also *Johnson v. Texas* (1993) 509 U.S. 350, 367 ["[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions"].)

In California, a defendant convicted of first degree murder becomes "eligible" for the death penalty if a jury finds true at least one of the thirty-three enumerated statutory "special circumstances." (Cal. Penal Code § 190.2(a) [West 2001].) A prior first or second degree murder conviction operates as a statutory special circumstance. (*Ibid.*) If *Simmons* stands for the proposition that juveniles, by virtue of their youth, are categorically less culpable than adults and their actions are less "morally reprehensible" (*Roper v. Simmons, supra*, 543 U.S. at p. 561), then it follows that a juvenile murder conviction may also not serve, as it did in appellant's case, as the only factor that made him *eligible* for the death penalty. Death-eligibility factors are designed to narrow the universe of offenders punishable by death to those who with "reliability can be classified among the worst," (*Id.* at p. 569) and "whose extreme culpability makes them the most deserving of execution." (*Id.* at p. 568.) It is analytically incoherent to admit that a juvenile is categorically less culpable than an adult but then rely on a juvenile offense as the very circumstance that demonstrates an adult defendant's "extreme culpability." (*Ibid.*) In *Graham v. Florida*, *supra*, the Supreme Court held that the Eighth Amendment prohibits the imposition of a life without parole sentence upon a juvenile offender who has not committed a homicide. In so holding *Graham* makes clear that the holding of *Roper v. Simmons, supra,* 543 U.S. 551, cannot be limited to its

facts.

In the wake of *Roper v. Simmons*, California can no longer use a juvenile conviction to establish the prior murder special circumstance. When the juvenile murder was committed, the individual was "one whose culpability or blameworthiness [was] diminished, to a substantial degree, by reason of youth and immaturity." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 571.) When a juvenile murder conviction is resurrected during a future adult criminal proceeding, the circumstances causing the juvenile's diminished culpability and blameworthiness when the juvenile crime was committed are still present and frozen in time, even though the individual has chronologically aged. After *Simmons*, the defendant's age at the time of the prior murder conviction – over 18, or under 18 – controls the future death penalty eligibility decision when the sole source of the eligibility is that conviction. Eighteen is now the bright line "age below which a juvenile's crimes can never be constitutionally punished by death[.]" (*Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 848 (O'Connor, J., concurring).)

Appellant, a 17 year old minor at the time of the prior murder, and not the actual shooter, certainly did not fall within the "narrow category" of defendants "whose extreme culpability makes them the most deserving of execution." (*Roper, supra,* 543 U.S. at p. 568.) It was unconstitutional for the State to use this prior conviction to make appellant death-eligible. As stated by the Supreme Court, "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 574.) Accordingly, use of the prior murder special circumstance finding in this case violates appellant's right to be free of cruel and unusual punishment, guaranteed by the Eighth Amendment. That

finding must be set aside, and appellant's death penalty reversed.

2. It Is Unconstitutional For Death Eligibility To Be Based Upon California's Unreliable And Arbitrary Procedures For Transferring Minors From Juvenile To Superior Court

Even if this Court disagrees that *Roper v. Simmons* categorically bars the states from using a juvenile murder conviction to make an adult convicted of first degree murder death eligible under Penal Code section 190.2, subdivision (a)(2), it is still constitutionally impermissible for California to use a juvenile murder conviction to make an individual death eligible. Penal Code section 190.2, subdivision (a)(2) provides that a defendant convicted of first degree murder is eligible for the death penalty if he "was previously convicted of murder in the first or second degree." California's juvenile transfer policies permit the exercise of arbitrary prosecutorial and juvenile court discretion that can turn a juvenile homicide adjudication into an adult murder conviction, with no guarantees of due process or a jury trial to protect the minor's constitutional interests. The level of systemic discretion, combined with the legislature's failure to require the juvenile or superior court to make a meaningful evaluation of the alleged juvenile offender's level of maturity before he can be convicted of murder in superior court, makes subsequent death penalty eligibility determinations under Penal Code section 190.2, subdivision(a)(2), based upon juvenile convictions, unreliable in violation of the Eighth Amendment, and contrary to the Due Process Clause.

To comply with the Eighth Amendment, capital punishment must be reserved only for those offenders most deserving of execution. (*Roper v. Simmons*, *supra*, 543 U.S. at p. 569; *Atkins v. Virginia*, *supra*, 536 U.S. at p. 311.) Death penalty eligibility procedures must rationally define and limit

the class of death-eligible defendants and provide for heightened reliability in death eligibility and sentencing proceedings. (*Roper v. Simmons*, *supra*, 543 U.S. at p. 568 ["Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force"]; *Tuilaepa v. California* (1994) 512 U.S. 967, 973 [death eligibility determination must be principled and make rationally reviewable the process for imposing a sentence of death]; *Lockett v. Ohio* (1978) 438 U.S, 586, 604; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Dillon* (1983) 34 Cal.3d 441, 481-483, discussing and quoting *Enmund v. Florida* (1982) 458 U.S. 782, 798-801.) When viewed in the context of subsequent death penalty eligibility consequences, California's juvenile case transfer procedures permit juvenile courts and prosecutors to make arbitrary and unreliable choices regarding which homicides committed by a person under age 18 can later be used to establish death eligibility.

In California, any person who is under the age of 18 when he allegedly commits a crime falls under the jurisdiction of the juvenile court.[64] (Welf. & Inst. Code, § 602.) However, Welfare and Institutions Code, section 707, subdivision (c), controls fitness determinations for youths 16 years of age and over charged with homicide (one of the offenses enumerated in section 707, subdivision (b)). In 1995, when appellant was charged with the attempted robbery-murder homicide, under subdivision

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[64] But see the 2000 amendments to Welf. & Inst. Code, section 602, described as follows by this Court in *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 550: "Section 602, subdivision (b), which specifies circumstances in which a minor must be prosecuted in a court of criminal jurisdiction, also was amended by Proposition 21. The revised statute decreases the juvenile's minimum age for such mandatory criminal prosecutions from 16 years to 14 years and alters in some respects the list of crimes for which a criminal prosecution is required."

(c), he was *presumed* to be unfit for juvenile court adjudication. To rebut this presumption, the burden was upon appellant to ask the juvenile court to order a probation investigation and report on his "behavioral patterns and social history," and to present the court with "extenuating or mitigating circumstances." [65]

Even after submission of the "extenuating or mitigating" evidence, a minor charged with murder, as was the case with appellant, is presumed to be unfit for juvenile adjudication unless the court finds that the minor would be amenable to treatment programs provided through the facilities of the juvenile court, based upon the court's evaluation of (1) the minor's exhibited "degree of criminal sophistication;" (2) whether rehabilitation of the minor can be accomplished while the juvenile court retains jurisdiction; (3) the minor's previous delinquent history; (4) the success of previous attempts by the juvenile court to rehabilitate the minor; and (5) the circumstances and gravity of the alleged offense. (Welf. & Inst. Code § 707, subd. (c).) Section 707 requires the juvenile court to make positive findings on each and every one of these five enumerated factors in order to find the juvenile fit to remain in juvenile court. (Welf. & Inst. Code, § 707, subds. (b)-(d); *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 680-681 [child carries burden of rebutting presumption of unfitness under each of the criteria by a preponderance of the evidence].)

There is no statutory requirement that a juvenile court base its amenability determination upon the individualized psycho-social development considerations related to the young offender's level of maturity that buttress *Roper v. Simmons*. Nor does the statute require that

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[65]These conditions still exist under the current version of the statute.

the juvenile court, before making a case transfer determination with future capital eligibility repercussions, provide for someone more competent than a probation officer – e.g., a qualified psychiatrist, psychologist, or social worker – to assess the youth in accord with the mental factors so critical to the United States Supreme Court's decision in *Simmons.*

In this case, the record on appeal provides no evidence as to the process by which appellant was deemed suitable for transfer to adult court. All that is known for certain from the appellate record is that appellant was a juvenile at the time of the offense but was tried and convicted as an adult. Assuming that the statutory procedures were followed, appellant was not assessed in accord with the mental factors deemed to be critical by the United States Supreme Court in *Simmons.*

Under California law, homicides which result in juvenile court adjudications under Welfare and Institutions Code section 602 are not criminal convictions (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1033 (dis.opn. of Kennard, J.)), and are not admissible under Penal Code section 190.3, subdivision (c), as prior felony convictions. (*People v. Hayes* (1990) 52 Cal.3d 577, 633; *People v. Burton* (1989) 48 Cal.3d 843, 862.) However, juvenile homicides which are transferred to adult court pursuant to the Welfare and Institutions Code, can result in murder "convictions" which, as in appellant's case, can be treated as a special circumstance that makes a defendant eligibility for the death penalty. Moreover, Welfare and Institutions Code § 707 also permits prosecutors to file homicide charges against some minors directly in superior court *without* a judicial determination of unfitness or maturity by the juvenile court. As explained in *Manduley v. Superior Court* (2002) 27 Cal.4th 537:

[C]ertain minors who were 16 years of age or older at the time

> they committed specified crimes were required to be prosecuted in a court of criminal jurisdiction-without any requirement of a determination by the juvenile court that the minor was unfit for treatment under the juvenile court law. Section 602, former subdivision (b), provided that an individual at least 16 years of age, who previously had been declared a ward of the court for having committed a felony after the age of 14 years, "shall be prosecuted in a court of criminal jurisdiction if he or she is alleged to have committed" any of several enumerated serious offenses, such as first degree murder where the minor personally killed the victim, certain violent sex offenses, and aggravated forms of kidnapping. (Stats. 1999, ch. 996, § 12.2.) When such a prosecution lawfully was initiated in a court of criminal jurisdiction, the individual would be subject to the same sentence as an adult convicted of the identical offense, subject to specified exceptions. (Pen. Code, § 1170.17, subd. (a).)

(*Manduley v. Superior Court, supra,* 27 Cal.4th at p. 549.)

Consequently, California's statutory scheme for handling juvenile homicide cases gives prosecutors – not juries or judges – wide discretion to channel some child offenders, but not others, into future death eligibility without the guaranteed constitutional due process and fair trial protections, or a meaningful evaluation of the juvenile offender's individualized level of maturity. (Cf. *Manduley v. Superior Court*, *supra*, 27 Cal.4th at p. 567 ["a prosecutor's decision pursuant to section 707(d) to file charges in criminal court does not implicate any protected interest of petitioners that gives rise to the requirements of procedural due process"]; *Id.* at p. 591 (dis. opn. of Kennard, J.) ["There is no hearing, . . . no right to counsel [and] no judicial review"].)

Appellant is challenging the constitutional due process and fair trial deprivations inherent in the state's procedures for moving him from juvenile court to superior court, which placed him in the zone of adult death

eligibility. In this regard, the prosecutorial and judicial discretion granted by California's juvenile charging and transfer statutes runs afoul of federal constitutional due process requirements. (See *Kent v. United States* (1966) 383 U.S. 541, 544, 552-553; *In re Gault* (1967) 387 U.S. 1, 20 [even in quasi-civil juvenile delinquency proceedings "[d]ue process of law is the primary and indispensable foundation of individual freedom"]; *Id.* at pp. 30-31 [in *Kent*, the Supreme Court held that a juvenile court's waiver of jurisdiction "must measure up to the essentials of due process and fair treatment"]; see also *Alverado v. Hill* (9th Cir. 2001) 252 F.3d 1066, 1068-1069 [*Gault* and *Kent* hold "that a state court must follow constitutionally adequate procedures in making factual and legal determinations when those determinations result in statutorily specified adverse consequences for a juvenile. . . . when a juvenile court has such authority it must be exercised in a manner consistent with due process"].)

