IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff/Respondent,

v.

SONNY ENRACA

Defendant/Appellant

Supreme Court No.
Crim. S080947

Riverside County
Superior Court
No. CR-60333

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
Riverside County
Honorable W. Charles Morgan, Judge

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DEATH PENALTY

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INTRODUCTION AND SUMMARY OF ARGUMENT

A. Factual Background: A Reckless Provocation Leads to Tragic Consequences.

This case revolves around a confrontation between young people at a scene of illegal street races. The two decedents, Dedrick Gobert and Ignacio Hernandez, were shot to death after Gobert provoked and threatened a group of ABC members (a predominantly Filipino gang dressed in red) standing in front of a Pizza Parlor.

Gobert had a blood alcohol level more than double the legal limit; Hernandez's blood alcohol level was also well above the legal limit. They had previously confronted another Asian gang after a brawl they had had on the streets after Hernandez had been cut off during one of the races. A member of the first Asian group had pulled a gun on them, though the confrontation ended without further incident.

Gobert was so angry about the first incident that he drove his car recklessly away from the pizza parlor where he had parked and was spinning out and engaging in other erratic driving behavior. When he then returned to the front of the pizza parlor, Gobert got out of his car and stalked up to the Filipino gang members, whom he mistook for the group in the first incident. Gobert made rival gang signs, uttered curse words and gang insults, challenged them ("I ain't afraid to die") and finally reached his hand towards his waist in a way that suggested that he had a gun in his waistband.

When Gobert went for his waistband, members of the ABC group jumped him and began hitting and kicking him to prevent him from using his gun. Hernandez joined in the fight to help his companion. Gobert and Hernandez were beaten down by a group of ten to twenty-five ABC members. Gobert and Hernandez were both shot within one to two minutes of the

beginning of the fight and their companion, Jenny Hyon, was shot shortly after the initial shootings; she survived the shootings, but was unable to identify the shooter.

Although there was evidence that someone other than appellant Sonny Enraca (hereafter "Sonny") did the shootings and that Sonny had been involved in the melee, Sonny made statements to law enforcement that he had been trying to break up the fight and get his gang members to leave when he thought he saw Hernandez about to shoot him with Gobert's gun and shot Hernandez; Sonny said he shot Gobert immediately thereafter believing that Gobert had taken the gun back and was going to shoot him. Sonny stated that he shot Jenny intending only to shoot over her head to scare her.

B. Prosecution and Defense Theories

The prosecution theory of the case was that Sonny shot Hernandez and Gobert with premeditation and deliberation and contended that the premeditation and deliberation occurred in the seconds between the time Hernandez and Gobert were knocked to the ground and the time they were shot. The prosecutor analogized the premeditation and deliberation in this case to the split-second decision we all make as to whether or not to go through a yellow light – as if there were no difference between that common situation and present case in which the emotional charge of gang insults and threats to use a gun were involved.

The defense offered evidence that someone else did the shootings, but also contended that if Sonny was the shooter he shot in self-defense or unreasonable self-defense and that he was provoked by Gobert's highly inflammatory behavior, and that the shortness of time, the provocative circumstances, and Sonny's state of methamphetamine intoxication made it very unlikely that he acted with premeditation and deliberation. Rulings by the

trial court combined with arguments by the prosecutor deprived Sonny of a fair trial on each of these defenses.

C. Guilt Phase Issues

Argument I. Sonny's statements to law enforcement were given after he asked when he could see a court-appointed lawyer and he was erroneously told that he could not see a lawyer until he was arraigned. He was also never told about his rights under the Vienna Convention and the 1948 Treaty between the Philippines and the United States to consult with Philippine consular officials prior to being questioned by the police. Argument I (pp. 58 to 82 below) demonstrates that the trial court erred by failing to find the Sonny's statements violated his Fifth Amendment rights – he could not making a knowing and intelligent waiver when he was misadvised as to his right to see an attorney before being questioned and not informed of his right to consult with the Philippine consulate. This error was highly prejudicial because Sonny's statements were critical evidence against Sonny both on the issue of the identify of the shooter and on the shooter's state of mind.

Argument II. The trial judge refused to instruct the jury on manslaughter in the heat of passion or by sudden quarrel or that provocation was relevant to deciding whether Sonny had committed murder in the second degree. Argument II (pp. 82 to 100 below) shows that these rulings were erroneous because of the extensive evidence of provocation. The judge's refusal deprived Sonny of substantial defenses to the first-degree murder charges.

Argument III. The trial judge did give instructions on self-defense and manslaughter (as a result of unreasonable self-defense) but also gave CALJIC 5.17 and 5.55 which were ambiguous, unsupported by the evidence and to which the prosecutor referred in closing argument to suggest that

Sonny's actions in entering the scene deprived him of the right to assert self-defense. Argument III (pp. 101 to 108 below) demonstrates that the combination of the judge's giving these instructions, their ambiguity, and the prosecutor's reliance upon them to argue that the jury should not find self-defense because Sonny had "created the circumstances that justified the shooting" when there was no evidence that he had done so likely misled the jury to believe they could ignore self-defense even if they believed that Sonny shot Gobert and Hernandez believing they were each about to shoot him.

Argument IV (pp.109 to 117 below) urges this Court to reconsider its rulings that a waiver of defendant's right to testify must be taken on the record.

D. Penalty Phase Issues

Argument V (pp. 118 to 138 below) asks this Court to re-examine the use of victim impact evidence as a "circumstance of the crime" and to at least require that the jury be instructed that information about the social status of the victims is not to be used to aggravate the offense.

Argument VI (pp. 138 to 153 below) demonstrates that even assuming victim impact evidence was properly admitted and the jury was properly instructed, the prosecutor's repeated arguments that the jury should vote for death to accommodate the desires of the victim's families and avoid negative impacts on these survivors was clear misconduct in violation of state law and of the Eighth Amendment and due process and highly prejudicial, especially because the arguments were permitted by the trial judge after repeated defense objections.

Argument VII (pp.153 to 160 below) shows that the prosecutor's argument that lack of remorse was an affirmative reason for choosing death was misconduct that violated *People v. Boyd* ((1985) 38 Cal.3d 762, 775)

and deprived Sonny of due process when it was reinforced by the trial judge's overruling of a timely defense objection.

Argument VIII (pp. 160 to 167 below) shows that the trial judge erred and violated the Sixth, Eighth and Fourteenth amendments by refusing to give a lingering doubt instruction requested by the defense, particularly after one of the jurors was replaced and the jury was instructed to accept the guilty verdicts as having been proven beyond a reasonable doubt.

Argument IX (pp. 168 to 200 below) challenges the constitutionality California's death penalty statute as interpreted by this Court.

E. Cumulative Error

Argument X (pp. 201 below) shows that even if any of the errors was not alone sufficiently prejudicial to justify overturning the verdicts in this case, the interaction of these errors was cumulative and requires reversal of the first-murder convictions and the death penalty judgment.

STATEMENT OF THE CASE

A. Pretrial Proceedings

1. Pleadings and Related Litigation

On December 14, 1994, a three count felony complaint was filed alleging:

Count 1: murder of Ignacio Hernandez in violation of Penal Code section 187

-enhancement: use of a handgun within the meaning of Penal Code sections 12022.5(a) and 1192.7(c)(8)
-special circumstance: murder of Dedrick Gobert within the meaning of Penal Code section 190.(2)(a)(3)

Count II: murder of Dedrick Gobert in violation of Penal Code section 187

-enhancement: use of a handgun within the meaning of Penal Code sections 12022.5(a) and 1192.7(c)(8)
-special circumstance: murder of Ignacio Hernandez within the meaning of Penal Code section 190.(2)(a)(3)

Count III: willful, deliberate and premeditated attempted murder of Jenny Hyon in violation of Penal Code section 664/187

-enhancement: use of a handgun within the meaning of Penal Code sections 12022.5(a) and 1192.7(c)(8)
-enhancement: great bodily injury of Jenny Hyon, not an accomplice, within the meaning of Penal Code section 12022.7

(I CT 1-2.)

A preliminary hearing was held on July 6 and 7, 1995, despite a defense motion for a continuance (I CT 27), after which the trial court found sufficient cause to believe the allegations of each count and also found that there was sufficient evidence that the each of the alleged crimes was committed "for the benefit of and at the direction of and in association with a criminal street gang" within the meaning of Penal Code section 1866.22(b). (I CT 151-152.)

On July 20, 1995, an information was filed by the District Attorney's

Major Crimes Gang Division alleging:

Count I:

Willful murder with malice aforethought of Ignacio Hernandez in violation of Penal Code section 187

Enhancement: use of firearm under Penal Code section 12022.5(a) and 1192.7(c)(8)

Special Circumstance: murdered Dedrick Gobert within meaning of Penal Code section190.2(a)(3)

Count II

Willful murder with malice aforethought of Derrick Gobert in violation of Penal Code section 187

Enhancement: Use of firearm under Penal Code sections 12022.5(a) and 1192.7(c)(8)

Special Circumstance: Murder of Ignacio Hernandez within meaning of Penal Code section.190.2(a)(3)

Count III

Willful, deliberate and premeditated attempted murder of Jenny Hyon in violation of Penal Code sections 664/187

Enhancements: Use of firearm under Penal Code sections 12022.5(a) and 1192.7(c)(8)

Great bodily injury enhancement under Penal Code section 12022.7(a)

(I CT 154)

On January 3, 1996, the defense moved to set aside the information under Penal Code section 995. (1 CT 167-173.) That motion was denied on January 26, 1995, but the prosecution was ordered to file an amended information regarding the special circumstances allegations. (1 CT 177.)

On March 13, 1998, the prosecution filed an amended information which, pursuant to the court's directions, removed the second multiplemurder special circumstance allegation from count II (because there could not be two multiple-murder special circumstance allegations for the same crime) and also added specific allegations of criminal gang activity under Penal Code section 186.22(b) as to each of the three counts of the amended information. (4 CT 896-899.) On that same day, defendant pleaded not guilty to and/or denied all

allegations of the amended information.

On March 1, 1998, the defense had already moved to set aside any gang allegations on the grounds that there was insufficient evidence of criminal gang activity, which is defined as involving a pattern of multiple criminal acts, in that the three shootings here were done at the same time and could not constitute a pattern of three or more crimes and on other grounds. (4 CT 889-95.) This motion was denied on April 3, 1998. (4 CT 913.)

2. Efforts to Remove the Trial Judge for Bias

On July 3, 1995, the defense filed a declaration seeking removal of the trial judge under Code of Civil Procedure Section 170.6 alleging prejudice by the trial judge. (1 CT 21.) That relief was denied on January 26, 1996. On that same day, the defense obtained a subpoena *duces tecum* seeking documents governing the assignment of judges and records of assignment of cases for trial, including whether there was a challenge of a judge under CPC 170.6. (I CT 174-176.) On February 2, 1996, the trial court granted County Counsel's motion to quash that subpoena. (I CT 179.) On February 27, 1996, the defense filed a motion for reconsideration of the Code Civil Procedure section 170.6 request. (I CT 190.) That motion was denied on March 8, 1996 (I CT 241.) On March 18, 1996, the defense filed a petition for a writ of mandate with the Court of Appeal seeking removal of the trial judge. (5th Supplemental CT 1.) On March 29, 1996, the Court of Appeal denied the writ of mandate. (I CT 243.)

3. Litigation Over Miranda and Vienna Convention Violations

On January 8, 1995, the defense moved to exclude statements made by defendant, which it contended were taken in violation of both the Vienna Convention and defendant's *Miranda* rights. (5 CT 1195-1226; 1227-1259; see also 5 CT 1396-1398.) After written response from the prosecution (5 CT

1267-1275 and 1279-1341 and 1342-1355) as well as a letter from the Philippine Consul (5 CT 1356), the trial court held hearings on February 10, 16 and 23, 1999 and denied the motion on February 23, 1999. (5 CT 1357-1358, 1359, and 1400.)

4. Litigation over Discovery Violations by the Prosecution

There was considerable litigation over prosecution failures to comply with defense discovery requests and/or make disclosure.

On April 24, 1997, the defense moved to compel disclosure of 23 separate categories of information which had been informally requested from the prosecution, but which had not been disclosed. (2 CT 409-459.) On April 25, 1997, the court ordered that the motion be treated as an informal request. (2 CT 460.)

On November 13, 1998, the defense moved to compel disclosure of statements made by victim Jenny Hyon in light of prosecution concessions that they had interviewed Ms. Hyon, but had not taken any notes of the interview. (5 CT 1068-1083.) The motion was argued and submitted on November 20, 1998. (5 CT 1084; see 5 CT 1151-1157A for a transcript of the argument.) The defense then moved to compel and for sanctions barring the testimony of Jenny Hyon on November 30, 1998. (5 CT 1125-1147.) On December 11, 1998, the court ordered the prosecution to prepare and produce a written summary of Ms. Hyon's statements and disclose it to the defense. (5 CT 1161.) On December 21, 1998, the police produced the summary pursuant to the court order, copies were furnished to the defense and they were placed in a confidential envelope. (5 CT 1172.) On December 28, 1998, the court found that the discovery should have been provided earlier, but reserved ruling on sanctions. (5 CT1176.) Counsel has found no record of any sanctions being imposed and Jenny Hyon did testify for the prosecution at trial. (XIV RT 2643-2686.)