This Court has not addressed the intersection of the Welfare and Institutions Code sections governing the near absolute discretionary powers of juvenile courts and prosecutors to transfer homicide cases to superior court and the death eligibility provision of the Penal Code section 190.2, subdivision (a)(2), special circumstance. Although the prior murder conviction special circumstance may not be disproportionate in the abstract when applied to prior murder convictions sustained by individuals over 18 years of age, *Roper v. Simmons* informs us that death eligibility based upon a juvenile murder conviction is unreliable and arbitrary when the state cannot prove that the juvenile court based its decision to send a juvenile to superior court on a *meaningful individualized assessment* (with adequate procedural and substantive protections for the minor) of the young offender's level of maturity and other psycho-social factors related to his

fitness to be tried as an adult. (See *Roper v. Simmons*, *supra*, 543 U.S. at p. 571; *Jimmy H. v. Superior Court*, *supra*, 3 Cal.3d at pp. 714-715; *In re J.L.P.*, *supra*, 100 Cal.App.3d at p. 89.)

3. California's Use of Juvenile Murder Convictions, But Not Juvenile Murder Adjudications, For Death Eligibility Purposes Cannot Survive Equal Protection Scrutiny

The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Hofsheier* (2006) 37 Cal. 4th 1185, 1199; *In re Eric J.* (1979) 25 Cal.3d 522, 530; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) California has followed the two-tier approach employed by the United States Supreme Court in reviewing legislative classifications under the equal protection clause. (*Graham v. Kirkwood Meadows Pub. Util. Dist.* (1994) 21 Cal. App. 4th 1631, 1642.) Under that approach, in cases involving suspect classifications or fundamental interests, the classification is subject to strict scrutiny. In all other cases, the state must show only that there is a rational basis for the distinction. (*Ibid.*) A fundamental interest for strict scrutiny purposes means a fundamental constitutional right. (*Ibid*, citing 8 Witkin, Summary of Cal.Law (9th ed. 1988) Constitutional Law, 602, pp. 55-56.)

In *Manduley v. Superior Court*, *supra*, 27 Cal.4th at p. 537, a non-capital case, this Court found no due process or equal protection violations arising from the 2000 amendments to Welfare and Institutions Code section 707 (via Proposition 21, the Gang Violence and Juvenile Prevention Act of 1998) expanding the circumstances under which prosecutors may exercise their discretion to try a minor in superior court without a prior fitness adjudication in juvenile court. However, Manduley only challenged "the

aspect of section 707(d) that confers upon prosecutors the discretion to file certain charges against specified minors directly in criminal court, without any judicial determination that the minor is unfit for a juvenile court disposition." (*Id.* at pp. 545-546, 550-551.)

Appellant's contention presents a somewhat different, and more complex, issue than that presented in *Manduley*. Using a criminal court conviction of a juvenile to prove the Penal Code section 190.2, subdivision (a)(2), special circumstance violates the equal protection guarantees of the Fourteenth Amendment to the United States Constitution because by doing so it enables the state's death penalty scheme to rely on unsupportable and unreliable distinctions between certain classes of adult defendants who have previously been found to have committed murder before they reached 18 years of age. The distinctions regarding the future death penalty eligibility of similarly situated individuals are based solely upon the juvenile court's and/or prosecutor's choice of forum, which is not based upon an individualized determination of the juvenile offender's level of maturity.

In California, some juveniles who are charged with homicide in the juvenile court are deemed unfit for juvenile adjudication and sent to superior court for reasons having nothing to do with their level of maturity. If convicted in superior court, they are subject to future death penalty eligibility under Penal Code section 190.2, subdivision (a)(2). Other adults who, as juveniles, allegedly committed homicides of the nature and circumstances committed by the first group of individuals, are not death eligible simply because their prior murder charges were adjudicated in juvenile court. The former become eligible for a future death sentence, but the latter do not. Similarly, under Welfare and Institutions Code section 707, simply by operation of statute and without individualized consideration

of the level of maturity of the juvenile offender, a prosecutor can make a choice to send some juveniles charged with homicide to juvenile court for adjudication, and others to superior court for trial and future death eligibility based simply upon the age of the offender and whether the minor is charged with a crime enumerated in Welfare and Institutions Code section 707, subdivision (b).

"The basic rule of equal protection is that those persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." (*People v. Karsai* (1982) 131 Cal.App.3d 224, 243-244.) When some youth who commit homicides are subject to a murder conviction and future death penalty eligibility, while others are retained in juvenile court for an adjudication without future death penalty ramifications, the state must guarantee that this selection process is based upon reliable criteria with a rational relationship to legitimate law enforcement interests, and not an arbitrary discriminatory purpose of the prosecuting authority. (*Mandulay v. Superior Court*, *supra*, 27 Cal.4th at pp. 568-569, citing *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 836.)

The current death penalty eligibility scheme, as it applies to the prior murder special circumstance, fails to consider the constitutional equal protection ramifications of allowing some, but not all, individuals who commit murder as juveniles to be death eligible under Penal Code section 190.2, subdivision (a)(2), without judicial review – at any level – to ensure that the juvenile charging and case transfer decisions were guided by constitutionally permissible, non-arbitrary, non-discriminatory considerations. Penal Code section 190.2, subdivision (a) (2), although neutral on its face, when applied to juvenile murder convictions, affects two similarly situated groups of offenders in an unequal manner.

The disparate treatment of similarly situated offenders based solely on which court had jurisdiction over their juvenile murder case violates equal protection. The key inquiry here is not whether juveniles charged with homicide and tried in a superior court are similarly situated, for the purposes of juvenile prosecutions, with juveniles charged with homicides that are adjudicated in juvenile court, but rather whether unconstitutional distinctions have been made with respect to the subsequent death penalty eligibility of the two similarly situated classes of juvenile offenders. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253; *In re Gary W.* (1971) 5 Cal.3d 296, 303 [a state may not arbitrarily "impose disabilities upon one class unless some rational distinction between those included in and those excluded from the class exists"]; *Hayes v. Superior Court* (1971) 6 Cal.3d 216, 223 [denial of equal protection in a statutory scheme which discriminated among prisoners based on whether their subsequent convictions were in-state or out-of-state].) It offends constitutional notions of equal protection for the state to use as the foundation for appellant's death sentence a 1996 juvenile "conviction" that could just as easily have been a juvenile "adjudication" without future death eligibility repercussions.

D. Appellant's Prior Murder Special Circumstance Verdict Must Be Reversed

Under the Eighth Amendment, there is greater constitutional scrutiny of the death-eligibility determination than the assessment of a capital defendant's deathworthiness. (*Buchanan v. Angelone* (1998) 522 U.S. 269, 275-276 ["It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or

capricious in its imposition"].) Appellant was charged with a single special circumstance, the murder conviction which grew out of his conduct as a juvenile. But for that unconstitutionally charged special circumstance, there would have been no basis for bringing this case as a capital murder case. In accord with the rule of *Roper v. Simmons*, this Court must vacate the prior murder special circumstance finding in this case and summarily vacate appellant's penalty verdict. But for the presence of this sole invalid eligiblity factor, appellant could not have been charged with a capital crime. The presence of this factor was not harmless, and the death sentence must be vacated. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 754; *Chapman v. California* (1967) 386 U.S. 18, 24.) (See Pen. Code, § 190.2, subd. (a); *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1322 ["Without a valid special circumstance finding, [the defendant] is ineligible for the death penalty"].)

Per *Roper v. Simmons*, *supra*, it was federal constitutional error for the state to use appellant's prior juvenile conviction to establish death eligibility under the Penal Code section 190.2, subdivision (a)(2), prior murder special circumstance. In light of the United States Supreme Court's proscription against basing death eligibility upon murders committed before the defendant reached the age of 18, as well as the higher standards of reliability applicable to capital verdicts, the use of appellant's juvenile conviction as the predicate for the capital prior murder special circumstance was federal constitutional error, and reversal of appellant's prior murder special circumstance finding and death sentence is required.

* * * * *

VII

THE TRIAL COURT ABUSED ITS DISCRETION BY CONDUCTING A CONSTITUTIONALLY INADEQUATE VOIR DIRE WHICH VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND RESULTED IN A MISCARRIAGE OF JUSTICE

Appellant raised numerous objections to the manner in which the trial court conducted voir dire. Initially, appellant requested several times that the court use written jury questionnaires. He also asked that prospective jurors be questioned about their views on the death penalty outside the presence of other jurors, that the court refrain from asking primarily leading questions, that the court permit follow-up questions before summarily excusing prospective jurors and, in general, requested a more careful and thorough voir dire. The trial court denied each of these requests.[66]

Trial counsel also raised an objection to the speed of the process, complaining that the trial court was moving so fast that counsel was unable to follow what was going on. (1 RT 330.) Although the court said it was "very comfortable" with the process, the court's confidence was misplaced. In fact, the court failed to identify and excuse jurors who would vote for death in all cases of first degree murder with a special circumstance. It also failed to ask four prospective jurors any questions about their views on the death penalty.[67] As a result, appellant was convicted of first degree murder

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[66] A-1 RT 48-49, 64, 84 [request for jury questionnaires]; A- RT 84 [sequestered death qualification]; 1 RT 330-331 [manner of voir dire]; 1 RT 347 [leading questions and summary dismissal of prospective jurors].

[67]Prospective juror number 5613 became seated Juror No. 10. Her voir dire is found throughout 2 RT 544-562. At no time was she asked a single question about her views on the death penalty.

and sentenced to death by a "tribunal organized to return" both a guilty verdict and a sentence of death. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521.)

A. Proceedings Below

1. Pretrial Proceedings.

At a pretrial hearing held on September 18, 1998, defense counsel requested that the trial court use written jury questionnaires as part of jury selection. The trial court denied the request and indicated that it was inclined to "just do the voir dire myself, on doing a full voir dire on the death penalty issue." (A-1 RT 48-49.) When asked whether it planned to do all of the voir dire on its own, the court said, "At this point I plan to do voir dire unless there is some reason not to." Defense counsel objected. (A-1 RT 50.) On November 19, defense counsel renewed his request for jury questionnaires and offered an appropriate 24-page questionnaire. (A-1 RT 64; 2 CT 292-314.) Subsequently, defense counsel requested that jurors be sequestered for the death qualification portion of voir dire. The trial court denied this request, noting the change in the law,[68] and assuring counsel that "jurors are straight with you. I'm able, I think, to get them to tell us their true attitudes." (A-1 RT 83.) Defense counsel renewed his

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[68]Code of Civil Procedure section 223, which took effect June 6, 1990, provides for court-conducted voir dire, and gives the trial court broad discretion in the manner in which voir dire is conducted. It provides that, where practicable, voir dire shall occur in the presence of the other jurors and that "[e]xamination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." Further, "The trial court's exercise of its discretion in the manner in which voir dire is conducted, . . . shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution."

request to use the proposed jury questionnaire, noting it had been used successfully in another capital case, and had been tailored to fit appellant's case. However, the trial court remained firm that a questionnaire "in a case like this" was not necessary:

> I think that we'll be able to cover the issue of [the death penalty]– *particularly in light of the fact that the People are of the opinion that – that the case is not an overwhelming case for murder, apparently . . . .*"

(A-1 RT 84, emphasis added.)

2. The First Panel

The first panel of seventy prospective jurors entered the courtroom on January 25, 1999. (1 RT 264; 2 CT 348-349, 352.) Following the hardship excusals (2 RT 271-282), the trial court moved immediately into the death-qualification portion of the voir dire. After briefly describing the stages of a capital trial, and the jury's duty to weigh aggravating and mitigating evidence[69] before reaching a penalty decision (1 RT 289-290), the trial court explained that jurors who would vote automatically, either for death or for life without parole, would not be qualified to sit. (1 RT 295.) The judge said it had been his experience that jurors in capital cases "break down into four categories," and that he would be asking them to identify in which one of the four categories they belonged. The trial judge explained:

"[C]ategory number one – are the people that don't believe in the death penalty." (1 RT 297.) The judge then singled out prospective juror number 5439 who had, during the hardship process, expressed concerns about the death penalty. (1 RT 287.) This exchange followed:

THE COURT: . . .Juror number 5439, you don't believe in the

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[69]The court defined mitigating evidence as "the positive things, the good things in the defendant's life and background." (1 RT 292.)

death penalty, is that right?
PROSPECTIVE JUROR NO. 5439: Right.
THE COURT: *So you're telling me that you could never ever vote to convict anybody* and sentence them to death; that is right?
PROSPECTIVE JUROR NO. 5439: Right.
THE COURT: So some people – I would consider her to be a category one, okay.

(1 RT 297-298, emphasis added.)

The trial court then defined those who fell into "category two" as people who were

> strong proponents of the death penalty and they would always vote for death, eye for an eye. *If someone took a life, then that person should pay for it with his life.*[70] That is. . . category two.

(1 RT 298, emphasis added.) The court designated as "category three" those who believed in the death penalty, but could not vote for it even if they felt the aggravating evidence substantially outweighed the mitigating evidence. (*Id.*) Those persons who could "keep an open mind," consider the aggravating and mitigating evidence, and "vote for death, if so persuaded, or for life, if so persuaded," were designated "category four." (1 RT 300.)

After providing these oral explanations of the four categories, the trial judge called the morning break. Upon the jury's return, and without

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[70]This was, of course, an over-broad description of those jurors who would always vote for death in cases of first degree murder with special circumstances, or as appellant's questionnaire phrased it, "in all cases in which the two alternatives [death and life without possibility of parole] are available." (2 CT 310 [Question 77].) A short time later, during the voir dire process, the trial court reiterated that category two was: "always vote for death," without defining the circumstances. (1 RT 314.)

repeating the category definitions, the trial court asked each juror to assign themselves to one of the four categories. (1 RT 301-302.) The definitions were not in written form, but jurors were presumed to remember the court's verbal descriptions. The trial court began the process with prospective juror number 5940. After the prospective juror said he had "been on cases of this nature before," (1 RT 303), the trial court did not ask this panelist to choose his category, but simply asked the following two leading questions:

> THE COURT: So you would consider yourself, what, to be a category four person, somebody that can look at the evidence?
> PROSPECTIVE JUROR NO. 5940: Yes.
> THE COURT: And make a decision only after you have seen the mitigating and aggravating evidence, is that right?
> PROSPECTIVE JUROR NO. 5940: Right.
> THE COURT: Let me go on to Juror No. 9516.

(1 RT 303.) This panelist was never asked any other question about his views on the death penalty.[71] With this first brief interview providing a model for the next panelists, the rest proceeded swiftly,[72] with the majority of panelists stating they were "a four."[73] In fact, the first thirteen panelists all claimed to be fours, and the trial court noted the pattern: "Now, I'm getting a lot of fours here. There is nothing wrong with telling me, "I am a one, two or three," do you understand that?" (1 RT 317-318.) When the

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[71]Prospective Juror No. 5940 eventually became seated Juror No. 1. (2 RT 585.)

[72] The trial court predicted that jury selection would take just one day. (A-1 RT 85.) In fact, voir dire of 110 venirepersons was completed and the jury was sworn in less than a day and a half. (2 CT 348-351; 2 RT 579.)

[73]Some jurors did not designate the number four but simply said "Yes," when asked a question such as, "You believe you could consider . . . the good evidence and the bad evidence?" (See 1 RT 332.)

fourteenth prospective juror, number 0547, broke the pattern by stating she was a three, the trial court remarked, "Finally found one."[74] (1 RT 322.)

Shortly thereafter, defense counsel objected that the process was going too fast, that he could not follow it, and that use of the categories was meaningless under the circumstances:

> MR. MEYERS: For the record, I just want to object to the manner in which this court is conducting this voir dire.
> THE COURT: All right.
> MR. MEYERS: It is too fast. I can't follow it. You are asking, "Are you number one, two, three, four." It is just meaningless except your definition that is recorded in memory before we took a break. I think you have to delve into these individuals a little more in-depth.
> THE COURT: I must tell you, I disagree with you. This last juror said she was number one and said why she is a number one. She could never vote for death. I don't think you need anything more from this juror on this point. I am very comfortable with the way this voir dire is going but your objection is noted for the record.

(1 RT 330-331.) In fact, in the previous interchange, when prospective juror number 8045 had said, "I am a number one. I don't believe in the death penalty," the trial court assumed that this juror would be unable to apply the law, and with a leading question secured the answer which would lead to his/her removal for cause: "All right. *And so you would never vote for death regardless of what the evidence showed; is that correct*? (1 RT 330, emphasis added.) When s/he simply answered, "Yes," the questions

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[74]Thereafter, a large number of panelists began to also identify as having scruples against the death penalty. In fact, 20 of the next 40 panelists said they were either "a three" [supported the death penalty but unable to apply it] or "a one [against the death penalty]." (1 RT 322 through 343.) In all 21 of the these 54 panelists were excused. Of those, 13 said they were "a three" and 8 said they were a "one."

ended and s/he was soon removed for cause, along with the other twenty prospective jurors who had self-identified either as a one or a three. (1 RT 349-350.) At that point, the defense objected again:

> MR. MEYERS: [M]y objection also is to your voir dire. I don't think that you tried to rehabilitate the number threes at all. In fact, of course, with the leading question, "You couldn't impose the death penalty," to some of these people in your statement, all they had to do is say, "That is right."
> THE COURT: When they tell me they are number three, I think they put themselves in that category.

(1 RT 347-348.) The trial court did not alter the process but continued in the same manner. Twenty-one scrupled jurors were removed for cause on the first day. (1 RT 349-350.) However, no prospective jurors admitted to being "a two." All the rest identified as "fours."

After removing only scrupled jurors, the trial court concluded the death-qualification portion of the voir dire and moved to the next phase, which consisted of group questioning. (1 RT 351.) During this phase, the trial court posed general questions to the remaining panel members, relying on individuals to raise their hands if a particular topic applied to them.[75] (1 RT 352-456.) In some cases, the trial court would ask a complete question of a panelist such as, "Now, if the evidence persuades you that Mr. Salazar was a member of one of these gangs so-called, is that going to be enough

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[75]The topics included whether anyone had ever been to the Beef Bowl or Au Rendez-Vous restaurants (1 RT 356-359); whether anyone had personal or family ties to law enforcement (1 RT 360-375); whether anyone had been charged with, was the victim of, or was a witness to a crime, or had close ties to anyone who had (1 RT 375-416); whether anyone had good or bad experiences with police officers (1 RT 417-424); whether anyone had been incarcerated or had visited a prison or jail (1 RT 451); whether anyone had training in psychiatry, sociology or psychology (1 RT 449) and various questions about gangs. (1 RT 425-447.)

just of itself to vote guilty?" (1 RT 429.) However, as the questioning proceeded, many jurors were simply asked if they *knew* any gang members, and if they did not, they were asked no further questions about their feelings towards gangs and gang members. Eventually, some jurors were not even asked a question, but simply replied, "No," or "None." (See, e.g., 1 RT 437 [THE COURT: 1780, do you know any gang members? A: No.]; 1 RT 442 [THE COURT: 7095. A: None.]; 1 RT 444 [THE COURT: 5197, do you know anybody in a gang? A: No, I don't.].)

After the court concluded this open questioning period (1 RT 456), it moved into the last phase of inquiry. The trial court asked each panelist to refer to "the items on the board" (1 RT 456) and provide answers with respect to each item listed. The board contained approximately ten subjects, mentioned on the record. (1 RT 456-457.)[76] In this phase, the trial court overlooked prospective juror number 2851, who provided no background information.[77]

3. The second panel

The next day, January 26, 1999, a second panel of forty prospective jurors was examined for hardship excusals and then subjected to a similar three-step process, beginning with death qualification, based on categories. For this second panel, the trial court said there are "four kinds of people,"

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[76]The subjects were: name, area of residence, marital status, occupation, occupation of spouse or children, prior jury service (civil or criminal) and type of case, educational level, membership in political or advocacy organizations, military background, if any, gun ownership, and whether they favored stricter gun controls. (1 RT 456-457.)

[77]Prospective juror number 2851 was questioned by the trial court at 1 RT 312-313 and again at 1 RT 434. This panelist was seated as Juror No. 8. (2 RT 585.)

but listed only three categories and gave slightly different definitions than had been given to the previous day's panel:

> One category are people *who don't believe in the death penalty*. They just flat out say it is not a good idea. *They could never vote for death.*
> Category two are what I consider to be people that would be called strong proponents of the death penalty to the point where they would always vote for death. Doesn't matter what the good evidence is, doesn't matter what the mitigating evidence is, boy, they would always vote to put someone to death. *If that person committed murder, they would always vote for death.*[78]
> There is a third category of persons . . . that say. . . I believe in the death penalty. But when you really get down to it, they can't do it. It is just too much for them.

(2 RT 512, emphasis added.) With this second panel, the court did not define, or even mention, category four. Although the court asked most panel members to state their selected category, four panelists were overlooked during this process and never asked to state a category or to otherwise provide any information at all about their views on the death penalty. Those overlooked were prospective juror number 5234, 0416, 5802 and 5613.[79] One of the jurors in that group became seated Juror No. 10. Out of both panels of jurors, totaling 110 persons, only one, prospective juror

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[78]As it had done with the first panel, the trial court again misdefined category two, which should have been defined as those who would always vote for death, regardless of the evidence, *in the case of first degree murder with special circumstances*. See fn.70, *supra*.

[79] See, generally 2 RT 486-595. There is no evidence that any of these people were examined for their views on the death penalty, though each was questioned on other topics. (2 RT 541, 550, 568 [juror 5234]; 2 RT 532 [juror 0416]; 2 RT 547, 554, 559, 576 [juror 5802]; 2 RT 544, 552, 558, 562, 574, 585 [juror 5613, who became seated Juror Number 10].)

number 7691, in the second panel, was identified as being "a two."[80]

B. The Trial Court's Refusal to Conduct Individual Sequestered Death Qualification Voir Dire, And Its Unreasonable and Unequal Application of California Law Governing Juror Voir Dire Violated Appellant's Rights

Appellant requested sequestered individual voir dire of the prospective jurors, citing, inter alia, his federal constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution. (A-1 RT 83.) The trial court summarily denied the request and conducted non-sequestered voir dire. (1 RT 5; 2 RT 125 - 3 RT 473.)

As discussed below, the trial court's failure to conduct individual sequestered death qualification voir dire, and its unreasonable and unequal application of state law governing such voir dire, violated appellant's federal constitutional rights to due process, equal protection, trial by an impartial jury, effective assistance of counsel, and a reliable death verdict, and his right under California law to individual juror voir dire where group voir dire is not practicable.