At trial two other discovery issues arose. On March 24, 1999, Christine Gilleres testified that she and others in her party had been drinking, that she had not seen the shooter and that there may have been two shooters, all matters which were not mentioned in discovery made available by the prosecution but which were included in statements made to prosecutors after the date of the witness statement of Gilleres which the prosecution had turned over to the defense. The defense stated that this was a "flagrant discovery violation" because no discovery of prosecution contacts with Gilleres between November 24, 1994 and March 21, 1999 (two days before she testified) was provided. (IX RT 1735-1736.) The defense sought relief, including a mistrial. (21 CT 5591.) On March 25, 1999, the court held a hearing on the defense motion, found that there was no *Brady* violation and imposed no sanctions. (21 CT 5593–94.)

On April 26, 1999, the defense filed a motion to compel disclosure (21 CT 5716-5766), but the trial court took no action on the motion. (21 CT 5767.) On April 26, 1999, just before the close of the guilt phase, the prosecution furnished the defense with a videotape version of the statement defendant made on December 12 of interview by Spidle, including Sonny's phone conversations in calls he was allowed to make. (XXVII RT 3768.) The prosecution explained that this was a videotape version of the audiotape, Exhibit 54, which was played for the jury, but that it had been misplaced and the prosecution only became aware of the videotape on the previous day. (XXVII RT 3669-3670.) Neither the prosecution, nor the defense sought to introduce the videotape into evidence at the guilt phase of trial.[1] (XXVII RT

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[1] The video was introduced during the penalty phase and discussed by defense expert Dr. Jean Nidorf who testified that Sonny's conversations on the tape showed remorse. See XXX RT 4338, XXX II RT 4613

3668, 3671.)

5. Litigation over Visas for Defense Penalty Phase Witnesses

There was extensive litigation in the trial court, the Court of Appeal and federal court seeking relief that would allow the defense to bring into the United States penalty phase witnesses from the Philippines. Defense efforts to obtain relief included:

- A motion for an order requiring the District Attorney to sign a "Parole Request" which would allow the witnesses to get a public benefit visa. (3 CT 650-72; October 23, 1997.)
- A motion to recuse the District Attorney because of his refusal to sign a Parole Request. (3 CT 673-698; October 24, 1997.)
- A motion that the court order dismissal of the penalty phase because of the District Attorney's refusal to perform a ministerial act to allow defense penalty phase witnesses to testify. (3 CT 740-750; November 6, 1997.)
- Motion for a judicial determination of materiality of testimony of proposed penalty phase witnesses. (3 CT 760-797; November 11, 1997.)
- Petition to the Court of Appeal for a writ seeking relief that would allow the Filipino penalty phase witnesses to testify. (See 3 CT 838; February 27, 1998.)
- A civil action in federal court seeking relief allowing Filipino penalty phase witnesses to testify. (See 4 CT 922-927; April, 14, 1998..)
- A petition for review of the Court of Appeal's denial of the petition for a writ. (See CT 954-955; May 27, 1998.)
- Order agreeing to terms under which Riverside County Sheriff

would take custody of the Filipino penalty phase witnesses while they were in the United States to testify. (CT 1016-1017; September 9, 1998.)

Although the defense got no formal relief from any court other than a brief stay of the penalty phase trial (see CT 839; January 29, 1998), as a result of defense efforts, the witnesses were eventually allowed into the United States and were able to testify in the penalty phase. Accordingly, no issue on appeal is being raised on this matter and therefore no further detail is provided here.

B. Guilt Phase Trial

The jury trial officially commenced on January 11, 1999 (5 CT 1183). Voir dire began on March 10, 1999 (6 CT 1520), continued on March 11 and March 17, 1999 (18 CT 4832 and 21 CT 5536) and concluded on March 18, 1999. (21 CT 5538.) Opening statements in the guilt phase were made and testimony began on March 22, 1999. (21 CT 5586-5588.) The prosecution guilt phase case was presented on 10 trial days from March 22 to April 7, 1999. (21 CT 5586 - 5588, 5685-86.) The guilt phase defense commenced on April 7, 1999 (21 CT 5686) and was presented on 8 trial days until the defense rested on April 20, 1999. (21 CT 5709-11.) The prosecution presented rebuttal evidence from April 20, 1999 and the presentation of evidence concluded with one prosecution and one defense witness testifying on April 21, 1999. (21 CT 5712-5714.) A stipulation was read to the jury on April 26, 1999 and both sides then rested. (21 CT 5767.) Closing arguments were delivered on April 26 and 27, 1999. (21 CT 5767, 5769.) The jury was instructed, sworn and began deliberating on April 28, 1999. (21 CT 5771) The jury deliberated on April 28, 29, and 30 and May 3 and 4, 1999 before reaching a verdict on May 5, 1999. (21 CT 5772-5775.) The jury reached the following verdicts: guilty of first-degree murder of Hernandez as charged in Count I (21 CT 5775); guilty of first-degree murder of Gobert as charged in Count II (21 CT

5776) and guilty of assault with a firearm on Jenny Hyon, a necessarily included offense of the offense charged in Count III. (21 CT 5777.) It made the following findings: that defendant used a firearm during the commission of the crime charged in Count I (21 CT 5778); that the crime in count I was done for the benefit of, at the direction of, and in association with a criminal street gang (21 CT 5779); that a firearm was used during the commission of the crime charged in Count II (21 CT 5880); that the crime in count II was done for the benefit of, at the direction of, and in association with a criminal street gang (21 CT 5781); that the allegation of a special circumstance of multiple murder (Penal Code section 190.2(a)(3)) was true (21 CT 5782); that a firearm was used in the commission of count III (21 CT 5783); that great bodily injury was inflicted on Jenny Hyon (21 CT 5784); that the crime in count III was done for the benefit of, at the direction of, or in association with a criminal street gang (21 CT 5785) and that the crime alleged in Count III was not willful, deliberate and premeditated. (21 CT 5786.)

C. Penalty Phase Trial

The penalty trial began with an opening statement by the prosecutor on May 12, 1999. (23 CT 6001.) The prosecution presented three victim-impact witnesses: victim Jenny Hyon, Carmen Vera (mother of Ignacio Hernandez), and Carolyn Gobert (mother of Dedrick Gobert). (23 CT 6001). The prosecution then rested.

The defense began presenting evidence on May 18, 1999. (22 CT 6003.) and continued on May 19, 20 and 24 (23 CT 6006, 6009, 6011). On May 19, 1999, juror no. 7 was removed after a hearing on defense concerns that the juror was not paying attention to defense witnesses. (23 CT 6006.) Closing arguments were made on May 25, 1999 and the jury was instructed and began deliberating on that date. (23 CT 6014.) The jury continued deliberating on May 26 and reached a verdict of death on May 27, 1999. (22 CT 6017-6019.)

D. Post-Trial Proceedings

On June 26, 1999, the defense moved for a new trial or reduction in sentence. (23 CT 6048.) That motion was argued and denied on July 23, 1999. (23 CT 6084.)

STATEMENT OF FACTS

A. Prosecution Guilt-Phase Case

1. Confrontations at Late-Night Street Races. On the night of November 18, 1994, Dedrick Gobert, Christine Gilleres, Ignacio Hernandez, Jenny Hyon, and Herman Flores drove from Los Angeles to Riverside to participate in illegal street races. (VIII RT 1605; XVI RT 2646.) Their friend Charles Madrid was also at the races. (VIII RT 1651.) When they got to Riverside, Hernandez was in a race and was cut off by another car; Hernandez got into a physical confrontation with the driver of the car that cut him off and then a number of that driver's friends, all Asian, joined in; Gilleres testified that there were 10 of them fighting with Hernandez. (VIII RT 1606-1608; see also XVII RT 2790-2793 [Testimony of Charles Madrid]: Hernandez was confronted by 12 or 13 Asians and whites and Madrid pulled him away].) According to Gilleres, Hernandez had won the fight and when police sirens were heard, they all left the scene to avoid getting into trouble. (VIII RT 1609.) Hernandez left in his car with Jenny Hyon; Gilleres left in Dedrick Gobert's car with Gobert and Flores. (VIII RT 1609-1610.)

Both cars drove to Etiwanda Avenue where there was a pizza parlor, and other stores, and parked in front of the pizza parlor. (VIII RT 1610-12.) Etiwanda is a four-lane road with a central median strip and a substantial set back from the roadway with grassy areas and a sidewalk. (See Exhibit Exh. 4.) On the sidewalk in front of the pizza parlor, they encountered a group of Asians, whom Gilleres recognized as having been involved in the previous confrontation with Hernandez. (VIII RT 1612.) They came up to Hernandez and started arguing and yelling. (VIII

RT 1613.) This group was dressed in red and some witnesses thought they were a "Wah Ching" gang. (See XX RT 3268 [Testimony of Daryl Arquero]; XXIII RT 3470-71 [Testimony of Herman Flores].) A verbal confrontation ensued and the groups were yelling and cursing at each other. (VIII RT 1613-14 [Testimony of Christine Gilleres]; RT 3154 [Testimony of Cedrick Lopez].) Gobert and his group claimed to be Crips and a gun was pulled by one the Asians. (XXIII RT 3470-3471 [Herman Flores], but see VIII RT 1673 [Christine Gilleres denied that her group identified themselves as Crips].) Jenny Hyon went crazy at the sight of the gun, yelled and screamed that she was not intimidated by guns and used abusive language. Christine Gilleres testified that Jenny yelled "shoot me," but Gilleres ran up and yelled "you are not going to shoot anybody" (VIII RT 1615, 1665-1666) ; Roger Boring told Investigator Bernard Skiles that Jenny Hyon said "fuck you nips." (XVI RT 2622). The young man holding the gun was described as short and young with a buzzed haircut, wearing a white tee shirt and baggy pants, Asian and part Latino. (VIII RT 1669, 1695 [Gilleres][2]). Hyon described him as 5'4" or 5'5" and about 18 years old with spiked hair, wearing a white shirt. (XVI RT 2671.) The confrontation ended when an older Asian man came along and apparently told the guy with the gun to put the gun away because the young man with the gun nodded and put the gun away. (VIII RT 1666-1667.) The yelling back and forth continued for a short time after the gun was put away and then both sides backed away. (VIII RT 1669.)

Gobert became enraged by the incident and drove his car around erratically on Etiwanda, making u-turns. (XV RT 2509-10) [Testimony of Roger Boring]; X RT 1842 [Testimony of Lester Mailiwat]; XX RT 3226 [Testimony of Darryl

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[2] Gilleres later testified that the person she saw shooting Hernandez and Gobert looked like the guy that pulled the gun on Jenny, but was not sure. (VIII RT 1764.)

Arquero]; but see VIII RT 1618 [Gilleres testifies that Gobert was driving at a normal rate of speed and not erratically].) Gobert appeared drunk at this time. (See XV RT 2465, 2513 [Roger Boring]; XIX RT 3052 "visibly drunk," smelled of alcohol and"belligerent." [John Frick]; but see VIII RT 1646 [Gilleres testified that Gobert had had only one bottle of Old English Malt Liquor which he shared with her]; XVI RT 2663-64 [Hyon also testified that Gobert had drunk only one bottle of Old English. [3]

Gobert then parked his car on Etiwanda and ran from the street toward the sidewalk in front of the pizza parlor and confronted defendant's group. (VIII RT 1676), members of Ahkro Boyz Crazy (ABC), which was a predominantly Filipino gang many of whose members were wearing red and considered themselves a Bloods gang. (IX RT 1827, 1833 [Lester Maliwat].) Gilleres tried to stop Gobert (VIII RT 1677-78) and witnesses heard her or Hyon yell to Gobert that these were the "wrong guys." (XVI RT 2514 [Testimony of Roger Boring]; XIX RT 3063, 3084 [John Frick]; XX RT 3233-3234 [Daryl Arquero].) According to Gilleres, the ABC group was chanting "bloods, bloods, bloods." (VIII RT 1619.) Gobert made gestures with his hands including stretching his arms out with his palms up and making the letter "C" (for Crips) with his fingers (IX RT 2030-31, 2042-43 [Lester Maliwat].) He was very angry and yelled that he was "not afraid to die" (XIX RT 3084-85 [John Frick]), asked "What's up cuz?" (VIII RT 1709 [Gilleres]), yelled at the ABC group that he, Gobert, was a Mafia Crip (XIV RT 2446 (Roger Boring]; XVI RT 2622 (Investigator Bernie Skiles testifying to what

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[3]Toxicologist Maureen Black testified that she tested blood samples from Gobert and Hernandez and found that Gobert's blood alcohol level shortly after his death was .16 and that Hernandez level was .14. (XVII RT 2742.) People with this level of blood alcohol are often very impaired with slurred speech, staggering. (XVII RT 2758.) It was stipulated that Hyon tested at .11 blood alcohol at 3:13 pm the morning she was shot. (XVII RT 2745.)