1. The Trial Court's Refusal To Allow Sequestered Voir Dire During Death-Qualification Violated Appellant's Constitutional Rights

A criminal defendant has federal and state constitutional rights to trial by an impartial jury. (U.S. Const., Amends. 6 & 14; Cal. Const, art. I, §§ 7, 15 & 16; *Morgan v. Illinois* (1992) 504 U.S. 719, 726.) Whether prospective capital jurors are impartial within the meaning of these rights is

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[80]Prospective juror number 7691 was excused for cause, after admitting he would always vote for the death penalty, without considering mitigating evidence. (2 RT 516.)

determined in part by their opinions regarding the death penalty. Prospective jurors whose views on the death penalty prevent or substantially impair their ability to judge in accordance with the court's instructions are not impartial and cannot constitutionally remain on a capital jury. (See *Wainwright v. Witt* (1985) 469 U.S. 412, 424; *Witherspoon v. Illinois*, *supra,* 391 U.S. at p. 522; see also *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 733-734; *People v. Cummings* (1993) 4 Cal.4th 1233, 1279.) Death qualification voir dire plays a critical role in ferreting out such bias and assuring the criminal defendant that his constitutional right to an impartial jury will be honored. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.) To that extent, the right to an impartial jury mandates voir dire that adequately identifies those jurors whose views on the death penalty render them partial and unqualified. (*Ibid.*) Anything less generates an unreasonable risk of juror partiality and violates due process. (*Id.* at pp. 735-736, 739; *Turner v. Murray* (1986) 476 U.S. 28, 37.) A trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors necessarily creates such an unreasonable risk.

This Court has long recognized that exposure to the death qualification process creates a substantial risk that jurors will be more likely to sentence a defendant to death. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 74-75.) When jurors state their unequivocal opposition to the death penalty and are subsequently dismissed, the remaining jurors may be less inclined to rely upon their own impartial attitudes about the death penalty when choosing between life and death. (*Id.* at p. 74.) By the same token, "[j]urors exposed to the death qualification process may also become desensitized to the intimidating duty of determining whether another person should live or die." (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th

1168, 1173.) "What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." (*Hovey*, *supra*, at p. 75.) Death qualification voir dire in the presence of other members of the jury panel may further cause jurors to mimic responses that appear to please the court, and to be less forthright and revealing in their responses. (*Id.* at p. 80, fn. 134.)

Given the substantial risks created by exposure to the death qualification process, any restriction on individual and sequestered voir dire on death-qualifying issues – including that imposed by Code of Civil Procedure section 223, which allows death qualification in the presence of other prospective jurors and abrogates this Court's mandate that such voir dire be done individually and in sequestration (*People v. Waidla* (2000) 22 Cal.4th 690, 713; *Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80;) – cannot withstand constitutional scrutiny. (See, e.g., *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 736, citing *Turner v. Murray*, *supra*, 476 U.S. at p. 36 ["The risk that . . . jurors [who were not impartial] may have been empaneled in this case and 'infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.'"].) Nor do such restrictions comply with Eighth Amendment requirements for the heightened reliability of death sentences. (See, e.g., *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Likewise, because the right to an impartial jury guarantees adequate voir dire to identify unqualified jurors and provide sufficient information to enable the defense to make peremptory challenges (*Morgan v. Illinois*, *supra*, 504 U.S. at p.

729; *Rosales-Lopez v. United States*, *supra*, 451 U.S. at p.188), the negative influences of open death qualification voir dire violate the Sixth Amendment's guarantee of effective assistance of counsel.

Put simply, juror exposure to death qualification in the presence of other jurors leads to doubt that a convicted capital defendant was sentenced to death by a jury empaneled in compliance with constitutionally compelled impartiality principles. Such doubt requires reversal of appellant's death sentence. (See, e.g., *Morgan v. Illinois*, *supra*, 504 U.S. at p.739; *Turner v. Murray*, *supra*, 476 U.S. at p. 37.)

2. The Superior Court Erred In Denying Appellant's Request For Individual Sequestered Voir Dire

Even assuming individual sequestered death qualification voir dire is not constitutionally compelled in *all* capital cases, under the circumstances of this case the trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors still violated appellant's constitutional rights to an impartial jury and due process of law. The court's conduct also violated appellant's constitutional right to equal protection of the law, and his federal due process protected statutory right to individual voir dire where group voir dire is impracticable. (See *Hicks v. Oklahoma* (1980) 447 U.S. at p. 346.)

Code of Civil Procedure section 223 vests trial courts with discretion to determine the feasibility of conducting voir dire in the presence of other jurors. (*People v. Box* (2000) 23 Cal.4th 1153, 1180; *People v. Waidla*, *supra*, 22 Cal.4th at p. 713; *Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1184.) Under that code section, "[v]oir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." (Code Civ. Proc., § 223.) However, as this Court recognizes, individual

sequestered voir dire on death penalty issues is the "most practical and effective procedure" to minimize the negative effects of the death qualification process. (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80, 81.) The proper exercise of a trial court's discretion under section 223 therefore must balance competing practicalities. (See, e.g., *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977["[E]xercises of legal discretion must be . . . guided by legal principles and policies appropriate to the particular matter at issue."].)

The trial court's summary denial of appellant's request simply does not reflect a sound exercise of discretion about whether, in the particular circumstances of this case, group voir dire was practicable. (A-1 RT 83.) The record fails to show that the court in making its decision "engaged in a careful consideration of the practicability of . . . group voir dire as applied to [appellant's] case." (*Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1183.) The court's summary denial of appellant's request does not equate with the kind of "reasoned judgment" this Court ascribes to judicial discretion. (See *People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at p. 977.) Nor does it equate with "a careful consideration" (*Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1183) of the practicability of small group voir over individualized sequestered voir dire, "[t]he most practical and effective procedure available to minimize the untoward effects of death-qualification[.]" (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80.)

Certainly, the concerns identified in *Hovey* applied in this case. For example, the record shows that after the first prospective juror, number 5490, stated he had sat on other "cases of this nature," the trial court asked two leading questions: whether the prospective juror considered himself to

be someone who could "look at the evidence," and someone who would make a decision only after seeing aggravating and mitigating evidence. (1 RT 303.) The court then moved on to the next panelist and ultimately, juror number 5940 was seated as Juror number 1. (2 RT 585.)

After this summary questioning, in front of the other prospective jurors, the next thirteen panelists all claimed to fall into category four, exactly the same as prospective juror number 5940. The trial court noted the pattern and felt compelled to admonish the jurors that there was nothing wrong with admitting they fell into another category than four. Immediately thereafter, the very next panelist identified himself as a number three, and the remainder began to classify themselves in other categories as well. It is thus clear that the court's leading questions to the first prospective juror signaled to the others that, regardless of their death penalty views, they would be qualified to serve if they merely expressed that they would look at aggravating and mitigating evidence before reaching a verdict. Under the circumstances, the trial court clearly committed error of federal constitutional magnitude in denying appellant's request for individual sequestered voir dire. (U.S. Const., Amends. 5, 6, 8 & 14.)

3. The Trial Court's Unreasonable and Unequal Application Of The Law Governing Juror Voir Dire Requires Reversal Of Appellant's Death Sentence.

Under Code of Civil Procedure section 223, reversal is required where the trial court's exercise of discretion in the manner in which voir dire is conducted results in a "a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." However, section 223 must be viewed as providing appellant an important procedural protection and liberty interest (namely, the right to individual juror voir dire

on death penalty issues where group voir dire is impracticable) that is protected under the federal due process clause. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Accordingly, the trial court's unreasonable application of section 223 in appellant's case must be assessed under the *Chapman* standard of federal constitutional error. In practical terms, any differences between the two standards is academic, for whether viewed as a "miscarriage of justice," or as an error that contributed to appellant's death verdict (*Chapman v. California*, *supra*, 386 U.S. at p. 24), the trial court's failure to conduct individual, sequestered juror voir dire on death penalty issues requires reversal of appellant's death sentence.

The group voir dire procedure employed by the trial court created a substantial risk that appellant was tried by jurors who were not forthright and revealing of their true feelings and attitudes toward the death penalty (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80, fn. 134), and who had become "desensitized to the intimidating duty" of determining whether appellant would live or die (*Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1173) because of their "repeated exposure to the idea of taking a life." (*Hovey*, *supra*, 28 Cal.3d at p. 75.) Accordingly, the trial court's failure to carefully consider the practicability of group voir dire as applied to appellant's case led to a voir dire procedure that denied appellant the opportunity to adequately identify those jurors whose views on the death penalty rendered them partial and unqualified, and generated a danger that appellant was sentenced to die by jurors who were influenced toward returning a death sentence by their exposure to the death qualification process. (See *Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 74-75.) These hazards infringed upon appellant's rights to due process and an impartial jury (see *Morgan v. Illinois*, *supra*, 504 U.S. at p. 729), and cast

doubt on whether the Eighth Amendment principles mandating a need for the heightened reliability of death sentences is satisfied in this case. By their very nature, these are rights that are so important as to constitute an "essential part of justice" (*People v. O'Bryan* (1913) 165 Cal. 55, 65) for which the risks of deprivation must be regarded as a miscarriage of justice. Indeed, errors that infringe on these rights are "the kinds of errors that, regardless of the evidence, may result in a 'miscarriage of justice' because they operate to deny a criminal defendant the constitutionally required 'orderly legal procedure' (or, in other words, a fair trial)[.]" (*People v. Cahill* (1993) 5 Cal.4th 478, 501; see also *People v. Diaz* (1951) 105 Cal.App.2d 690, 699 ["The denial of the right of trial by a fair and impartial jury is, in itself, a miscarriage of justice."].)

Moreover, because the voir dire procedure employed by the trial court was inadequate to identify those jurors whose views on the death penalty rendered them partial and unqualified, it is impossible for this Court to determine from the record whether any of the individuals who were ultimately seated as jurors held disqualifying views on the death penalty that prevented or impaired their ability to judge appellant in accordance with the court's instructions. The trial court's use of this procedure cannot, therefore, be dismissed as harmless. (*People v. Cash* (2002) 28 Cal.4th 703, 723.) Stated simply, the jurors' exposure to death qualification of other jurors leads to doubt that appellant was sentenced to death by a jury empaneled in compliance with constitutional impartiality principles, and that doubt requires reversal of appellant's death sentence. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739; *People v. Cash*, *supra*, 28 Cal.4th at p. 723.)

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C. When A Trial Court Opts To Conduct Voir Dire On Its Own And Without A Written Questionnaire, It Has A Heightened Responsibility To Assure That The Process Is Adequate For Selecting A Fair And Impartial Jury

The selection of the jury through the voir dire process "plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.) The purpose of voir dire is "to cull from the venire, persons who demonstrate that they cannot be fair to either side of the case. . . . " (*Morgan v. Illinois, supra*, 504 U.S. at p. 734, n. 7 [citations omitted].) Thus, "[w]ithout an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*Rosales-Lopez v. United States*, *supra,* at p. 188; *People v. Bolden* (2002) 29 Cal.4th 515, 537-538; see also *Morgan v. Illinois, supra*, 504 U.S. at pp. 729-730.)

Accordingly,

> Questions which merely invite an express admission or denial of prejudice are a necessary part of voir dire because they may elicit responses which will allow the parties to challenge jurors for cause. However, *such general inquiries often fail to reveal relationships or interests of the jurors which may cause unconscious or unacknowledged bias. For this reason, a more probing inquiry is usually necessary.*

(*Darbin v. Nourse* (9th Cir. 1981) 664 F.2d 1109, 1113, emphasis added.) In a capital case "certain inquiries must be made to effectuate constitutional protections." (*Morgan v. Illinois, supra*, 504 U.S. at p. 730.) In *Wainwright v. Witt, supra,* 469 U.S. at p. 424, the Court clarified that a prospective juror was subject to removal for cause only if the juror's views on the death penalty would "prevent or substantially impair the performance of his duties

as a juror in accordance with his instructions and his oath. " Thus, jurors may not be removed for cause simply because they "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon v. Illinois, supra*, 391 U.S. at p. 520-523.) However, jurors who are either unalterably in favor of or opposed to the death penalty *in every case of capital murder*, are ones who, by definition, cannot perform their duties in accordance with the law, and are subject to removal for cause. (*Morgan v. Illinois, supra*, 504 U.S. at p. 734.)

A defendant in a capital case therefore, is entitled to a voir dire that is sufficient to "lay bare the foundation of a defendant's challenge for cause" (*Id.* at p. 733), against jurors who would invariably vote for death in cases of first degree murder with a special circumstance. General questions which merely ask prospective jurors about their ability to "follow the law," or to be "fair and impartial" are not insufficient for meeting this constitutional standard. (*Id.*, at p. 734.)

This Court has held that in a capital case, "the court must permit counsel to ask each juror whether he or she believes the death penalty should be imposed automatically upon conviction of a capital offense." (*People v. Lucas* (1995) 12 Cal. 4th 415, 479, citing *Morgan v. Illinois, supra,* 504 U.S. at pp. 735-736.) A defendant on trial for his life must be allowed to ascertain whether prospective jurors are operating under the "misperception" that it is possible to follow the law and be fair and impartial, and still maintain that death is the *only* appropriate punishment in the case of capital murder.

On the other hand, in *People v. Avila* (2006) 38 Cal.4th 491, this Court confirmed that simply expressing a personal opposition to the death

penalty was not grounds for exclusion under either *Witherspoon* or *Witt*. Rather, even

> [t]hose who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law.

(*People v. Avila, supra*, 38 Cal. 4th at p. 529, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 176; accord, *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146.)

What all of these cases confirm, however, is that before empaneling a jury in a capital case, a trial court must have sufficient information regarding that person's state of mind to reliably determine whether that person's views would "prevent or substantially impair" the prospective juror's performance of his or her duties. While a particular response may provide a *preliminary* indication that a juror is either qualified to serve or subject to a challenge for cause, the trial court must ask the correct follow-up questions to establish the juror's qualifications, before either accepting or excusing that person. (*Morgan v. Illinois, supra,* 504 U.S. at pp. 733-736; *People v. Stewart* (2004) 33 Cal.4th 425, 445-449.)

In California, the responsibility for a properly conducted voir dire has been statutorily placed with the trial court. (Code of Civ. Proc., § 223.) With this greater authority, however, "goes an increased responsibility to assure that the process is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors." (*People v. Wilborn* (1999) 70 Cal.App.4th 339, 343, quoting *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314.)

Generally, "there is no constitutional right to any particular manner of conducting the voir dire and selecting a jury, so long as such limitations

as are recognized by the settled principles of criminal law to be essential in securing impartial juries are not transgressed." (*People v. Boulerice* (1992) 5 Cal.App.4th 463, 474.) When counsel has made a timely objection as to the scope of the voir dire, the Supreme Court reviews the trial court's actions using the abuse of discretion standard. (*People v. Visciotti* (1992) 2 Cal. 4th 1, 48.)

To aid in the process of voir dire, and within its discretion, the trial court may opt to use written jury questionnaires. (*People v. Wilson* (2008) 44 Cal. 4th 758, 790.) However, when a trial court refuses written questionnaires, does not allow sequestered voir dire for death qualification, and elects to handle the entire voir dire on it's own, the chances for error are increased. Error in identifying and excusing potential jurors who might invariably vote for death in all capital cases is "unacceptable in light of the ease with which that risk could have been minimized." (*Turner v. Murray* (1986) 476 U.S. 28, 36.) In appellant's case, in refusing the jury questionnaire proposed by defense counsel, the trial court took it upon itself to assure that the appropriate inquiries were made of each panelist. However, except for the one prospective juror who volunteered that he would invariably vote for the death penalty regardless of the evidence, not a single prospective juror was asked the question posed on page 20 of the written questionnaire: "Do you favor imposing a sentence of death rather than a sentence of life without the possibility of parole in all cases in which the two alternatives are available?" (2 CT 310.) While there are a number of ways to pose this question, the question actually posed by the trial court was not an acceptable alternative, i.e., asking if the juror "would always vote for death . . . "if someone took a life." (1 RT 298.) By refusing to question prospective jurors if they would always vote for death in a capital

murder case (or the functional equivalent of that question) "the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury." (*Turner v. Murray, supra*, 476 U.S. at p. 36.)

In appellant's case, the trial court's method of voir dire was designed for speed, but not accuracy. The result was a disorganized and haphazard process that failed to meet minimal constitutional standards. Appellant's counsel asked to use written questionnaires, posed regular objections to the process and asked that the court proceed more slowly so that it was possible to keep track of what was going on. The trial court should have addressed these legitimate concerns. However, perceiving that appellant's case "was not an overwhelming case for murder," (A-1 RT 84), Judge Perry rejected jury questionnaires and, in their place, carried out the voir dire in a hasty, unilateral, and constitutionally inadequate fashion. While the process succeeded in removing all jurors who were opposed to capital punishment as well as those who had qualms about applying it, 29 panelists in all,[81] the trial court's process completely failed to remove those jurors who would always vote for the death penalty in the case of first degree murder with a special circumstance. Except for those who were opposed to capital punishment (in which case their views were carefully scrutinized by the trial court) the death qualification process used in this case was entirely dependent upon a panelist (1) recognizing, and (2) admitting, that they could not be fair. In fact, there was only one panel member who described himself in this manner. As soon as the judge called on prospective juror number 7691, he said "I am for the death penalty but I don't think I could

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[81] 21 scrupled panelists were removed for cause from the first panel (1 RT 349-350) and 8 scrupled panelists were removed for cause from the second panel. (2 RT 533-534.)

be fair." (2 RT 515.) When questioned further, he affirmed that he would vote for the death penalty without regard to the mitigating evidence, and was removed for cause. (2 RT 515-516; 2 RT 533.) No other prospective juror was removed for cause for this reason.

As discussed further below, the trial court's decision to reject a written questionnaire made it impossible for appellant to impanel a fair and impartial jury. In place of a questionnaire, the trial court relied almost exclusively on an over-simplified and incorrectly-defined four category system that was dependent upon jurors being able to properly assess themselves. Not only was the voir dire incomplete, it was also disorganized, and resulted in a number of panelists were not screened at all.

1. Inadequacy of the four category death-qualification process used by the trial court

This Court has acknowledged that death-qualifying a capital jury is a "long and tedious business" and that to "streamline" the process, a written jury questionnaire can be a valuable screening tool. (*People v. Wilson* (2008) 44 Cal. 4th 758, 790.) In addition to the time-saving factor, however, a written questionnaire, used in conjunction with the oral voir dire, has a number of important advantages over an entirely oral voir dire.

For example, requiring every prospective juror to complete a properly composed questionnaire that asks the critical death-qualifying questions[82] can assure that each prospective juror, at a minimum, will have undergone a rudimentary screening process. (See *People v. Avila, supra,* 38 Cal.4th 491 at p. 529 [prospective jurors may be subject to removal for

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[82]See, e.g., *People v. Stitely* (2005) 35 Cal.4th 514, 540, referencing "three, four, or five general questions tracking language from *Witherspoon, supra,* 391 U.S. 510 and and *Witt, supra,* 469 U.S. 412, 424."

cause based solely on jury questionnaire responses].) Using a written form for the essential questions relieves the trial court of concerns over precise wording of questions; it also relieves jurors from having to remember how the question was phrased. A written form also avoids the potential problem of jurors responding precipitously, without adequate thought; merely repeating answers given by a previous panel member; or failing to respond to a group question when others in the group have not responded. A written form can also be an invaluable organizational tool, for both the trial court and the parties, in preparing for, and then tracking the responses to, the oral voir dire. Having a form which already provides each juror's background information, in advance, can also assist the court in discovering and addressing those areas where follow-up questions may be necessary.

In appellant's case, the jury questionnaire proposed by the defense was 24-pages long and covered numerous topics, including twenty-nine questions (with sub-parts) related to the juror's views on the death penalty. (2 CT 307-311.) In addition to the four essential death-qualifying questions,[83] about half of the questions were open-ended, allowing jurors to

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[83]See 2 CT 310:

76. Do you favor imposing a sentence of life without the possibility of parole rather than the death penalty in all cases in which the two alternatives are available?

77. Conversely, do you favor imposing a sentence of death rather than life without the possibility of parole in all cases in which the two alternatives are available?

78. No matter what the evidence shows, would you refuse to vote for guilt as to murder or refuse to find the special circumstance true in order to keep the case from going to the penalty phase, where death or life in prison without the possibility of parole is decided?

79. No matter what the evidence shows, would you always vote for guilt as to murder and find the special circumstance true in order to get the case to the penalty phase, where death or life in prison without the possibility of

express their views, in their own words. For example, jurors were asked to explain their "general feelings regarding the death penalty," (2 CT 307); how strongly they held their views (2 CT 308); the types of crimes for which they believed the death penalty was appropriate (2 CT 311); whether they believed it to be the appropriate penalty in all cases of murder; or in all cases in which the defendant was convicted of more than one murder. (2 CT 311.) Jurors were asked whether a defendant's background should be relevant to the penalty decision (2 CT 310), and whether the juror would be willing to consider a defendant's background in determining the appropriate penalty. (2 CT 310.) The questionnaire also asked what the juror would do if his/her own personal views conflicted with the court's instructions. (2 CT 307.) None of these questions were posed to appellant's jurors.

The trial court also failed to pose any questions to jurors about their ability to fairly evaluate the evidence in the guilt phase of appellant's trial. Appellant's proposed Question Nos. 78 and 79, rejected by the trial court, addressed this area of inquiry. (2 CT 310.) Since appellant's case was one in which there was a strong likelihood that the case would not proceed beyond the guilt phase,[84] it was particularly important that appellant be assured that panelists not hold such strong feelings in favor of capital punishment that they would invariably find appellant guilty, in order to reach the penalty phase of the trial. To address this issue, appellant

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parole is decided?

[84]When the prosecutor said he could easily try this case in three to four days, the trial court remarked, "Yes. *And then if it comes out voluntary manslaughter,* we're done. And we just all go home." (A-1 RT 79.) While this would have also been true with respect to a jury finding of second degree murder, the belief that the jury would find manslaughter was frequently expressed before trial, by both the court and the prosecutor.

proposed Question No. 79, which asked:

> No matter what the evidence shows, would you always vote for guilt as to murder and find the special circumstance true in order to get the case to the penalty phase, where death or life in prison without the possibility of parole is decided?

(2 CT 310.) Appellant's proposed question No. 78 posed the reverse question, an inquiry which is specifically authorized under California law.[85]

Finally, since appellant's prior murder conviction formed the basis for the only special circumstance in this case, questioning prospective jurors if they would invariably vote for the death penalty if the defendant were convicted of more than one murder was critical to appellant's ability to select an impartial jury. (See *People v. Cash* (2002) 28 Cal.4th 703, 722-733 [defendant entitled to reversal of death sentence where denied opportunity to examine jurors on view of his prior murder conviction].)

Had the trial court agreed to use appellant's questionnaire, many of the problems which arose from the trial court's disorganized and improperly framed voir dire would not have occurred. However, in rejecting written questions and opting instead for an entirely oral death qualification process – one that was hastily presented and critically flawed – the trial court failed in its duty to provide a constitutionally adequate voir dire.