Roger Boring had said during an interrogation] and then said "fuck you slobs" and "fuck bloods." (See IX RT 1972-73, 2004 [Lester Maliwat].) Alfred Belamide testified that Gobert was dressed like a gang member and had a blue rag bandana. (XVII RT 2818.) Jenny Hyon testified that she yelled to the group Gobert was confronting not to pay any attention to him. (XVI RT 2672) Neither Roger Boring, nor Lester Maliwat, both members of ABC at the scene, initially took Gobert, alone confronting a group of 10 to 25 ABC members, very seriously. (IX RT 1978 (Maliwat) But Gobert then put his hands to his waistband in a gesture which made many witnesses believe Gobert had a gun. ((XV RT 2513-2514, 2531 [Roger Boring]), XIX RT 3110 [John Frick]); XIX RT 3168 [Cedrick Lopez]); XXIII RT 3460 [Detective John Schultz testifying to what Lester Maliwat told him during an interrogation]; XVII RT 2820 [Alfred Belamide]); XIV RT 2450 [Roger Boring]; see also testimony of Officer Michael Martin, prosecution witness on gangs: XII RT 2143 [it would have been reasonable to infer from Gobert's actions in these circumstances that Gobert had a gun and/or that he wanted the others he was confronting to think that he had a gun].)

As Gobert went to his waistband, members of the ABC group, thinking he had a gun, rushed him, began hitting and kicking him and knocked him down to the ground in the grassy area in front of the pizza parlor. (IX RT 2514-16 [Lester Maliwat]; VIII RT 1622-1623 [Gilleres].) Gilleres estimated that there were 25 people attacking Gobert (VIII RT 1626); Maliwat estimated that there were 8 or 10 (IX RT 1922); John Frick estimated there were 10 to 15. (XIX RT 3059, 3093.) Charles Madrid testified there were 12 or 13. (XVII RT 2795.) The fight continued out into the street and across the median strip of Etiwanda. (XV RT 2515.) Members of Gilleres group (Hernandez, Gilleres, Hyon and Flores) tried to hit anybody they could to defend Gobert, but were helpless. (VIII RT 1626.) The group attacking was hitting, kicking, and stomping Gobert. (VIII RT 1627.)

Gilleres lost sight of Gobert at some point as the fight went out into the street. (VIII RT 1626.). When Gilleres finally found her way through the melee, she saw Hernandez covering Gobert like a turtle shell. (VIII RT 1627-1628.). Gilleres then jumped on top of Hernandez to try help protect him and Gobert from further blows; while on top of them, Gilleres was kicked in the head and was dazed by the blow; she did not understand what happened when the shooting took place. (VIII RT 1627-28.) She got to her feet and heard shots but was so out of it that she did not know what they were. (VIII RT 1628.) When her head cleared, she saw the bodies of Hernandez and Gobert lying on the ground. (VIII RT 1633.)

Other witnesses testified that Gobert was knocked to the ground a second time in the street across the median divider (IX RT 1984, 1988 [Lester Maliwat]; XIV RT 2471, XV RT 2516-2517 [Roger Boring].) Boring testified that when Gobert was knocked to the ground a second time, people were kicking him all over. (XV RT 2469.) Hernandez was fighting with some members of the ABC group (IX RT 1979) and eventually jumped on top of Gobert to protect Gobert from further blows. (XV RT 2534.) Lester Maliwat testified that the fight with Hernandez was over when Claudio Hotea kicked Hernandez in the head, but that Hernandez was conscious. (IX RT 1923.)

Lester Maliwat testified that after Gobert was knocked to the ground a second time, somebody yelled "he has a strap (gun)." (IX RT 1986, 1998.) Lester ran away when he heard this warning. (IX RT 1989) Shortly after this, shots rang out. (Ibid.)

Gilleres testified the shooter "appeared to me to be the same guy who had put the gun in Jenny's face previously" in the confrontation with the other group. (VIII RT 1630:18-19). Jenny Hyon did not know if it was the same guy, but it was possible. (XVI RT 2671.) Lester Maliwat testified that after he heard the warning that "somebody has a strap," he ran back to his car and saw Defendant Sonny

Enraca point his arm at someone on the ground and shoot. (X RT 1923; see also X RT 1981, 1986) The gun was pointing down toward the ground at about a 45 degree angle. (X RT 2040.)[4] Lester panicked and started to drive away, and Sonny got in his car. Lester asked why he shot the girl and Sonny replied "fuck them ... They deserve it." (IX RT 1926.)[5] Maliwat also testified that as he was driving with Sonny, he saw Sonny remove shell casings and throw them out the window, (X RT 2009), but he did not see a gun thrown out he window. (X RT 2010.)

Roger Boring testified that he saw Sonny next to Gobert and Gobert was on the ground and Sonny shot him from a distance of 4½ feet. (XV RT 2482-83 but see XV RT 2572 [Boring acknowledges that he told defense investigator that he did not see the shootings, but says that he lied to her].). Boring did not remember if Gobert was on his back, or his stomach or sitting up when he was shot. (XV RT 2547.) Boring also testified that Sonny grabbed Hernandez by the head or shoulders, and shot him two or three times. The Hispanic guy was face down on the black guy when Sonny grabbed him (XV RT 2543.)

Roger Boring testified that after Gobert and Hernandez were shot, Jenny Hyon came running up and pushed Sonny from behind; he turned and fired at her. (XV RT 2553.) Hyon testified that she heard gun shots and one of them hit her (XVI RT 2678), but denied running toward the shooter (XVI RT 2678, 2681) who she testified was 15-18 feet away from Gobert and Hernandez. (XVI RT 2679.) Hyon survived, but is paralyzed and in a wheel chair with a spinal chord injury

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[4] Maliwat's testimony was contradictory on this point. On cross-examination, he denied seeing the actual shooting and said that he told Detective Schultz that he had seen it because Lester believed that was what Sonny had said. (IX RT 2001-2002.)

[5] Eric Garcia testified that later that night when asked why he shot, Sonny said "Maybe they deserved it." (IX RT 2320.) The trial judge described Eric Garcia as follows: "my opinion, this guy would break out in rash if the truth came around him." (XIV RT 2457:1-2.)

from the gun shot wound sustained that night. (XVI RT 2645.)

Hyon testified that the whole incident from the time of Gobert's confronting the group to him lying in the middle of the street was about one minute or two minutes. (XVI RT 2675, 2680.) Roger Boring testified that the initial skirmish took a couple of minutes before it went into the street. (XV RT 2469). Alfred Belamide testified that the whole fight took less than 5 minutes (XVII RT 2824) and that the time from the original rushing of Gobert to the shots was about a minute. (XVII RT 2847.) But Investigator Bernard Skiles of the District Attorney's Office testified that Boring told him that Gobert was on the ground for five to seven minutes and that the victim's friends (presumably Hernandez and Gilleres) came running up and that the girl was crying. (XVI RT 2615-16.) According to Roger Boring, defendant Sonny Enraca was not involved in the fighting.[6] (XV RT 2537.)

2. Forensic evidence. Coroner Daryl Garber testified that Hernandez was shot twice, once in the back of the chest and once in the head above his left ear, and died from these wounds. (VII RT 1550.) Abrasions on Hernandez' head suggest his head may have been against a hard surface when the shot to his head was fired. (VII RT 1553), but this was not certain and would not be true if the bullet stopped before reaching the side of his head where there was an abrasion. (VII RT 1598.) Gobert was shot in the head at an angle consistent with him lying on the ground, but a little movement of the head could dramatically change this conclusion; Gobert's head was definitely not on the ground when the bullet hit. (VII RT 1568, 1591.) Moreover, Gobert could have been in a sitting up (consistent with Sonny's description of events) when the shots were fired. (VII RT

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6. Other witnesses, particularly Lester Maliwat (XXIII RT 3459 [Testimony of Detective Schultz concerning what Maliwat told him]) placed Sonny Enraca in the fight. See also testimony of Marcus Freeman – shooter was involved in the fight. (XXIII RT 3484)

1591.) The gun shot wound to his head was the cause of Gobert's death. (VII RT 1569). Hernandez' body showed various abrasions consistent with a fight, but none were so serious as to be life threatening or lead to unconsciousness. (VII RT 1576.) There was no stippling (gunpowder residue) indicative of the shots that hit either victim having been fired from within two feet of either victim. (VII RT 1581-1582 [Hernandez]; 1587 [Gobert].)

Paul Sham, a criminalist, examined bullet fragments taken from the victims. (IX RT 1872-1873.) Of the three large bullet fragments he examined, one was so damaged that he could not identify its caliber (IX RT 1881), but the other two were .38 caliber. (IX RT 1882-1884.) The fragments were damaged enough that Sham could not determine if they were fired from the same gun. (IX RT 1881.) When Sham identified a bullet as .38 caliber, that could include .357 or.380 caliber or 89 mm., which are all about the same size (IX RT 1885.) None of the large projectiles he examined could have come from a .22 caliber cartridge. (IX RT 1886.)

3. Defendant's Statements. Sonny was brought in for interrogation by the Riverside Sheriff's Office on December 12, 1994. When first interrogated by Investigator Schultz of the Riverside Sheriff's Department, Sonny denied being at the street races that night and said he was at home watching movies with his girlfriend. (21 CT 5603-04, 5605 [tape of statement to Schultz].) Shultz confronted Sonny with assertions that Lester Maliwat, Cedrick Lopez and Sonny's girlfriend Dawn all said he was there that night, but Sonny continued to deny being at the races the night of the shootings. (21 CT 5606-5616). Ultimately, Sonny asked when did he get to see his lawyer, he was told that he could get one only when he went to court for arraignment in 48 to 72 hours. Schultz told Sonny he should "deeply consider" that and the interview ended. (21 RT 5616-17; see generally, Exhibit 53A, transcript taped Interview with Sonny Enraca and Investigator

Schultz, 21 CT 5598-5617.) But later that same night, as he was being booked by Investigator Eric Spidle, Sonny indicated he might be willing to talk to Spidle about what happened. (21 CT 5630.) Spidle stated and Sonny agreed that Spidle did not ask him any questions about the incident and that the only promise Spidle made was that he would tape record any statement and give it to the District Attorney to consider when deciding what charges to bring. (21 CT 5630-5631.) Spidle asked Sonny if "he knew his damn rights" and whether he wanted Spidle "to read them again," and Sonny replied "Nah, I know my rights." (21 CT 5631-5632.) Spidle, like Schultz, advised Sonny that Sonny would not get an attorney until after he went to court for arraignment and that it would be 48 to 72 hours before this happened. (IV RT 744:26.) Spidle was fully aware that Sonny is Filipino born and raised. (21 CT 5633; IV RT 803.) Schultz was also aware that Sonny is Filipino. (IV RT 727:10-18; 21 CT 5600.) Neither officer informed Sonny of his right to consult the Philippine consulate. (IV RT 727:20-27 (Schultz); 21 CT 5618-5674 [No mention of consulate in entire tape].)

An audio tape recording of Sonny's statement to Spidle was played for the jury and the transcript of that statement was given to the jury. (XII RT 2201-2205; transcript of this statement, Exhibit 54A, appears at 21 CT 5629-5674); a videotaped version of the statement was later located by the prosecution and turned over to the defense just before the close of evidence; it included a recording of Sonny's conversation with his girlfriend which was not included in the transcript of his statement to Spidle; neither party sought to introduce this videotape at the guilt phase of trial.[7] (XXVII RT 3768-3771.) Sonny's statement is summarized below.

Sonny stated that he did not want to go out that night because there had

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[7] The defense did play the videotape at the penalty phase. See XXIX RT 4186.

been an incident where a member of ABC had been shot by a La Sierra Reva (LSR), a Mexican gang, and he had been avoiding going to places like the races where this gang might be cruising. (21 CT 5635-5637.) Sonny indicated that he was on speed that night and he was coming down, leaving him kind of scared and nervous. (21 CT 5638.) In any case, Sonny was in front of the pizza parlor on Etiwanda, when Gobert drove up, slammed on his brakes, appeared angry and stopped in front. (21 CT 5643.) He made gestures as if he had a gun and was claiming some crip gang. (21 CT 5643-44.) He then said "fuck you" and "Mafia Crip" and Roger Boring answered back "fuck you, this is ABC gang blood." (21 CT 5645.) Sonny thought that Gobert was confusing his group with the Asians that his friends had been in a confrontation with earlier and tried to calm things down. (*Ibid.*) The "Oriental Chick" was telling Gobert to "kick back": and "that's not them," but then, one of Sonny's friends yelled "he's reaching," he's reaching" and then someone punched Gobert to prevent him from reaching for what they thought was a gun.. (21 CT 5646-5647.) There were about 10 members of Sonny's ABC group there. (21 CT 5647-48.) And the ABC group was yelling "cover him up" and "watch the gun" (21 CT 5648.) Then the Mexican guy, Hernandez, jumped in and was angry that they went on his car; and then the girls started swinging as well. (21 CT 5648-49.) And there were 10 guys from ABC fighting with Gobert, Hernandez and the two girls. It was everyone trying to pull everyone apart and hitting each other. (21 CT 5649.) The girls were warning "Don't touch the car [Hernandez' car]" and then started hitting Sonny's friends, but his friends pushed the two young women off off. (21 CT 5650.)