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[85] In California, Code of Civil Procedure §229 sets forth the grounds upon which a challenge for implied bias may be taken. One ground, designed to prevent jury nullification, specifically addresses capital cases: "If the offense charged is punishable with death, the entertaining of such conscientious opinions as would *preclude the juror finding the defendant guilty*; in which case the juror may neither be permitted nor compelled to serve." (Code of Civil Procedure §229(h), emphasis added.) Relying on the principles set forth in *Hovey v. Superior Court, supra,* 28 Cal. 3d 1, *Morgan v. Illinois, supra,* 504 U.S. at pp. 728-729, a capital defendant has a right to inquire when a prospective juror holds views that would cause him/her to always vote for guilt, in order to reach the penalty phase.

a. Incorrect category definitions

Initially the court defined category one as "people who do not believe in the death penalty." (1 RT 297.) While many who categorized themselves as "a one" [against the death penalty] were later asked to confirm that they could never vote for the death penalty under any circumstances, in at least one case a juror was excused simply on the basis of the following voir dire:

> THE COURT: Our next juror, your name, sir?
> PROSPECTIVE JUROR NO. 8759: 8759.
> THE COURT: Juror No. 8759?
> PROSPECTIVE JUROR NO. 8759: My vote is not for the death penalty.
> THE COURT: I am sorry?
> PROSPECTIVE JUROR NO. 8759: My vote is not for the death penalty. *I don't believe in the death penalty.*
> THE COURT: *That is what we want to know, okay.*

(2 RT 529-530, emphasis added.) After only this exchange, the trial court moved on to question the next juror. Later, with no further questioning of prospective juror number 8759, the trial court added him to a group that was excused because their "views on the death penalty would substantially impair their ability to be jurors in this case." (2 RT 532.)

The trial court's removal for cause of prospective juror number 8759 simply because he did not believe in the death penalty, without more, requires reversal of appellant's death sentence. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424; *Witherspoon v. Illinois, supra*, 391 U.S. 510; *People v. Stewart, supra* 33 Cal.4th 425.) While prospective juror number 8759 may have felt that he could not impose the death penalty under any circumstances, he was never asked that question, and was simply excused based on his statement that he did not *believe* in the death penalty. (2 RT 533.) His unsolicited statement, "my vote is not for the death penalty," as

well as the court's response, "I am sorry," suggested there may have been some confusion. However, the juror's only response was that he did not believe in the death penalty, an insufficient ground for his excusal for cause. Followup questioning "was essential to assess whether the juror could overcome personal reservations and properly weigh and consider the aggravating and mitigating factors." (*People v. Avila, supra*, 38 Cal.4th at p. 530, citing, *People v. Stewart, supra*, 33 Cal.4th at p. 447.)

As this Court explained in *People v. Stewart, supra*, 33 Cal.4th at p. 446, the mere fact a prospective juror states a personal opposition to the death penalty does not permit the court to automatically disqualify him from the jury. Even jurors who firmly believe that the death penalty is wrong may serve as capital jurors "so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree, supra,* 476 U.S. at p. 176.) Similarly, in *People v. Wilson* (2008) 44 Cal. 4th 758, 785-86, this Court held: "Neither *Witherspoon* nor *Witt,* . . . nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty. The real question is whether the juror's attitude will " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (*Id.*, citing *People v. Kaurish* (1990) 52 Cal.3d 648, 699, quoting *Wainwright v. Witt, supra,* 469 U.S. at p. 424, fn. omitted.)

With respect to the other three categories used by the trial court, the court also failed to adequately describe those jurors who should be disqualified for cause because they would always vote for the death penalty in cases of first degree murder with special circumstances [category two]. Rather than describe the category properly, the trial court gave an incorrect

short-hand version, describing these jurors as "very strong proponents of the death penalty" who would "always vote for death, eye for an eye." (1 RT 298.) The court explained further that category two jurors would believe that "[i]f someone took a life, then that person should pay for it with his life." (*Id.*) At no time did the trial court distinguish between persons who were found guilty of first degree murder with one or more special circumstances and all others who "took a life."

The trial court's over-broad definition allowed panelists to believe they would not belong in category two (and were therefore qualified to serve) as long as they did not subscribe to the belief that anyone who "took a life" should receive the death penalty. Thus, panelists who did not believe the death penalty was appropriate for second degree murder, manslaughter, negligent homicide, killing in combat or even self-defense, could legitimately conclude that they were not "a two," even if they also believed that death was the *only* appropriate punishment (and would vote for it automatically) for those who committed a first degree murder with a special circumstance.

Had the trial court agreed to a written juror questionnaire, the court's poorly-phrased, and constitutionally inadequate definitions could have been examined and corrected. As it was, the trial court's failure to correctly define category two likely explains why, out of 110 prospective jurors, only one person placed himself in this category.[86]

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[86]Another panelist started to do so, but changed his mind. Prospective juror number 5197 said, "I started out being a number two, but upon your explanation. . . I am definitely number four." (1 RT 345.) Asked whether he felt "if somebody killed somebody, then they should be killed," he replied, "*in murder cases, yes. If it was an accident, that's not - - - "* (1 RT 345, emphasis added.)

Although the trial court defined the four categories twice for the first panel and once for the second panel, some of the definitions changed each time. In the case of category two, the court never defined it correctly. (See 1 RT 298 [definition described *supra*]; 1 RT 314 ["Two, always vote for death."]; and 2 RT 512 ["if that person committed murder, they would always vote for death"].) Although the last time the court defined it, it came closer to the proper definition [restricting the automatic death vote to cases of "murder,"], because the category necessarily included cases of second degree murder and first degree murder without special circumstances it was still incorrect. Because the trial court's description of category two failed to ask the right question, it failed to identify those jurors whose views would "prevent or substantially impair the performance of his duties as a juror." (*Wainwright v. Witt, supra,* 469 U.S. at p. 424; *Morgan v. Illinois, supra*, 504 U.S. at p. 728.)

Finally, with respect to category four, those in the second panel were not even given a definition of this category. Consequently, unless a panel member believed they were in either categories one or three (against the death penalty and/or unable to impose the death penalty), or said they would impose death in all "murder" cases, there was no applicable category. However, as discussed below, with the help of leading questions from the trial court, nearly every juror either said s/he was "a four," or gave a similarly brief assessment of his/her views such as "I could weigh all the evidence." (See, e.g., 1 RT 324.) The trial court made little to no effort to delve into the juror's views, and often simply accepted without question, their own automatic self-assessment, in rote manner.

b. <u>Reliance on prospective juror's self-assessment</u>

In the case of prospective jurors who said that they were opposed to

capital punishment [category 1] the trial court improperly asked leading questions which presumed that philosophical opposition to the death penalty was the equivalent of never being able to apply it under any circumstances. Nearly every juror who claimed to be "a one," was asked a question similar to the one posed to prospective juror number 5439, the very first juror who did not believe in the death penalty: "*So you're telling me* that you could never ever vote *to convict anybody*[87] and sentence them to death, that is right?" (1 RT 297-298.) From the outset, the trial court continuously expressed the assumption that one who did not "believe in" the death penalty would be unable to unwilling to temporarily set aside that belief and follow the court's instructions. With the exception of prospective juror number 8759 (discussed supra at p. 157), jurors who identified as a one, [against the death penalty], were removed for cause after they affirmed, in response to the trial court's leading questions, that they could never vote for death.

Those who identified as being in category 3 were presumed to have identified themselves as persons who, despite supporting the death penalty, believed they could not apply it. The trial court followed up with each juror who self-identified as a three, to confirm that this was so, before removing them.

However, with respect to those jurors who said they belonged in category four, there was virtually no follow-up or testing of their answers.

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[87]Linking an unwillingness "to convict anybody" to category one, appears to be just another example of the trial court misspeaking. This was the only time, to appellant's knowledge, that opposition to the death penalty was so linked by the trial court. However, this example demonstrates why having a form, that is correct and stays the same for each juror, is important, especially in a capital case.

The trial court routinely assumed that jurors' self-assessment – that they could be fair to both sides – was valid. It is reasonable to assume that anyone who said they were a four supported (or at least did not oppose) the death penalty.[88] However, none of those in category four were asked to describe the strength of their position, or any follow-up questions pertaining to their ability to consider such factors as the defendant's background, sympathy, or other mitigating factors, before deciding upon the appropriate penalty. No one in category four was asked if they believed death to be the only appropriate punishment for those convicted of more than one murder.

The voir dire process encouraged panelists to claim they were in category four, and rarely questioned that self-assessment. As a result, the process moved swiftly, without careful attention to whether the voir dire was constitutionally effective in weeding out bias and impartiality on the death penalty. For example potential juror number 6495 was only asked, "What do you think?" He responded by saying, "I place myself in number four category." The trial court followed up with, "You believe you could consider the evidence on both sides and make a decision appropriately?" The juror said, "Yes, sir" (1 RT 339), and the trial court posed no further questions about the death penalty. Eventually, this person took a seat on appellant's jury as sworn Juror No. 3. (3 RT 585.)

Neither the questions he was asked, nor the answers he gave, establish that Juror No. 3 would not vote for the death penalty in all cases of first degree murder with special circumstances, since jurors, for example, who would *not* vote for death in the case of vehicular manslaughter, could

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[88]This is a reasonable assumption to make since all jurors were asked to identify themselves as ones, if they did not "believe in" or were opposed to the death penalty.

still correctly conclude that they did not fit into what the trial court called category two. Under the system used by the trial court, such a juror could still properly assume s/he was a qualified "four."

Similarly, in the death qualification questioning of potential juror number 6573, the trial court asked just two questions and the juror responded with just two, one-word replies: The Court: "What do you think?" The potential juror responded, "Four." (1 RT 343). The trial judge then asked,

> When you say four, that means to me that you believe you could consider both the good and the bad evidence and make a decision based upon that evidence; is that correct?

(*Id.*) Juror number 6573 responded, "Definitely." (*Id.*) For the trial court, these two, separate one-word responses were sufficient to meet the death qualification standard. However, simply believing that one is capable of making "a decision based upon the evidence" does not necessarily mean that one would not still vote for death in all cases of first degree murder with a special circumstance. This type of general questioning about a juror's ability to "make a decision" is similar to the type of general questions of "fairness and impartiality" criticized in *Morgan v. Illinois, supra*, 504 U.S. at p. 735. Jurors might truthfully respond, and be personally confident, that they could make a decision after hearing the evidence, all the while "leaving the specific concern unproved." (*Id.*) Appellant has no way of knowing, for example, since the questions were never asked, whether any of the jurors who decided his fate also believed that a defendant guilty of more than one murder unequivocally deserved the death penalty; or that the testimony of appellant's family members was an inappropriate consideration for determining penalty. Although these were included in appellant's proffered jury questionnaire, because the trial court

rejected it out of hand, these important questions were never asked.

In another example, when the trial court called on prospective juror number 4027, the juror simply said, "Put me in category four." When the court followed up by asking, "You could see yourself going either way?" juror number 4027 responded only with, "Yes, sir." That concluded this juror's death qualification. (2 RT 518.) Allowing jurors to self-assess, and then following up with just a single leading question, falls woefully short of the "long and tedious business" that this Court anticipated when it referred to the death qualification process in a capital case. (*People v. Wilson, supra*, 44 Cal. 4th at p. 790.)

Defense counsel objected to the cursory manner in which the trial court conducted the voir dire, saying "It is too fast . . . I think you have to delve into these individuals a little more in-depth." (1 RT 330.) However, the trial court responded that it was satisfied with the previous juror's answers and that it was "very comfortable" with the voir dire. (1 RT 330-331.) While the defense was clearly objecting to the voir dire *in general* as being too hurried and superficial ["For the record, I just want to object to the manner in which this court is conducting this voir dire" (*Id.*)], the trial court dismissed counsel's objection by explaining only that the immediately preceding prospective juror's answers were sufficient. (*Id.*)

These types of interchanges, which the trial court deemed sufficient to death-qualify the panels, are found throughout the record, and many of the panelists who were questioned in this manner became sworn juror's on appellant's jury. For example, prospective juror number 9942 was death-qualified as follows:

> THE COURT: Juror No. 9942, good morning.
> PROSPECTIVE JUROR NO. 9942: I believe I am a number four. I can also weigh all the evidence and I am an open-

minded person.
THE COURT: All right, let's go to Juror No. 8045.