Sonny was trying to break things up and told the group "come on let's go ... just leave him [Gobert] the fuck alone," but Gobert was already knocked out. (21 CT 5650.) Hernandez was covering Gobert's body. Sonny did not recognize Hernandez, but thought he might be one of Sonny's friends; Sonny was trying to

see his face by pulling his hair to lift him and eventually asked him "where you from," but Hernandez slapped Sonny's hand away and Sonny thought Hernandez was reaching for a gun and going to shoot him. Sonny shot him first (Sonny already had his gun out) . (21 CT 5651.)

Sonny had his gun out because he was planning to shoot in the air to break up the fight. (21 CT 5652). Hernandez smacked Sonny's hand hard, turned quickly away and was on one knee; Sonny thought Hernandez had gotten the gun from Gobert's belt and was going to shoot Sonny and so Sonny shot him in the shoulder and he was leaning over as if he might shoot again, so Sonny shot him again. (21 CT 5652-5653; 5655.) Gobert then looked at Sonny and said "fuck you asshole," grabbed his friend and Sonny thought Gobert was grabbing his gun, so Sonny shot him. (21 CT 5653-5654; 5655.)

After shooting at Gobert, Sonny was pushed from behind by a girl who yelled "what the fuck you doing asshole"; Sonny really did not know what was going on since he fired the first shot and the girl got in his face said "come on" and was going to hit him. (21 CT 5654). Sonny did not know what to do, so he backed off and raised the gun to scare her, but she came towards him with her fists up; Sonny told her to step back and signaled with his left hand, but she charged at him and yelled "come on asshole" and kept coming toward him and he just shot. (21 CT 5656.) Sonny had just meant to shoot to scare her by shooting in the air over her head as he turned to run away. (21 CT 5657.)

Sonny stated that he fired a total of four shots with a five-shot, .38 revolver.[8] (21 CT 5657.) He then turned and ran to Lester's car which was still parked in the parking lot. (21 CT 5657-5658.) Sonny jumped into Lester's car,

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[8] He said it was .38 special, snub-nose revolver that he had found a long time before in Santa Ana.(21 CT 5662.)

went north to the 10 freeway and went back to Sonny's house. (21 CT 5659-5660.)

On that ride, Sonny threw the gun onto the freeway as they were passing over a bridge. (21 CT 5660.)[9]

Sonny admitted to Spidle that although he believed that he saw a gun before he shot, he never actually saw a gun on either Hernandez or Gobert. (21 CT 5663, 5664.) Sonny emphasized that he had not intended to kill them or he would have shot them when the incident first started; rather he was trying to break up the fight. (21 CT 5665.) The fight started after Gobert was yelling profanities at Roger and then seemed to be going for his gun. (21 CT 5665.)

Sonny did not see the girl fall. (21 CT 5667.) When he got to the car he did not know what he was doing; he felt like shooting himself. (*Ibid.*) He had had six drinks, but was not drunk because "it takes a lot for me to get drunk." (*Ibid.*) He was coming down from speed; he had inhaled two lines earlier that night, one line at around 5:00 pm and one around 8:00 or 9:00 pm. (21 CT 5667-5668.) Sonny wanted to make it clear that he was carrying the gun for protection because someone had shot an ABC member previously and the he was ashamed that he had used it because he had been preaching to other members to avoid violence. (21 CT 5671.)

After the initial interview with Spidle was concluded, Sonny rode in a police car with Spidle to show him the route Sonny took after leaving the scene of the shootings and to reconstruct where he had disposed of the gun used in the shootings, which he said he threw out of the vehicle when leaving the scene. (21 CT 5660; transcript of exchanges during ride to find location gun was thrown out

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[9] Sonny agreed to go with Spidle to go look for the gun and Exhibit 54A is a transcript of the exchanges between Sonny and Spidle during the ride that Sonny took with Spidle the night he was arrested. (21 CT 5618-5628, 5661.)

is Exhibit 55A, 21 CT 5618-28.) At the end of this ride on the freeway, Sonny agreed to go out to the crime scene the next day and reconstruct the shootings. (21 CT 5625-5626). Sonny did accompany Spidle to the crime scene next day and complying with Spidle's request was videotaped re-enacting the shootings. The video, exhibit 3 was shown to the jury twice, once during opening statements (VII RT 1457) and once during the prosecution's case in chief (XIII RT 2212.) No transcript of the audio portion of that videotape is in the record.

4. Evidence Regarding Weapons Involved in Incidents that Night.

Deputy Pico testified that shell casings of a small caliber bullet were found in the street at Etiwanda on the night of the shootings on the other side of the median from where the bodies were found. (VII RT 1393-1394.) Daryl Arquero testified that he heard both loud gun shots and smaller firecracker like shots; he believes he heard two different guns that night. (XX RT 3252-3253.)

The gun pointed at Jenny Hyon during the confrontation with the first Asian group was a shiny, chrome weapon and did not have a wheel (revolver) and was not a cowboy gun. (VIII RT 1748.)

Lester Maliwat testified that Sonny's gun was .38 caliber snub nose revolver. (CT 1927.) Eric Garcia[10] testified that after the shootings, he talked with Sonny about the shootings and got into a shoving match with him. (XIII RT 2322.) Then Garcia asked Sonny for the gun and he refused. (XIII RT 2323.) After that Sonny came out, changed his mind and asked Garcia to take the gun; although Garcia did not want to take the gun, Sonny forced it on him . (XIII RT 2324-2325.) The gun was wrapped in cloth, but he could feel it was a revolver. (XIII RT 2326.) Sonny came back two to four days later and asked for the gun back,

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[10] The trial judge described Eric Garcia as follows: "my opinion, this guy would break out in rash if the truth came around him." XIV RT 2457:1-2.

Garcia told him where it was, and Sonny took it back. (XIII RT 2327.) Garcia took Sonny to see Michael Betts, an ABC in Orange County, and Sonny gave Betts the gun. (XIII RT 2328.) Garcia also testified that both Sonny and Lester Maliwat had guns that night and that they were switching off; one gun was chrome, the other was black; one of these was semi-automatic. (XIV RT 2374-2376.)

5. Evidence of Gang Activity. Garden Grove Police Officer Michael Martin testified as the prosecution's expert on gang activity. (XI RT 2054.) Martin testified that ABC (Ahkro Boyz Crazy) was a street gang. In response to a hypothetical question based on the facts of the altercation between Gobert, Hernandez, Gilleres and Hyon and the members of ABC Riverside, he opined that the beating and shooting of Gobert and Hernandez was for the benefit of ABC. The actions of Gobert in saying "What's up cuz," "Fuck you slobs" and throwing a "C" handsign (indicating he was a member of rival "Crips" gang) was an insult to ABC and showed a lack of respect for their gang; the attack by a number of ABC members on Gobert was a gang attack; the attack was a benefit to ABC because if they fail to punish somebody for insulting them, they lose face within the gang society; if one backs off after being challenged, one loses face in the gang world. (XI RT 2070-2074.) In Martin's opinion, one of the primary activities of ABC was drive-by-shootings, assaults with deadly weapons and attempted murders.(XI RT 2074.) Martin also opined that ABC Riverside was a street gang. (XII RT 2124.)

Martin's direct knowledge of ABC Riverside was very limited. Martin was familiar with the Orange County Gang Ahkro Boyz Crazy from his work in Garden Grove, California which is in Orange County. Martin estimated that there were 20 to 40 members of ABC total, based on his discussions with ABC members in Garden Grove/Orange County; he had no idea how many ABC members there were in Riverside; it could have been less than five. (XII RT 2123.) Martin was not aware of any shootings that were perpetrated by Riverside ABC members,

other than the incident here. (XII RT 2136.) Martin based his opinion about the Riverside set of ABC based on his knowledge of the Orange County set. (XII RT 2123-2124.) Martin had heard no reports of incidents involving ABC Riverside in 1994 other than the events surrounding this case and had no idea what their activities may have been at that time. (XII RT 2126.)

B. Defense Guilt-Phase Case

The defense presented evidence supporting alternative defenses: (1) That there was a reasonable doubt that Sonny was the actual shooter; (2) that he shot in self-defense; (3) that he shot in the unreasonable belief, influenced by methamphetamine use, that he was acting in self-defense and was therefore guilty of only manslaughter; (4) that he shot as a result of provocations by Gobert and Hernandez and was therefore guilty of only manslaughter; and (5) that the provocations by Gobert and Hernandez, followed within a minute or two by the shootings while Sonny was under the influence of methamphetamine, precluded Sonny from premeditating the shootings and he was thus guilty of only second-degree murder. The evidence supporting these defense theories is set forth below.

1. Reasonable Doubt that Sonny was the actual shooter. Despite Sonny's statements that he was the shooter and testimony from Sonny's fellow ABC members, Lester Maliwat and Roger Boring, that Sonny was the shooter, there was sharply conflicting evidence as to who was the actual shooter. The defense argued that Sonny had given his statements of responsibility after he made a deal with interrogators to assume responsibility for the shootings as long as other members of ABC avoided prosecution. (VII RT 1462-63.) In light of the conflicting evidence on the identity of the shooter and the motivation to protect other gang members, Sonny's statements and Maliwat and Boring's testimony were not reliable enough to prove beyond a reasonable doubt that Sonny was the shooter.

The conflicting evidence casting doubt that Sonny was the shooter was as follows:

a. None of the members of Gobert's group thought that Sonny was the shooter. Christine Gilleres, Gobert's girl friend, who was an eyewitness to the shootings, testified that Sonny Enraca was not the shooter. (VIII RT 1687 [states that the person shown in Exhibits 16 and 17 (line up photos of Sonny Enraca) was not the shooter].) According to Gilleres, the shooter was the same guy who had pointed the gun at Jenny Hyon previously in the confrontation with the first group they encountered in front of the pizza parlor. (VIII RT 1630). Jenny Hyon did not know if it was the same guy, but thought it was possible. (XVI RT 2671.) According to Detective John Schultz, Herman Flores, another member of Gobert's group, described the shooter as five feet tall, about 110 pounds and age 17, Asian, wearing a white sweatshirt with a hood, beige jeans with ragged bottoms. [11] (XXIII (RT 3486.) Flores picked out the photo of John Labatton as the one which resembled the shooter (XXIII RT 3480). Flores also said that the shooter drove away in a white Tercel with a license plate with "LSR" in it.[12]

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[11] Defense counsel noted that videotape evidence played for the jury showed that Sonny is 5'6" tall and weighed 130 pounds. (VII RT 1464.) Lester Maliwat, who testified that Sonny did the shooting, weighed 110 pounds. (XXVII RT 3816) Maliwat testified that Sonny was wearing dark pants and a light blue shirt the night of the shootings. (X RT 1972.)

[12] Sonny's statement to the police identified LSR as La Sierra Riva, a Mexican gang which had shot a member of ABC prior to the evening. (See 21 CT 5635; see also, XIX RT 3071.) Roger Boring also stated that ABC was in a dispute with LSR gang and ABC members suspected them of the recent shooting of an ABC member. (RT 2498-99.)

b. Other eyewitnesses described the shooter's looks as inconsistent with Sonny's dress and physical appearance and/or heard the shooter addressed as someone other than Sonny Enraca. The defense called two other eyewitnesses both of whom described the shooter as someone who could not have been Sonny Enraca. Marcus Freeman, who witnessed the shooting from his car which was stopped on Etiwanda because the fight had spilled out into the street directly in front of his car, described the shooter in terms remarkably similar to Herman Flores description: "5 foot, 110 pounds wearing a white hooded sweatshirt and beige Levi's." (XXIII RT 3371; see also XXIII RT 3381.)