(1 RT 329-330.) Without more, this panelist was considered by the trial court to be death-qualified and eventually became sworn Juror No. 2. (2 RT 585.) Similarly, the prospective jurors who later became sworn Jurors No. 5 and No. 6 went through a similar process:

THE COURT: Juror No. 8667?
PROSPECTIVE JUROR NO. 8667: I think I am a number four, your honor.
THE COURT: Okay, why?
PROSPECTIVE JUROR NO. 8667: Because I think I am flexible. I could weigh all the evidence.

(1 RT 324.) This panelist became sworn Juror No. 5. (2 RT 585.) Juror No. 6 was examined as follows:

THE COURT: Good morning.
PROSPECTIVE JUROR NO. 1780: I feel that I am a four.
THE COURT: All right.
PROSPECTIVE JUROR NO. 1780: I am open-minded and I do make decisions on my job every day.
THE COURT: And you could consider the good and the bad evidence?
PROSPECTIVE JUROR NO. 1780: Yes.
THE COURT: And make a decision accordingly?
PROSPECTIVE JUROR NO. 1780: Yes.

(1 RT 328.) This panelist became sworn Juror No. 6. (2 RT 585.) A similarly cursory and unexamined process was used with prospective juror number 2148, who became sworn Juror No.11.:

THE COURT: Do you think you would be able to consider all the mitigating evidence and all the aggravating evidence and to weigh them and to make a decision?
PROSPECTIVE JUROR NO. 2148: Yes, I believe I could do that.
THE COURT: So you would consider yourself what I would

call a category four person. [End of inquiry.]

(2 RT 517; 2 RT 585.)

The trial court's abbreviated method for identifying unqualified jurors provided appellant with virtually no opportunity to uncover bias on the part of the jurors. This Court has recognized that "[w]hen *voir dire* is inadequate, the defense is denied information upon which to intelligently exercise both its challenges for cause and its peremptory challenges." (*People v. Bolden* (2002) 29 Cal. 4th 515, 537.) Here, the manner in which the trial court conducted voir dire made it impossible for appellant to actually identify those jurors who, despite their personal belief in their own fairness or "open-mindedness," would actually be unwilling to consider such factors as sympathy, appellant's background, or other mitigating evidence which appellant might present in the penalty phase.

The four-category self-assessment procedure employed by the trial court to death-qualify appellant's jury not only included erroneous definitions, but relied almost exclusively on jurors being able to accurately assess whether they held views which would substantially impair their ability to sit on the case. In short, Judge Perry's cursory and inadequate voir dire and his refusal to amend the questioning process upon defense counsel's objections, deprived appellant of his right to fully question jurors in the areas that would enable him to effectively exercise his challenges for cause and denied him his right to an impartial jury under *Witherspoon* and *Witt*. (See *Morgan v. Illinois, supra*, 504 U.S. at pp. 729-731.) Ultimately, the trial court's superficial and haphazard voir dire resulted in a jury that was not death qualified, in violation of appellant's right to a fair and impartial jury, a fair trial and a reliable penalty determination under the United States Constitution and its state counterparts. (U.S. Const., 6th, 8th

& 14th Amends.)

2. The incomplete voir dire led to the seating of a juror who was not death-qualified.

The second problem with the trial court's voir dire was the speedy and disorganized way in which the trial court carried out the voir dire. In the absence of a written questionnaire,[89] the process not only lent itself to error, but also to the inability to *discover* the error. In turn, these oversights led to the seating of a sworn juror who had never been asked a single question about her views on the death penalty: seated Juror No. 10.

As shown in the preceding argument, the category system used by the trial court was an inadequate substitute for a jury questionnaire and an in-depth voir dire process. Under the circumstances, it cannot be said that the trial court effectively identified and removed prospective jurors who would always vote for death in the case of first degree murder with special circumstances. Not a single prospective juror was asked that specific question. However, even if this Court were to find that the trial court's system was a sufficient screening device, the trial court's voir dire must still be struck down as constitutionally inadequate because it resulted in at least four potential jurors being passed over altogether in the death qualification process.

The trial court's method for questioning potential jurors was carried out so rapidly, so inconsistently, and in such a disorganized fashion, that it

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[89]While this Court, in other capital cases, has rejected claims that a voir dire was "hasty" or "perfunctory," in those cases the trial court used written jury questionnaires which supplemented oral voir dire. See, e.g., *People v. Carasi* (2008) 44 Cal.4th 1263, 12 , fn 7 [70-question form] *People v. Stitely* (2005) 35 Cal.4th 514, 538 [25-page questionnaire]; *People v. Stewart* (2004) 33 Cal.4th 425, 441 [13-page questionnaire]; *People v. Navarette* (2003) 30 Cal. 4th 458, 486 [31-page questionnaire].

was virtually impossible for anyone, including the trial judge himself, to keep track of what was going on.[90] The record contains multiple examples of confusion resulting from the fast-paced manner in which the trial court chose to conduct the voir dire. In fact, one juror had to stop the proceedings to alert the trial court to its oversight.[91]

The most striking example of critical matters being overlooked was the trial judge's failure to realize he had not questioned potential jurors 5234, 0416, 5802 and 5613[92] *at all* about their views on the death penalty. This is especially significant because juror 5613, who was only questioned on other unrelated topics during voir dire, was ultimately seated as sworn Juror Number 10. (2 RT 585.) Without any examination into this individual's beliefs on capital punishment, it cannot be said that appellant's jury was free of any individual who held views that "would prevent or substantially impair the performance of his duties as a juror in accordance

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[90]The trial judge admitted uncertainty as to which potential jurors he had questioned on certain topics: "Anybody else? I'm sorry. And I'm having trouble because we lost so many jurors here." (2 RT 547.)

[91] PROSPECTIVE JUROR NO. 9942: Your honor, you skipped us.
THE COURT: I skipped you guys?
PROSPECTIVE JUROR NO. 9942: Yes.
THE COURT: Thank you for telling us.
(1 RT 381-382.) In this example, the trial court had forgotten to question four people about whether they or their relatives had ever been charged with a crime.

[92]See, generally 2 RT 486-595. There is no evidence that any of these people were examined for their views on the death penalty, though each was questioned on other topics: For juror 5234, see 2 RT 541, 550, and 568. For juror 0416, see 2 RT 532. For juror 5802, see 2 RT 547, 554, 559 and 576. For juror 5613(who became seated Juror Number 10), see 2 RT 544, 552, 558, 562, 574, and 585.

with his instructions and his oath." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.)

The trial court assured the defense that it was "comfortable" with the process, that the system was working, and that the trial court was not going "too fast," to follow what was going on. (1 RT 331.) However, the system – having to rely strictly on memory or error-free note-taking for ensuring that each panel member was qualified to serve – was not working well at all. The trial court opted to go without a questionnaire, and had ample time to prepare a voir dire that would meet constitutional requirements. Unlike other trial court responsibilities, "the conduct of voir dire in a death penalty case is an activity that is particularly susceptible to careful planning and successful completion." (*People v. Heard* (2003) 31 Cal.4th 946, 966.) Here, the trial court was given multiple opportunities to fashion both a death-qualification process, and a general voir dire, that was complete, accurate, and effective. Instead, it repeatedly rejected those opportunities, always confident that it was capable of adequately covering its bases, when in fact it was not.

While questionnaires are meant to supplement effective one-on-one, in-person questioning, not supplant it, in this case the questionnaire would have been a welcome improvement, and would have assured that every juror was subjected to at least minimal screening. As it was, without a proper system for guaranteeing that each juror was fully questioned, critical matters fell between the cracks, with neither the court's nor the parties' knowledge. In conducting voir dire, "particularly in capital cases, . . certain inquiries *must* be made to effectuate constitutional protections." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 730, emphasis added.) If proper inquiry is not made, the conviction, or at the very least, the sentence of death, may be

invalid. (*Id.* at p. 739; *Mu'Min v. Virginia, supra,* 500 U.S. at pp. 431-432 [given the crucial role of voir dire plays in protecting the right to trial by an impartial jury, perfunctory voir dire is not sufficient].)

On the present record, there can be no doubt that the court's short-cut voir dire resulted in a constitutionally deficient jury selection process. The trial court's superficial and disorganized procedure undermined the very purpose of general voir dire: "ferreting out bias and prejudice on the part of prospective jurors." (*People v. Wilborn, supra,* at p. 343; *Rosales-Lopez, supra,* at p. 189.) In appellant's case, with the notable exception of the scrupled jurors, who were all promptly excused for cause, the trial court essentially rubber-stamped the panelists' suitability for service on this capital jury.

The errors in this case are such that it is impossible to determine whether any of the seated jurors, including, but not limited to, Juror Number 10, held disqualifying views. (*People v. Cash* (2002) 28 Cal.4th 703 [failure to conduct adequate voir dire is reversible error because it is not possible to determine from the record whether the individuals ultimately seated as jurors held the disqualifying views]; *Morgan v. Illinois, supra,* 504 U.S. at p. 739 [inadequate voir dire requires reversal]; see also *People v. Holt, supra,* 15 Cal.4th at p. 661 [reversal required for inadequate voir dire that denies the defendant a fair trial].)

3. Inadequacy of the general voir dire

In addition to the inadequacy of the death qualification portion of the voir dire in this case, the general voir dire was similarly flawed. As with the death qualification questions, the trial court relied entirely on the juror's themselves coming forward with information, rather than making the specific, and necessary, inquiry. This flawed procedure was most apparent

in the court's general questioning with respect to gangs and gang membership.

Although the initial questions posed to the first jurors were reasonably adequate, the process quickly deteriorated into the same types of short-handed, meaningless interchanges that plagued the rest of the voir dire. Questioning that started as "[I]f the evidence persuades you that Mr. Salazar was a member of one of these gangs so-called, is that going to be enough just of itself to vote guilty?" (1 RT 429), soon ended up as, "Do you know anybody in a gang?" (1 RT 444.) If a juror said they did not, the trial court was satisfied that they held no disqualifying attitudes. However, simply asking panel members if they knew anyone in a gang, was obviously not sufficient for determining, even as a preliminary matter, whether a particular juror might hold view about gangs or gangmembers which would make it impossible for appellant, an admitted gang member, to receive a fair trial.

Knowing a gang member personally might have little bearing on whether that person would harbor disqualifying biases against a criminal defendant who belongs to a street gang. In fact, the opposite may be true. Persons who only know gang members from what they have seen or heard in the news might be among the most biased, and least able to treat gang-related cases fairly. Appellant had a right to have this area of inquiry – how panelists felt about gangs and gang-related activity – explored in much greater detail than the trial court was willing to indulge. The trial court gave short shrift to these, and many other, topics that directly affected appellant's case.

The manner in which the trial court conducted the voir dire in appellant's case deprived appellant of his state and federal right to a fair and

impartial jury in both the guilt and penalty phases of the trial, his state and federal right to due process and his right to a reliable guilt and penalty determination. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 16, 17.) The trial court's abuse of discretion in failing to conduct a constitutionally adequate voir dire has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution. Appellant is entitled to a new guilt and penalty trial.

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VIII

CUMULATIVE ERROR UNDERMINED FUNDAMENTAL FAIRNESS AND VIOLATED EIGHTH AMENDMENT STANDARDS OF RELIABILITY IN THIS CASE

Even assuming that none of the errors identified by appellant are prejudicial by themselves, the cumulative effect of these errors undermines confidence in the integrity of the guilt and penalty phase proceedings. (*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438- 1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

This Court must reverse unless it is satisfied that the combined effect of all the errors in this case, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* standard to the totality of the errors].)