Alfred Ward testified that the shooter had a "buzzed head" on top with a multicolored pony tail in back (XVIII RT 2939)[13] and wore a white hooded sweatshirt. (XVIII RT 2948); in fact what made the shooter stand out that night was that white hooded sweatshirt. (XVIII RT 2961-2962.) According to Ward, the shots were fired after a voice said, "Fuck it, John, just shoot them." (XVIII RT 2940.)

c. Maliwat and Boring each admitted lying and Maliwat admitted having a motive to faricate to protect himself. Lester Mailiwat admitted that he asked his girlfriend, Judy Bae, to lie for him and create an alibi because he was afraid he might be charged with the shootings (X RT 2031); Bae confirmed that Maliwat had asked her to lie for him. (XVIII RT 2909.) Maliwat had reason to be concerned about being prosecuted since he was at the scene and his weight was 110 pounds (X RT 1980), the same as that of the shooter described by Herman Flores and Marcus Freeman. Maliwat admitted lying in a number of other respects because he was scared of being prosecuted (X RT 1828): he admitted he lied when

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[13]The video of Sonny's statement shows Sonny had a full head of hair, two to three inches long when questioned three weeks after the shootings. (Exhibit 83.)

he initially talked to investigators because he wanted to minimize his responsibility for the shooting and because he did not want to do jail time (X RT 1935); he admitted he lied to investigators when he said he actually saw Sonny shoot anyone that night; (X RT 2002); he admitted it was not the truth when he denied seeing Gobert raise his arms that night (X RT 2031); he admitted he lied and made it up that he had seen Gobert shot first. (X RT 2027); he admitted that he lied at his own sentencing as an accessory in this case when he stated that he was no longer an ABC member. (X RT 1941.)

Roger Boring stated that he lied to defense investigator Penni Stablein when he repeatedly told her that he heard the shootings, but did not see who fired the shots (XV RT 2571-72) and when he told her that he made up a story about Sonny being the shooter to tell the District Attorney because he thought it was what the District Attorney wanted to hear. (XV RT 2572-74.)

2. Sonny shot in self-defense. It was undisputed that prior to any physical confrontation between Gobert and any ABC member, Gobert reached under his shirt toward the waistband in a gesture that was reasonably interpreted as an indication that he had a gun in his waistband or that he wanted people to believe he had a gun in his waistband. (XII RT 2143-46 [Testimony of prosecution gang expert Michael Martin]; see also XV RT 2513-2514, 2531 [Roger Boring]), XIX RT 3110 [John Frick]), XIX RT 3168 [Cedrick Lopez]), XXIII RT 3460 [Detective John Schultz testifying to what Lester Maliwat told him during an interrogation]), XVII RT 2820 [Alfred Belamide]), XIV RT 2450 [Roger Boring].) Gobert's gestures toward the apparent gun in his waistband were preceded by gang insults, gang signs and identifications of himself as a Crips gang member. (X RT 1972-1973 [Testimony of Lester Maliwat that Gobert told the ABC group "what's up cuz,""fuck slobs," fuck bloods"; since ABC was a Blood set and "cuz" was a term used to describe members of the rival Crips gang, this was a direct insult);

XIV RT 2446 [Testimony of Roger Boring]; XX RT 3232-3235 [Testimony of Daryl Arquero]; RT 1708 [Testimony of Christine Gilleres that Gobert addressed the ABC group with the phrase "What's up cuz" which signified that he was a Crips member], hand gestures making the letter "C" (for Crips); XX RT 3233 [Testimony of Daryl Arquero], and the statement "I don't give a fuck. I ain't afraid to die" (XX RT 3166) [Testimony of Cedrick Lopez]; and XIX RT 3054 [Testimony of John Frick].)

At first, members of the ABC group did not take Gobert seriously since he was one person confronting a group of 10 or more and he appeared drunk, but when he made the threatening gestures to his waistband, the ABC members thought he had a gun and five or more of them rushed him, knocking him down. (RT 2447 [testimony of Roger Boring]; RT 3287 [Testimony of Daryl Arquero].) Arquero testified that on seeing Gobert's gestures, Arquero, yelled out loudly that "he has a gun." (RT 3236.) Sonny claimed that he was not involved in the fight that ensued and was in fact trying to break it up. (21 CT 5650.)

Sonny told investigators that he came over and told the group "just leave him [Gobert] the fuck alone," but Gobert was already knocked out. (21 CT 5650.) Hernandez was covering Gobert's body. Sonny pulled Hernandez by the hair to lift him and asked him "where you from?" because Sonny did not recognize him, but Hernandez slapped Sonny's hand away and Sonny thought Hernandez was going to shoot him. Sonny shot him first. (Sonny already had his gun out because he was planning to shoot in the air to break up the fight.) (21 CT 2651-2652). Hernandez smacked Sonny's hand hard, turned quickly away and was on one knee; Sonny thought Hernandez was reaching for the gun from Gobert's belt and was going to shoot Sonny and so Sonny shot him in the shoulder and he was leaning over as if he might shoot again, so Sonny shot him again. (21 CT 5652-5653; 5655.) Gobert then looked at Sonny and said "fuck you asshole," and then

Sonny thought Gobert was grabbing for his gun, so Sonny shot him first. (21 CT 5653-5654; 5655.)

3. Sonny shot in the unreasonable belief that he was acting in self-defense and was thus guilty of only manslaughter. The defense contended that Sonny shot while under the influence of methamphetamine and alcohol and that any actions he took that night were likely in an impaired mental state caused by the methamphetamine which left him paranoid, edgy, and quick tempered. This mental state led him to believe that Gobert and Hernandez were a threat to shoot him, even if this belief was not reasonable in the circumstances.

a. The defense presented evidence that Sonny was under the influence of methamphetamine and alcohol that evening. In his statement to Detective Spidle, Sonny indicated that he was on speed that night and he was coming down, leaving him kind of scared and nervous (21 CT 5638, 5644); he had had two lines, one about 5 pm and one about 8 or 9 pm just before his friends arrrived. (21 CT 5667.) Sonny also stated that he has six drinks that night, but was not drunk, "just buzzed." (21 CT 5667)

Roger Boring testified that Sonny was drinking heavily that night as well as doing speed before they left for the races. (RT 2500-2501.) Derrick Toguchi testified that he used speed with Sonny the night of the shooting at the meeting at Roger Boring's house. (XVII RT 2720-24.) Toguchi testified further that when you take speed, at first you feel good, a lot of energy. As you start coming down, you start getting paranoid and little things can upset you. (XVII RT 2726-2627.) Eric Garcia testified that Sonny showed him some speed that night and offered some to him, but Garcia declined; according to Garcia, Sonny used a lot of speed at that time and Garcia believes that Sonny was using speed that night.(XIV RT 2405, 2417.)

b. Expert testimony that persons under the influence of even small amounts of methamphetamine experience paranoia, irrational fears, and impluse control problems, including outburts of temper and physical outbursts. Dr. James Rosenberg, a psychiatrist specializing in forensic psychiatry and psychopharmacology and who runs an inpatient clinic in which reactions to methamphetamine are the most common reason for hospitalization, testified about the effects of methamphetamine use. (XVIII RT 2868, 2670) Rosenberg testified that the effects of methamphetamine can last for several hours to a few days. (XVIII RT 2872.) Methamphetamine use can cause psychosis, disturbances, and hallucinations; paranoia has been known to go on for months; even after methamphetamine is out of your system, the chemical is still stuck in the cells of your brain and it can have very prolonged effects. (XVIII RT 2873). The half-life of methamphetamine is 11 hours. (XVIII RT 2873, 2878.) Intoxication could last for a few hours to a few days: the initial energized stage includes agitation, grandiose thinking, maybe euphoric mood, racing heart, dilated pupils. But thought disturbances – being very paranoid, racing thoughts, being very impulsive can go on for a substantial period after that. (XVIII RT 2878.)

Typical symptoms of methamphetamine intoxication include loss of impulse control, easy to lose temper, things done in an explosive way, outbursts of anger or physical outbursts (XVIII RT 2881) in addition to paranoia, racing thoughts and irrational fear. (XVIII RT 2873-76.) Moreover, paranoia and impulse control outbursts can become very severe even on relatively low doses of methamphetamine; you do not have to be in a profound meth-induced psychosis to experience these symptoms. You can appear normal and appropriate and snap at a moment's notice. (XVIII RT 2904.) Users of methamphetamine also suffer from withdrawal symptoms. Intoxication and withdrawal melt or blend together until later when it is primarily withdrawal. Withdrawal is the opposite of intoxication:

depression, irritability, fatigue, feeling run down, slowed-down body movements. To some extent the shut down of frontal lobes occurs in withdrawal stage as well, but is primarily a function of intoxication. (XVIII RT 2879.) Paranoid thinking does not require bizarre delusional thoughts like space aliens or hearing voices, but may include irrational beliefs that someone is out to get you. People can still be delusional just by holding on to false thoughts when they get other input. It is common for this paranoid thinking to encompass belief that an individual is out to get you; it could be a stranger walking off the street or you could perceive a loved one as an imminent threat for no reason at all. (XVIII RT 2880.) Nervousness and agitation are symptoms consistent with methamphetamine intoxication.

It is related to adrenaline-like chemicals released in your body as a result of the methamphetamine (XVIII RT 2881); being scared, jittery, nervous, are characteristic of methamphetamine use. (XVIII RT 2888.) Alcohol combined with methamphetamine can be worse: alcohol adds poor judgment to the mix (XVIII RT 2881-2882.) A person with methamphetamine intoxication could perceive a situation which was not threatening as threatening or a slightly threatening situation could be perceived as an extremely threatening one; with methamphetamine induced disorders we often see an individual attack a loved one or a stranger, believing the person is out to get them. (XVIII RT 2883-2884.)

Dr. Rosenberg testified that hypothetical behavior that closely mirrored the behavior Sonny was charged with in the instant case was consistent with an individual acting under the influence of methamphetamine intoxication and perceiving a threat that a person not under the influence might not perceive (though such intoxication was not the only explanation for the behavior). (XVIII RT 2885-2886.) Moreover Dr. Rosenberg testified that "if you have someone who is agitated, on edge, and paranoid ....[and there is] commotion or the sense of ... impending danger going on around them is only going to aggravate it." (XVIII RT

2887.) He further testified that Sonny's description of himself in the statements to Detective Spidle – that he was jittery and on the edge – "would be absolutely classic for methamphetamine." (XVIII RT 2888.).

Dr. Rosenberg further testified that "when they are in that agitated situation and someone else then jumps on top, that certainly would be perfectly consistent with a perceived threat." (XVIII RT 2890.) Dr. Rosenberg pointed out that "we are talking about paranoid thinking... so the person is interpreting the situation as a real thereat to them.... They're not interpreting it as a fantasy. (Ibid.) He further testified that after there first two shootings if a third individual comes running toward him or is yelling... and appears to identify herself as being somehow related to two people he just shot ... certainly perceiving that a threat is not inconsistent." (Ibid.) "Rushing up to somebody on meth, you're just asking for a problem." (Ibid.)

4. Sonny was provoked by Gobert's gestures, gang signs, language and threatening and drunken, irrational behavior, and hence the shootings which followed these behaviors by no more than a minute or two were either manslaughter or, at the most, second degree murder, but could not have been deliberate, premeditated murder.

a. Inflammatory Actions by Gobert. Gobert, enraged by the earlier incident in which one member of a different group of Asians pulled a gun on Hyon, drove around in a noticeably erratic manner making u-turns at high speed. (RT 2509-10) [Testimony of Roger Boring]; RT 1842 [Testimony of Lester Mailiwat]; XX RT 3226 [Testimony of Darryl Arquero].) Gobert then parked his car on Etiwanda and ran from the street toward the sidewalk in front of the pizza parlor and confronted defendant's group (VIII RT 1676), Gilleres tried to stop Gobert, (VIII RT 1677-78) and witnesses heard her or Hyon yell to Gobert that these were the "wrong guys." (RT 2514 [Testimony of Roger Boring].) XIX RT

3063, 3084 [John Frick]; XX RT 3233-3234 [Daryl Arquero].) Gobert appeared drunk at this time. (See XIV RT 2465, 2513 [Roger Boring]; XIX RT 3052 "visibly drunk," smelled of alcohol and "belligerent." [John Frick].) Toxicologist Maureen Black testified that she tested blood samples taken from Gobert and that he had a blood alcohol level of .16 (twice the legal limit for driving under the influence). (XVII RT 2741). She further testified that people with levels of blood alcohol this high exhibit exaggerated emotional states such as belligerence, anger, impaired judgment and unwarranted confidence. (XVII RT 2747-2748.)

Gobert's behavior was consistent with behavior described by toxicologist Black. His manner was flamboyant and confrontational: he strutted with a "gangsterly walk" (XX RT 3274 [Testimony of Daryl Arquero]), was ready to take on a whole group by himself and uttered gang insults, gang signs and identifications of himself as a Crips gang member. Gobert made gestures with his hands including stretching his arms out with his palms up and making the letter "C" (for Crips) with his fingers (IX RT 2030-31, 2042-43 [Lester Maliwat]; he was very angry and yelled that he was "not afraid to die" (XIX RT 3084-85 [John Frick]), asked "What's up cuz?" (VIII RT 1709 [Gilleres]) yelled at the ABC group that he, Gobert, was a Mafia Crip (XV RT 2446 (Roger Boring]; XVI RT 2622 (Investigator Bernie Skiles testifying to what Roger Boring had said during an interrogation])and then told them "fuck you Slobs"[14] and "fuck Bloods." (See IX RT 1972-73, 2004 [Lester Maliwat].) Alfred Belamide testified that Gobert was dressed like a gang member and had a blue rag bandana. (XVII RT 2818.) Jenny Hyon testified that she yelled to the group Gobert was confronting not to pay any attention to him. (XVI RT 2672) Neither Roger Boring, nor Lester Maliwat, both

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[14] In gang parlance, "Slobs" is a derogatory term used by Crips members to insult bloods.(IX RT 1846:9-22; XIV RT 2446.)

members of ABC at the scene, initially took Gobert, alone confronting a group of 10 to 25 ABC members, very seriously. (IX RT 1978 [Maliwat].) But Gobert then put his hands to his waistband in a gesture which led many witnesses to believe Gobert had a gun. (RT 2513-2514, 2531 [Roger Boring]), XIX RT 3110 [John Frick]); XX RT 3168 [Cedrick Lopez]); XXIII RT 3460 [Detective John Schultz testifying to what Lester Maliwat told him during an interrogation].) XVII RT 2820 [Alfred Belamide]); XIV RT 2450 [Roger Boring].) Officer Michael Martin, the prosecution's expert witness on gangs testified that it would have been reasonable to infer from Gobert's gang signs, the fact that he was claiming to be a member of Crips and his gestures that Gobert had a gun and/or that he wanted the others he was confronting to think that he had a gun. (XII RT 2143-2146.)

Just before he was shot, Gobert looked at Sonny, said "fuck you asshole," and grabbed his friend, and Sonny thought Gobert was grabbing his gun, so Sonny shot him. (21 CT 5653-5654; 5655.)

b. Evidence that Sonny was directly involved in the fighting before the shooting. Although in his statements to Detective Spidle, Sonny claimed that he was trying to break up the fight and not involved in the fighting (21 CT 5650), three eyewitnesses provided evidence that the shooter was in the fight:

- Marcus Freeman told Detective Schultz that the shooter was involved in the fight and got off the ground just prior to shooting. (XXIII RT 3484);
- Detective Schultz testified that Lester Maliwat told him that Sonny was involved in the fighting] XXIIII RT 3459 .)
- Roger Boring (XV RT 2492) and see RT RT 3462 [Detective Schultz testified that Boring listed Sonny's and Maliwat's name on Exhibit 59 as involved in the fighting when Schultz interviewed Boring], but see XV 2519 [not involved after Gobert broke away and

went out on the street].)

c. Evidence of the impact of Sonny's use of methamphetamine on his responses to provocations. As discussed above, Dr. Rosenberg testified that typical symptoms of methamphetamine intoxication include loss of impulse control, quick loss of temper, lose temper, things done in an explosive way, outbursts of anger or physical outbursts. (XVIII RT 2881.) Thus, use of methamphetamine may have caused Sonny to react impulsively and angrily to Gobert's confrontational behavior in a way that was inconsistent with premeditaiton.

d. The short time between Gobert's behavior and the shootings. Arnold Belamide testified that the fight lasted only about 1 minute (XVII RT 2847.) Herman Flores testified that the fight lasted only a minute or two. (XXIII RT 3342.)

In light of the evidence of provocation, both the defense and the prosecution requested that the jury be instructed on voluntary manslaughter based on heat of passion or sudden quarrel, and also instructed to consider provocation on the issue of whether the defendant acted with deliberation and premeditation. (22 CT 5920-5921, 5924.) The trial court indicated that for there to be a heat of passion defense, you need proof of more than provocative conduct, you must have evidence of the impact on the defendant; here there was no evidence that defendant or anyone else was angered by Gobert's actions and they responded only when he made gestures suggesting that he had a gun. (XXVI RT 3726-3727.) For similar reasons, the court refused to instruct the jury to consider provocation on the issue of premeditation and deliberation, stating that the "only" provocative conduct was Gobert's gesturing toward an apparent weapon and that this was dealt with by the self-defense instructions. (XXVI RT 3728-3730.)

C. Prosecution Penalty Phase Evidence.

The prosecution case consisted of three victim impact witnesses. Jenny Hyon testified that she was permanently paralyzed from the shot fired at her by Sonny. Because of where the shot hit, she lost the function of her hands as well as her legs and had difficulty breathing. She was unable to go the bathroom or shower on her own and thus could not live independently. She is in constant pain. She is being taken care of by her mother and younger sister, but worries about whether she will have to go to a nursing home if her sister marries and when her mother is no longer there to take care of her. (XXVIII RT 4129.)

Carmen Vera, Ignacio Hernandez' mother, testified that she felt that her life was leaving her when she heard her son had died. The notice that he had been accepted to an engineering school in Texas arrived shortly after his death. He was a good and loving son who was never in trouble with gangs or drugs. His death affected the whole family. She saw a psychiatrist for three years and was advised to leave the country to help get over the loss. She told her younger son Emanuel that his brother was in New York for two and one-half years before she told him of Ignacio's death; this was done in order to prepare Emanuel for the bad news. On the advice of the school psychiatrist, she told Emanuel at school. Emanuel still misses his brother. (XXVIII RT 4135-4136 .)

Carolyn Gobert, Dedrick Gobert's mother, testified that it is still hard for her to believe that her son is dead. (XXVIII RT 4142). She still sometimes catches herself talking to him. She remembers his voice when he came into the house. She remembers how she used to come in and turn off the TV when Dedrick would fall asleep in front of it and cover him up. Her younger son does the same thing and it reminds her of that. She sometimes calls her younger son "Dee." (XXVIII RT 4142-4143.).

Her memories of him are always there. When she comes into the house and

sees his picture and every time she passes by she says "I love you Dee. I miss you." And she wonders whether he can hear her. It hurt her younger son who has not done well in school since then. (*Ibid.*)

Carolyn was so focused on Dee that she almost forgot about her younger son and it was like she had just given up on him. She is a single mother and her children are all she had. She just could not have a regular life as she had before. She had psychiatric care for a while. She wanted to die. (XXVIII RT 4143.) The death has changed her lifestyle. She is alone a lot and does not have visitors. She has had to take off work a couple of times because she just could not be around people. Her personal relationships have not been good because she cannot commit to anybody. (XXVIII RT 4144.)

Carolyn also testified about her son's budding movie career: he was in "Boys N the Hood" for Director John Singleton and then was in other movies for the same director. He was then in "Poetic Justice"; Janet Jackson and Tupaq and others were the stars of that movie. Then Dee played a college student in "Higher Learning," a movie released after his death. He was also in some commercials (Coca Cola) and TV sitcoms. (XXVIII RT 4139-4140.)

D. Defense Mitigation Evidence

The defense presented a case in mitigation so substantial that the trial judge agreed that it was "most benign" death case he had seen in Riverside County. (XXXIII RT 4700:24 to 4701:4.) There was no evidence of any prior criminal activity of any kind and the defense presented the following mitigating evidence: (1) he was the unwanted son of teenage mother; (2) he was rejected by his mother and left with to live with his Aunt and family; (3) he spent an idyllic first eight years with his aunt's filipino family; (4) but then was uprooted by his abusive mother and stepfather to Guam; (5) the family abuse worsened after a move to Japan; (6) the family situation further deteroriated and resulted in escalating abuse

of Sonny after they moved to the United States; (7) Sonny left the abusive home at age 13 and took shelter in the home of friends where he was loved, especially by the mothers of the homes who found him responsible, caring and compassionate; (8) Sonny longed to return to his home in the Philippines with his aunt, but was not allowed to do so; (9) Expert testimony that: (a) he had genuine remorse for what he had done; (b) his gang membership was based on his need to belong to the family he had lost; c) the gang he belonged to was not a predatory gang and there was no evidence of criminal behavior by it; (d) his role in the gang was being a peacemaker and moral conscience and it was rooted in his family history; (e) faced with the need to support himself and to perform in several jobs, he eventually turned to methamphetamine which adversely affected his behavior. Each of the these points is discussed in turn below.

1. Unwanted Son of a Teenage Mother. Sonny was an unwanted child of Shirley, a teenager. Shirley had moved out of the house of her sister Floresfina Schell (called "Pina" by the family) when she was 16. (XXXII RT 4492.) When she same back, she was pregnant with Lilybeth Hernandez, whose father was Benjamin Hernandez. (XXX RT 4492 [pregnancy] XXXI RT 4501 [identity of father].) Shortly after Lilybeth's birth, Shirley left again and when she came back, she was pregnant again, this time with Sonny. (XXXII RT 4492.) For years, Shirley claimed that Sonny was the product of a rape (XXXI RT 4375). Sonny was told by his stepfather, Robert Harris, that Sonny was the product of a rape and that every time Shirely saw Sonny, he reminded her of the rapist (XXXI RT 4429), but other relatives stated that they had the met Sonny's father, who had an affair with Shirley and earned his living as a taxi driver. (XXXII RT 4508.) Sonny never met his father, who was also named Sonny. (XXXII RT 4502.).

2. Rejected by his Mother and left with his Aunt and Family. After Shirley gave birth to Sonny, she left both Lilybeth and Sonny with her sister Pina,

who lived with her husband Ray and her own two children, as well as Ray's mother, who was known as "Mamang," and Tatai, Mamang's husband. (XXXII RT 4492, 4495.) Three to four years later, Shirley came back married to Robert Harris. (XXXII RT 4494.) According to Harris's sister, Donzelle, Robert is not a person who is truthful; he does not have a grasp on reality. Kind of a Walter Mitty type, Robert fantasizes a good deal. To this day, he still claims he is in the military on special assignment by the President, though he was discharged from military[15] long ago and is not employed. (XXXI RT 4419.) At that time, Shirley took Lilybeth to live with her, Harris, and Johnny, a son born to her while she was with Harris,[16] but left Sonny with her sister Pina and Pina's family. (XXXII RT 4494.)

3. Idyllic First Eight Years in the Philippines. Sonny led an idyllic life for his first eight years with his Aunt Pina and her family: Raymond Schell [husband], their children, including Jocelyn Schell who testified at trial, Rosario Revenque ["Mamang" – the woman who raised Ray and then Sonny], and Dominga Revenque [Mamang's younger sister]. Sonny was treated as a first-born son and slept in the same bed with Mamang until he was eight. (XXXII RT 4495.) Sonny called Pina "Mama Pina" and her husband "Papa Ray." (XXXII RT 4500.) Mamang testifed that Sonny would sleep in her arms with his hand on her head. He would make up the bed and made coffee for Mamang every day from the time he was six until he left at age eight. (XXXII RT 4559-4560.) And if her husband went out drinking beers and was out too late, Sonny would go get him and bring him home to bed, telling him "remember Sonny." (XXXII RT 4560-4561.) Mamang loved Sonny so much; if she could change places with him she would.

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[15] It is not clear on what grounds Harris was discharged. (XXXIX RT 4214.)

[16] Donzelle Harris, Robert Harris's sister, did not believe that Harris was Johnny's biological father. (XXXI RT 4421.)

(XXXII RT 4565.)

Everyone in Sonny's life in the Philippines spoke of their love for Sonny and his positive behavior there. Pina testified that Sonny was a very good boy growing up, very close (XXXII RT 4500.) She feels that he is her true son; he is very close with her son Jason. (XXXII RT 4508). Dominga Revenque, Mamang's younger sister, who also lived with the family when Sonny lived with them, testified that she took care of Sonny, told him when to take a bath, put him to sleep, gave him sticky rice treats. He would do what was asked, sit down with her daughter, get a treat and then he would ask if he could go out and play. She made him a clown costume for school and he was so happy that she would make this for him, he asked if he could hug her. She loves Sonny; her son Ernie told her to hug Sonny if she saw him. (XXXII RT 4522-4523.) Raymond Shell, Pina's husband, testified that when Sonny left, he felt lonely because Sonny was like his son; he loves him very much. He was a good boy and never gave Raymond any headaches. (XXXII RT 4542, 4545.) Roger Dajuan was Sonny's next door neighbor and friend from the time Sonny was three. (XXXII RT 4546-4547.) They played games together as children every day except Sunday when they went to church together. (XXXII RT 4547.) Sonny was more than a good friend to Roger, he was like a brother; they love each other and it will never end. He is the kind of person whose kindness you can never forget. This was a true friendship and they showed it and they were happy together. When Sonny left Roger did not how to feel; he did not know when he would see Sonny again (XXXII RT 4549-4550.) .

But Sonny still felt the pain of separation from his mother. His cousin Jocelyn Schell (Pina's daughter) testified that Sonny's favorite song as a child was

> I am a little chick separated from my mother. Nobody cares for me and I am chilled because it is cold.... In the morning there is no one to take me out to care for me. Nobody to recognize me, ignore me and no mother to give me love.