In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. (*See Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*), *cert. denied*, 440 U.S. 974 (1979) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-43 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v.*

Wallace (9th Cir. 1988) 848 F.2d 1464, 1476.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

In appellant's case, even before the trial commenced, the prosecutor and the trial judge expressed doubt that this was a case of first degree murder. Because this was apparently "not an overwhelming case" for murder, the trial court refused trial counsel's request for second counsel, as well as his request for written jury questionnaires as part of voir dire. Appellant has argued that the evidence against him was insufficient to establish that he even fired a weapon on the night of Guevara's death. The evidence conclusively established that only two weapons were fired at that time, and the prosecution conceded that Guevara fired one of them. The other weapon was fired either by Rascal or appellant. Rascal testified that he alone shot and killed Guevara and numerous witnesses testified that Rascal and Guevara were involved in a scuffle. In a prior proceeding, Rascal was convicted of killing Guevara, and at the time of appellant's trial was serving time for that killing. There was no credible or competent evidence that appellant, rather than Rascal, was responsible for Guevara's death.

However, even assuming that appellant fired the fatal shots, then it must also be true that Rascal was fired upon and seriously wounded by Guevara, before appellant fired a single shot. These facts strongly suggest that if appellant fired a weapon, he did so only in response to a sudden, deadly attack by Guevara, and that shooting Guevara was necessary to save his own or Rascal's life. There was no evidence at all from which the jury could conclude that appellant committed first degree premeditated murder.

Appellant's conviction was also the result of serious instructional

error which deprived him of his constitutional right to a fair trial. Each of these errors, alone, was sufficiently prejudicial to warrant reversal of his guilt judgment. It is in consideration of the cumulative effect of the errors, however, that the true measure of harm to appellant can be found.

As argued previously in this brief, appellant's juror's were never told that if they, individually, believed that appellant was guilty of an unlawful killing, but had a reasonable doubt as to whether it was murder or manslaughter, the juror was *required* to find manslaughter, giving the benefit of the doubt to appellant. Moreover, the juror's were never told that if they were in doubt between first and second degree murder, they were *required* to find for second degree murder, again giving the benefit of their doubt to appellant. In each instance, jurors were told that giving the benefit of the doubt to appellant was only appropriate if all of the jurors, collectively and unanimously, entertained a doubt. These instructions lowered the State's burden of proof and effectively made first degree murder the default verdict.

In addition, these instructional errors were compounded by the trial court's failure to correct CALJIC No. 8.71, or provide the jury with the correct instruction, CALJIC No. 17.11, when the jury sent a note to the judge asking for clarification. Rather than explain that unanimity of doubt was an unnecessary prerequisite to giving appellant the benefit of their doubt, the trial court simply referred the jury back to the same confusing instruction. The next day, the jury returned a verdict of first degree murder.

Further, the trial court failed in its *sua sponte* duty to instruct the jury that pre-offense oral statements attributed to appellant should be viewed with caution. In appellant's case, there was no evidence at all that appellant killed Guevara as an act of premeditated murder. Rather, the evidence

suggested that appellant and his friends had simply come to the Beef Bowl because they were hungry and wanted to buy food, and that the violence which erupted was a spontaneous, unexpected occurrence. The evidence was unrefuted that the victim, Guevara, was armed with a .25 caliber weapon, shot his weapon first, and seriously wounded Rascal. Nevertheless, the prosecutor argued to the jury that it would be unreasonable to find that appellant had committed anything less than first degree premeditated murder, since appellant's own statements demonstrated that he and Rascal were talking about "gaining control of this particularly area for Harpys," that they had "already sought quarrels inside the Beef Bowl" (5 RT 998), and "they wanted to find someone to go after and they did." (5 RT 999.) Most of the statements attributed to appellant came in through Kathy Mendez. However, in each case Mendez was never certain as to what exactly was said, or whether it was said by appellant or Rascal. Nevertheless, these hearsay statements came in as admissions and became the linchpin of the State's claim that appellant committed premeditated first degree murder. Without these statements, allegedly attributed to appellant, there simply would have been no evidence to suggest that he had done anything more than, at most, acted in defense of his friend when suddenly attacked by a rival gang member.

Finally, the voir dire of the jury in this case was entirely ineffective and inadequate for allowing appellant to select a fair and impartial jury, both in the guilt and penalty phases of this capital case. Although the process was more than adequate for identifying and removing jurors who had scruples against applying the death penalty, the process was entirely inadequate for identifying those death-leaning jurors who, if given the opportunity might well have revealed their feeling about the death penalty

as applied in appellant's case. Instead, the trial judge sped through the process, simply asking jurors to categorize themselves into one of four categories. As defined by trial court, the categories failed to identify those jurors who would vote automatically for the death penalty in all cases of first degree murder with a special circumstance. Out of two panels of jurors, only one juror identified himself as someone who would always vote for the death penalty in a murder case. Few jurors were asked anything more about their opinions on the death penalty than whether they would categorize themselves as "a four." Even the trial judge himself remarked that nearly every juror was simply saying he or she was "a four," with few exceptions. The defense attorney objected several times to the process, but the objections were overruled. The result was a jury that included at least one person who was asked no questions about his/her opinion on the death penalty or whether he/she could consider all of the evidence before making the penalty decision.

With respect to the guilt phase of the trial, appellant was denied the opportunity to identify and screen out those jurors who would invariably vote for guilt, regardless of the evidence, in order to get to the penalty phase of the case. The first degree murder conviction as well as the death judgment rendered in this case must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of trial. (*See People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) (See also *People v. Brown* (1988) 46 Cal.3d 432, 466 [state law error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be

harmless at the guilt phase but prejudicial at the penalty phase].) Error of a federal constitutional nature requires an even stricter standard of review. (*Yates v. Evatt* (1991) 500 U.S. 391, 402-405; *Chapman v. California, supra*, 386 U.S. at p. 24.) Moreover, when errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams, supra,* 22 Cal.App.3d at pp. 58-59.) Even if this Court were to determine that no single penalty error, by itself, was prejudicial, the cumulative effect of these errors sufficiently undermines the confidence in the integrity of the penalty phase proceedings so that reversal is required. Reversal is mandated because respondent cannot demonstrate that the errors individually or collectively had no effect on the penalty verdict. (*Skipper v. South Carolina*, (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

For all the reasons stated above, the guilt and penalty verdicts in this case must be reversed.

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IX

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

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

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

A. Penal Code Section 190.2 Is Impermissibly Broad

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

eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offenses charged against appellant, Penal Code section 190.2 contained 19 special circumstances (one of which – murder while engaged in felony under subdivision (a)(17) – contained nine qualifying felonies).

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

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

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 4 CT 918-920; 16 RT 3672-3673. Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the

killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

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

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

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

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (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.

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) 530 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: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. Because these additional findings were required before the jury could impose the death sentence, *Ring*, *Apprendi*, *Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law

"necessary for the jury's understanding of the case." (People v. Sedeno (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

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

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (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 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, (10 CT 2329-2330, 2340-2341; 41 RT 3347-3348, 3355-3356), failed to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof,

the trial court committed prejudicial error 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. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

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

The failure to require that the jury unanimously find the aggravating

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

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

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (10 CT 2332 [CALJIC No. 8.87,

modified]; 41 RT 3348-3349.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecutor presented extensive evidence of appellant's alleged prior criminal activity under factor (b) and substantially relied on this evidence in her closing argument (See Argument VIII, *ante*.)

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

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

4. The Instructions Caused The Penalty Determination To Turn On An Impermissibly Vague And Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (10 CT 2341.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

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

5. The Instructions Failed to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (CALJIC 8.85(e), (f), (g), (i), and (j).) The trial court failed to omit those factors from the jury instructions (10 CT 2329-2330; 41 RT 3345-3347) likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights.

Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

6. The Instructions Failed 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. (10 CT 2329-2330.) 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 requested that the jury be instructed that "[t]he absence of any mitigating factor listed above may not be considered aggravating." (10 CT 2345.) The trial judge did not include this instruction in those given to appellant's jury. The jury in this case, therefore, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

7. The Instructions Failed to Inform the Jury That Lingering Doubt Could Be Considered a Mitigating Factor

The instructions failed to inform the jury that it could consider

lingering doubt as to appellant's guilt as a mitigating factor in determining the appropriate punishment. He requested such an instruction on lingering doubt (10 CT 2350), but the trial court denied his request (41 RT 3324.) This Court has held that evidence and argument about lingering doubt can be presented as a mitigating circumstance (*People v. Gay* (2008) 42 Cal.4th 1195, 1218; (*People v. Terry* (1964) 61 Cal.2d 137, 145-147), but nonetheless repeatedly has held that a lingering doubt instruction is not required by state or federal law, and that the concept is sufficiently covered in CALJIC No. 8.85 (*People v. Zamudio* (2008) 43 Cal.4th at p. 370; (*People v. Cox* (1991) 53 Cal.3d 618, 675-679.) Contrary to these rulings, the trial court's refusal to give the instruction on lingering doubt violated appellant's federal constitutional rights to due process, equal protection, the full consideration of his mitigating evidence and a reliable and non-arbitrary penalty determination. (U.S. Const., 8th and 14th Amends.; (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [right to present mitigation]; (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [having jury consider lingering doubt as a mitigating factor is a state created-liberty interest protected by Due Process Clause]; *Mills v. Maryland*, *supra*, 486 U.S. at pp. 383-384 [requirement of heightened reliability in capital sentencing].) Appellant asks the Court to reconsider its previous decision

8. 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. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

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

9. 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 ("LWOP") 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.) The trial judge refused appellant's request to instruct the jurors that if they found that any mitigating circumstance outweighed the aggravating circumstances, they shall to return a verdict of life without parole. (10 CT 2365.) Instead, the trial court instructed the jury with CALJIC No. 8.88, which does not address this

proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. (10 CT 2340-2341; 41 RT 3352-3354.) 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 non-reciprocity 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.)

10. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard of Proof And Lack of Need For Unanimity As To Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 292-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374;

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

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit apellant 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.

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11. The Penalty Jury Should Be Instructed on The Presumption of Life

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

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

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

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

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

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

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

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. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

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

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

prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons, supra*, 543 U.S. at p. 554), appellant urges the court to reconsider its previous decisions.

CONCLUSION

For all of the reasons stated above, the entire judgment – the conviction, the special circumstance finding, and the sentence of death – must be reversed.

DATED: August 26, 2011

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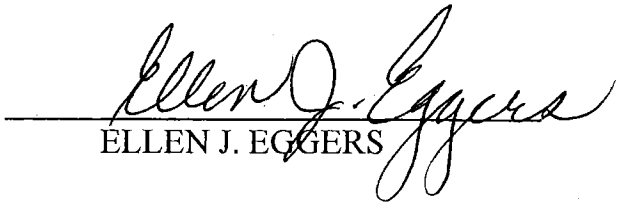
CERTIFICATION

I hereby certify that I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates, contains approximately 58, 788 words.



ELLEN J. EGGERS

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Magdaleno Salazar**
Case Number: **Supreme Court No. Crim. S077524**
Superior Court No. BA 081564

I Saundra Alvarez, declare that I am over 18 years of age, a citizen of the United States, and not a party to the within cause; my business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ **X** / **placing** the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on August 26, 2011, as follows:

Mr. Magdaleno Salazar
PO Box P-34200
San Quentin State Prison
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Ryan Smith
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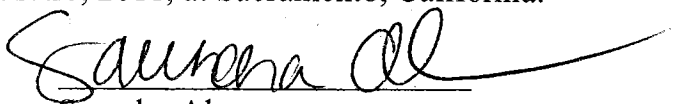
300 S. Spring Street, 5th Floor
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 26, 2011, at Sacramento, California.



Saundra Alvarez