(XXXII RT 4555.)

4.Unhappy Uprooting by Abusive Mother and Stepfather to Guam. Sonny's life changed dramatically when he was eight. Shirley returned with Robert Harris to take Sonny with her to live with them and the other two children in Guam, where Harris, then in the U.S. military, was stationed. Sonny cried and cried when he was forced to leave his home in the Philippines.(XXXII RT 4502.) Sonny was never accepted by his mother, stepfather or siblings. (XXX RT 4369-4370; XXXIX RT 4208-4209.) His stepfather was abusive. In fact, Donzelle Harris, Robert Harris' sister, testified that prior to Sonny coming to live with Harris, the rest of the family was put in a shelter because of Harris' abuse. (XXXI RT 4417.) It was not a happy family. (XXX RT 4369.)

The language barrier was a big problem for Sonny in adapting to life in Guam; Lilybeth, Sonny's half-sister, knew no Tagalog and spoke to him in English. (XXX RT 4370.) Lilybeth testified that Sonny was treated in a very severe manner by her parents who were always watching his every move. He was treated very differently than she and Jonathan were treated: Jonathan was babied because he was the youngest and she was because she was a girl. Her mother paid attention to Lilybeth, but Sonny was left out in the dark; Lilybeth knew that as a nine year old and knew that it was not fair. (XXX RT 4370.) Lilybeth remembers that when Sonny came to Guam he was a bed wetter. This caused problems in the family with her mother; her mother was always yelling at Sonny about it, telling his friends and humiliating him.(XXX RT 4378-4379.) Sonny developed a nervous tick or twitching. Shirley did not seek medical aid for Sonny, but she talked about it and mentioned that she thought that something was wrong with Sonny and yelled at him to stop. (XXX RT 4379.)

5. Family Abuse Worsens After Move to Japan. After about a year and one-half in Guam, the family moved to Japan. The family unit became more

dysfunctional. Harris became more abusive; his abuse was both physical and emotional (telling kids that they we were not good enough and were lowlife and telling Lilybeth that she would never get anywhere because she was not white, she was female and not a U.S. citizen). (XXX RT 4473.) In Japan, Robert Harris would beat Shirley often; Lilybeth recalls seeing Shirley with a black eye, fat lip, or broken arm. Shirley's medical record was so thick, Lilybeth still remembers it. Police or military police were coming in all the time, either putting Harris in the brig or getting him out. They were in Japan for 5 years. (Ibid.) Harris would beat the kids if they made a mistake or did something wrong; he would beat them badly. (XXX RT 4374.) Sonny described himself as "being used as a punching bag" by Harris and being on his own from age 12 when they left Japan for California. (XXXI RT 4436.) In Japan, Harris and Shirley began having affairs which were not hidden from the children. Although all the children were witnesses to various affairs, Lilybeth would not tell the parent who was not involved in the affair what happened, but Sonny did. Shirley was angry and upset with Sonny for telling Harris about her affairs. (XXX RT 4375.)

6. Further Deterioration of Family Situation and Escalating Abuse after move back the United States. When Sonny was twelve, the family moved to California. They lived with Donzelle Harris, Robert's sister, for a few months before moving out. (XXXI RT 4516.) They moved to Santa Ana and ended up living next to Donzel Harris's stepmother. (XXXI RT 4423.) When they came to the U.S., Lilybeth was in ninth grade and Sonny was in the seventh grade. The family situation had gotten worse. The family was dysfunctional in the extreme. (XXX RT 4380.) In terms of physical abuse, Lilybeth Hernandez testified that one time in Santa Ana, Robert Harris punched Sonny in the chest so hard that Sonny "flew back." (XXX RT 4374.) The family was in difficult financial shape: Harris was not working and Shirley worked very hard in a flower shop. Sonny retreated

more and more into a fantasy life and became passive, withdrawn. He was not doing well. (XXIX RT 4214.) He was hanging on in school but not doing as well as he had done before. (XXXIX RT 4215) Shirley remained with them for less than two years and moved to New York. First Shirley went to visit her cousin for a vacation. (XXX RT 4380.) Shirley stayed away about six months and Lilybeth, Sonny, and Jon were left with Robert Harris. He treated them like slaves. Lilybeth is still fearful of Harris to this day. She was afraid he might kill her. Harris never actually threatened to kill her, but twisted her arm, threw things at her and punched her. He stole from Lilybeth. He physically abused her, but never molested her. (XXX RT 4381.) She was molested, however, during this period by Phil Harris, Robert's brother. (XXX RT 4382.)

Shirley eventually announced that she did not want to be a mother anymore and just wanted to get away from her abusive husband. Sonny was devastated by this. (XXIX RT 4215.) At some point Shirley came back from New York and took Jon back with her, but Lilybeth and Sonny remained with Robert Harris. Lilybeth had been invited to go with her mom when she left for New York, but wanted to finish high school and did not want to leave her boyfriend. Her boyfriend was Ronnie Okialda, the brother of Rhomel. John was also invited to go with mother Shirley, but Sonny never was. (XXX RT 4382.). Lilybeth split from there when she graduated; Sonny was always off at a friend's house and never lived full time with Robert Harris again. (XXX RT 4383.) Sonny was devastated by his mother leaving him. His stepfather was abusive to him, and it was difficult for him to stay in the house. So he began to attach himself to other families. He would make friends in school and live with their families. At 14, he faked his age and got a job at a fast food restaurant, worked more and more hours and withdrew from the normal life of a young person and from school. He was hanging by a thread and quite disaffected. (XXIX RT 4215.)

7. Shelter in the Home of Friends: Sonny Was Loved Wherever He Stayed. At some point Sonny and Lilybeth lived in the Okialda house for about six months. After Lilybeth and Ronnie broke up, Lilybeth moved in with a co-worker until she moved to New York to join Jon and her mother. Lilybeth did not even know where Sonny was at that point; Lilybeth assumed that he was with friends. (XXX RT 4384.) .

Sonny never lived with Harris again. First, he and Lilybeth lived with Okialda family. Sonny and Rhommel Okialda worked together when Sonny was 14 by lying about their age. Sonny's life turned when his mother left; he dropped out of school and started working full time. (XXXII RT 4465.) Sonny was very well behaved when he lived with Rhommel; Sonny would clean up and do everything around the house. Rhommel's mom liked him a lot. (Ibid.) Rhommel still cherishes his relationship with Sonny and comes from northern California to visit him. Rhommel considered Sonny a good friend whom he could confide in and trust. (XXXII RT 4465-4566.)

Later, Sonny lived with the family of Ralph Accurso and Ralph's mother Teresita from 1990 to 1991. (XXXI RT 4441.) When Sonny lived with the Accursos, Teresita ran a care facility for Alzheimer patients. Sonny helped in this facility. He would come to the facility and ask if he could help walk patients and help with other outings. Sonny also helped at home with cooking and cleaning the house. Teresita lived at home with three children and one grandchild. Sonny had a particular interest in one patient, Jack Segal. (XXXI RT 4441-4442.) Jack Segal was very fond of Sonny; Sonny would ask Jack about problems with his girlfriend and Jack would sit down and give Sonny advice. (XXXI RT 4444-4445.) Sonny would help prepare food at the Alzheimer facility. He did it voluntarily. He cooked both at the facility and at the Accurso's house – egg rolls and fried rice. (XXXI RT 4445.)

Teresita Accurso got to know Sonny well. He actually referred to her as "mother." (XXXI RT 4446.) In Teresita's country when you are very close to someone, you call them a mother. In Filipino culture, you love and respect your mother, not matter how bad she is. "We owe our mothers our life". (XXXI RT 4447.) Sonny is a very religious person. He says prayers at night and goes to church regularly. Teresita left Sonny in charge of her infant grandson because she knew she could trust Sonny. (XXXI RT 4448.) She trusted Sonny completely in her house. Sonny is the only one of Ralph's friends that she trusted. Sonny was respectful, trusting. When Sonny came to the house, she gave him the key and he proved to be very trustworthy and compassionate and very emotional too. (XXXI RT 4449.) He was very helpful, and very easy to get along with. He is just like her son. (XXXI RT 4450.)

When Sonny left her house, he told Teresita that he had to leave to find his own way and be a successful person, have a nice family. When Sonny lived with Teresita, he was going to school and working at the same time. Sonny expressed appreciation by saying "Mother you were so nice to me, just like your own children." He would tell her children not to tell their mother she is wrong. (XXXI RT 4451-4452.)

After that, Sonny moved in with the family of Cedrick Lopez in 1992. Gloria Lopez, Cedrick's mother, testified that Sonny will always be welcome in her home because he has so much love and is so caring. He has always been like a father and brother to her children. Always there to help them. He was very grateful to be in her home. Lopez cares about him very much and that is why she testified. (XXXI RT 4436.)

In sum, Sonny was a responsible, appreciative guest in these home and his behavior there fit with how his sister Lilybeth and Defense Expert Jean Nidorf characterized Sonny: Sonny would do anything for his friends (XXX RT 4316.)

8. Frustrated Desire to Return to His Filipino Family. When Sonny was twelve, he went back to the Philippines for a visit. He asked his uncle Ray if he could remain there in his boyhood home, but Ray told him to go back with his mother, which Sonny did. (XXXII RT 4543.) He also told his cousin Jocelyn and Mamang that he did not want to return to his mother in the United States. (XXXII RT 4555 [Jocelyn]; 4563 [Mamang].) Mamang described it this way: When Sonny came home from Japan for a visit, he was still the same sweet boy and he wanted to stay with Mamang and not go back with Shirley, but Mamang told him to go back with his mother for a better future so that he could have a good education. (XXXII RT 4563-4564.)

Mamang got a letter from Sonny when he was 16. The letter said Sonny wanted to come home. Mamang replied by telling him to stay with his mama so he can have a future in the states. In Sonny's letter, he did not tell Mamang that his mother was no longer living with him. Mamang wanted Sonny back very much and still loves Sonny so much. (XXXII RT 4564-4565.)

Pina remembers that on another occasion, Sonny wrote that he wanted to come back and be with her, her husband and Mamang, and she wrote back that he should stay with his mother because she (Pina) did not have any money to send him to school. All of her children were studying for high school and college, she did not have money for Sonny, and you have to pay for school in the Philippines. All of Pina's children finished high school and some went to college. Pina feels that Sonny is her true son and that he is very close with her son Jason. She is very hurt about what happened to Sonny. (XXXII RT 4506-4507)

Christopher Harris (Robert Harris's brother) testified that Sonny often cried because he desperately wanted to return to the Philippines. He seemed sad. He always spoke of his grandmother, Mamang. He was really attached to her and loved her dearly. Sonny often said that the only place he found love and freedom

was the Philippines. Sonny's mother, Shirley, did not have the normal warmth you would see between a mother and a child. (XXXII RT 4482-4483.)

9. Expert Opinion. Dr. Jean Nidorf testified as cultural mental health expert who is a certified trainer for the State Probation Department. (XXXIX 4193-4194.) She has testified as an expert four or five times a year on whether youths should be tried as juveniles or adults and testified as a gang expert. (XXXIX RT 4197) and has worked as a mental health expert in a wide variety of criminal-related issues for the counties of Los Angeles, Santa Clara, Alameda and San Diego. (XXXIX RT 4198.) In the present case, Nidorf reviewed police investigative reports, Sonny's videotaped statement to Detective Spidle, and Sonny's school and employment records. She also interviewed Robert Harris, Sonny's sister Lilybeth, members of the Harris family and other individuals who knew Sonny well, including the mothers of Sonny's friends and Rachel Sanchez, a girlfriend of Sonny's. (XXXIX RT 4200-4201.)

a. Sonny had genuine remorse for his actions and believed that he was acting in self-defense. On the basis of this information, Nidorf prepared a report in 1997 (two years before trial). (XXXIX 4201.) She concluded that Sonny "experiences sincere remorse for his conduct and its grave consequences." (XXX RT 4346.) Sonny felt remorse for taking the course of action he did and for harming people. He interpreted his conduct as self-defense; he was concerned when he found out about Jenny and said "I had no idea," and in that sense felt very badly, but these were people he did not know. (XXX RT 4345.) But his actions that night are consistent with his intense fearfulness in that situation. He was motivated by the disrespect shown, but also he actually thought this person had a gun and that he and Roger were in danger. And he repeated those statements when he did not know anyone was listening. In Nidorf's view, this confirms her conclusion that Sonny believed that he believes he acted in self-defense (XXX RT

4152.)

Dr. Nidorf also testified that the video of Sonny making a statement to Detective Spidle and talking with his girlfriend is consistent with the conclusions she reached about Sonny. Sonny is emotional on the tape. He assumes responsibility. When he is on the phone and does not know he is being taped, he says he has to face it and accept the consequences. He is protective of his friends. He tells them not to worry. They all "fucked up" and did not suggest going after anyone or other behaviors that you see in a hard-core gang member. You also see him confessing and saying he should have confessed before. He wants to be direct and honest and says he should have turned himself in sooner and he tells Roger's mother that he is sorry he is a disappointment. (XXX RT 4249-4250)

Dr. Nidorf saw him as very emotionally involved with his peers. He is distraught, tense, anxious, and tearful. He does not want his peers to forget him and he wants them to visit him. He sees his role as something of counselor, as reflected in his telling his girlfriend that she had to cut the gang activity out. He is also disturbed by his own conduct and feels that he did not set a good example. (XXX RT 4250).

Sonny felt respect was important and when Spidle treated him with respect, he backed off the angry response he had to Schultz and Horton. Sonny has his share of emotional problems and he is needy for affection; he fears rejection, is numb in his feelings and behaviorally guarded. He can respond with despair and anger and anxiety and then become manipulative and have a lot of contradictory emotions where his mood is not a fit with external reality. He can go off in ways that the actual situation does not require. But his actions that night are consistent with his intense fearfulness in this situation. {⇦except for last 2 lines, repeats text from top of previous page} (XXX RT 4251-4252)

For Sonny, respect is what you saw on the tape – the way he is with his

friends: He is sensitive to feelings and wants to be respectful and he wants that back. And that is very important to him in view of the relationships with his parents when he was a child which lacked either sensitivity or respect When the detective seemed to be genuine and concerned about him, Sonny responded in kind. Thus, the video of Sonny's statement to Spidle is consistent with how Dr. Nidorf viewed Sonny.(XXX RT 4252-4253.)

Dr. Nidorf did not think that the video showed Sonny to be a remorseless gang member who wanted to know who the snitch was and to get him when he got out. It rather goes to his bravado and rage and his concerns that everybody should stick together. Saying so would be consistent with his concerns in this area. But Dr. Nidorf concedes that hardened gang members would also want to get somebody who snitched on them. (XXX RT 4343.)

Although Dr. Nidorf was not aware that Roger Boring testified that Sonny asked Roger to find out who snitched so that Sonny could get him when he got out, she believed that such a statement was consistent with Sonny's grandiosity. Although Dr. Nidorf agrees that there are gang members who feel remorse for their conduct and some who feel distressed that they got caught, she felt Sonny's remorse was genuine. (XXX RT 4344-4345.)

b. Sonny's Gang Membership Based on Need to Belong to a Family and Fit In. Dr. Nidorf traced Sonny's gang membership to his need to replace the family he lost when he was taken away from the Philippines. Sonny was emotionally involved in being a part of the gang and believing that they were all trustworthy and a family and loyal. That is different from being engaged in sophisticated forms of drug trafficking and killing police officers and other serious criminal conduct. (XXX RT 4342.) Dr. Nidorf found that Sonny had a great deal of nurturance as a young child and that was very important to him in his development. Once he was uprooted and moved into a new family where he really

did not belong, he felt quite abandoned and alone and experienced persistent rejection and confusion. He felt weak and powerless as if he could not determine his own destiny and nothing was in his control. In his case, he needed to see himself as important and unique to overcome the difficulties he had. He does not trust people easily even though on the surface he gets along well with people. (XXX RT 4331-4332.)

Sonny is a verbal person, a thoughtful person and he had that sort of role. He was not a person orchestrating criminal activities. It was very important to Sonny that younger people look up to him. He said over and over that "they needed me." This made Sonny feel needed, that he had a place, that he had a role, a kind of a parental role to play.(XXX RT 4339.)

The aspects of Sonny's personality that were disturbed were also given acceptable channels through gang affiliation. It worked for him to be in a gang which necessarily had enemies because he saw the world in terms of enemies and people he could not trust. He had fantasies about that and the gang context made them acceptable. The gang for him was a family and in Filipino culture, the family is where you get your role, moral development, and social development. And he had lost that in his real family. So the gang became that for him and cemented relationships among brothers and allowed him to be "the moral person in the gang" and tell everyone to go to church and such. (XXX RT 4339-4340.) Sonny had personality traits that fit into gang membership. He was a very suspicious person, but in a gang that is not strange. He was a questioning person – Why this? Before in his family this was seen as irritating, but it was accepted in the gang. (XXX RT 4241.) Dr, Nidorf also noted that the gang gave Sonny the opportunity to find mothers in the mothers of gang members. He would ingratiate himself to these mothers by helping out the mothers of friends and by working for the families of gang members. (XXX RT 4226.)

c. ABC and its Members Were Not Predatory

Dr. Nidorf concluded that the ABC gang was not a predatory gang. The gang members were going to school, working and living with their families. They were not a cluster of boys living on their own and acting up all the time. (XXX RT 4226.). There was not a clear documentation of a lot of gang activity. At the time Sonny was apprehended, there really was not much information showing gang activity by the ABC Riverside gang: they were not perceived in Riverside as a very sophisticated, predatory gang. ABC Riverside was not a violent, high-profile gang (XXX RT 4328.)

d. Sonny's Role in the Gang Fulfilled His Need to Belong.

Dr. Nidorf concluded that Sonny's role in the gang was directly related to his family history. Sonny had a great deal of nurturance as a young child and that was very important to him in his development. Once he was uprooted and moved into a new family where he really did not belong, he felt quite abandoned and alone and experienced persistent rejection and confusion. He felt weak and powerless as if he could not determine his own destiny and nothing was in his control. He needed to see himself as important and unique to overcome the difficulties he had. (XXX RT 4231-4232.)

He would move from family to family as if he did not want to wear out his welcome and was afraid he might be rejected. Sonny would often tell Dr. Nidorf that "they welcomed me" but he still moved on. On the one hand, he has a desperate need to fit in; on the other, he kept himself apart. And the need to be in control and watching for things that would make him vulnerable left him with fearfulness and hyper-vigilance. Being pulled from the Philippines was one thing that was beyond his control. He described his internal experience as always being taken by surprise. (XXX RT 4233.) To some kids that might not be that bad, but with all the rest that happened to him it was harmful. (XXX RT 4332-4333.)

Dr. Nidorf observed that Sonny wanted to see himself as having a moral conscience and as the peacemaker. He saw himself as being David in David and Goliath terms and as having exceptional abilities: "I want to be very wise so I can make good decisions for everybody." He could be grandiose like his stepfather Robert Harris who said he was a Navy seal, but he was never a seal. Harris also claimed to follow orders and have killed people under orders, but none of that is true. Harris invented a reality and a role for himself. Sonny also had some of those tendencies. (XXX RT 4333-4334.)

The reason why Sonny would perceive himself as he did was that he felt very vulnerable and he wanted to create a new reality in which he was not vulnerable. This causes him to blur fantasy and reality, especially verbally. In Sonny's case, he wanted to use the law to settle disputes rather than take matters into his own hands such as with the guy in his gang that was shot and about whom he wanted to go to the police. He saw himself as a wise, respected member of his group and when Rhomel went into the Navy, he saw himself as the next guru of the group. (XXX RT 4334-4335.) Sonny was not a charismatic leader, but he did have a role as being bright and getting along with people reasonably well. (XXX RT 4336.) He noted that it was ironic that he was always telling younger folks to settle things with words or with your fists but not to use guns. It was very important to Sonny that younger people look up to him. He said over and over that "they needed me." This made Sonny feel needed, that he had a place, that he had a role, like a parental role to play. Dr. Nidorf does not know how the younger people saw him, but that is how Sonny experienced himself. (XXX RT 4339.) Sonny was a very vulnerable person and was more concerned with people hurting him, not going out and using the gun to exercise power. (XXX RT 4351.)

e. Sonny's Drug Use. Sonny was involved with speed at age 19.To some extent, he controlled his use; he was taught by an uncle of his friend how to do

that. He was also self- reporting that he was jittery and impatient on his jobs and perhaps inappropriate. (XXIX RT 4226.) Sonny told Dr. Nidorf that he was using drugs everyday except Sunday when he went to church. He appeared to be using it to as self-medication to try to make himself feel up. And when you come down from speed, you get depressed again. According to Nidorf, it becomes a sort of cycle. Most people minimize their drug use when they describe it to Dr. Nidorf. She suspects Sonny did so as well. (XXXIX RT 4227.)

Many Asian and Southeast Asian youth are drawn to crystal meth. It may be that they feel small or weak or depressed and it makes them feel psychologically empowered. They feel a rush of thoughts and feelings. Drugs are used to change the way these young people think feel and think. The drugs may may create a new reality for them. (XXXIX RT 4228-4229.)

Sonny found that use of speed interfered with normal kinds of employment. So, he worked under the table for the relatives of his friends. At the time of the offense in this case, he was living with Roger and with a young woman and was working for Roger's father, fixing bicycles. (XXXIX 4229.)

ARGUMENT

GUILT PHASE ISSUES

I.
SONNY ENRACA DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL AS REQUIRED BY *EDWARDS v. ARIZONA* BEFORE MAKING INCRIMINATING STATEMENTS BECAUSE HE WAS MISADVISED ABOUT HIS RIGHT TO COUNSEL AND NOT INFORMED OF HIS RIGHT TO CONSULT WITH THE PHILIPPINE CONSULATE

A. The Record

On December 12, 1994, Sonny Enraca was brought in for questioning regarding the shooting incident some three weeks before. Interrogating officer Detective Schultz was aware that Sonny was not a U.S. national, but rather born in the Philippines. (IV RT 727:10-18; 21 CT 5600.) Schultz acknowledged that he failed to notify Sonny of his right to consult the Philippine consulate and that he failed to notify the Philippine consulate of Sonny's arrest. (IV RT 727:20-27.) Indeed, the Philippine Consulate was not informed of Sonny's arrest until four years later and that was by defense counsel, not law enforcement. (See Declaration of Maria Lourdes C. Bello, Vice-Consul of the Republic of the Philippines, 5 CT 1249.)

During Schultz' interrogation of Sonny, which Schultz conducted together with Sergeant Horton, after standard *Miranda* warnings, Sonny waived his *Miranda* rights: he checked the box that he understood his rights, initialed the box that he wished to talk with the officers (IV RT 713:1-28, 716), and began talking with Schultz and Horton. (IV RT 717:27-28.) Schultz and Horton did not question Sonny very long, about 15 or 20 minutes. (IV RT 718:4-5, 23-25; a transcript of the interview is at 21 CT 5598-5617 [Exhibit 53A at trial].) During that interview,

Sonny denied any involvement in the shootings or that he was even at the scene that night; Schultz told him that he had anywhere from 2 to 5 witnesses who identified him as the shooter (21 CT 5605-5611 [transcript of interview, introduced at trial as Exhibit 53A].) Both Schultz and Horton suggested to Sonny the benefits of giving his side of the story and the need to make a statement before Sonny was formally charged with a crime; Horton told Sonny "What you need to do is to explain why you did it so we have some type of defense, there must have been some reason." (21 CT 5610.) Later, Horton became more emphatic:

> Let me explain something to you. Your only chance in life is to come up with exactly what happened so we could make sense of what happened.... Your only chance is to explain to us why so we have some idea of what happened.

(21 CT 5612). The interrogators then explained that Sonny might not be as guilty as all the witnesses were saying and that the district attorney would want to hear his side of the story:

> Did you get caught up in it, did you ... make a mistake. I mean did the first go off by accident I don't know. Tell us what happened guy so we can help you out here. Right now, you're ... in over your head, you need to have some type of explanation so we could go to the DA and talk about either manslaughter or I don't know, what the hell happened in your mind but right now everybody is saying you just cold bloodily shot and killed these people.

(21 CT 5613.)

When Sonny continued to deny even being there, Schultz became angry – "I have had it up to here with you cuz you're full of shit"– and Sonny requested a lawyer, invoking his rights under *Miranda* to remain silent. (21 CT 5616, IV RT 719-720.). Schultz again expressed anger at Sonny telling him "you can get anything your want, turn around, you're going to jail for double homicide" and "from now on you are to shut your mouth and I don't want to hear another word

out of you." (21 CT 5616). Sonny responded by asking "Can I ask a question ...when am I going to see my lawyer" (*ibid.*) and had the following interchange with Schultz:

> Schultz: I don't know. I don't pay for your lawyer. You do."
>
> Sonny: I thought you were going to get me appointed one."
>
> Schultz: You can, *when you go to court and get arraigned, one will be appointed to represent you. That's when you can see your lawyer.* Now, I suggest for the next 48 hours that you deeply consider that. Is that all clear?"

(21 CT 5616-5617 [transcript of interview]; IV RT 721-22 [Schultz describing interchange] [emphasis added].)

Schultz then turned Sonny over to Detective Eric Spidle for booking, telling Spidle, "he has invoked his right to remain silent." (IV RT 723.) Spidle then had Sonny photographed and allowed him to phone his girlfriend. (IV RT 743.) After making the phone call, Sonny asked Spidle "when would he get a lawyer." (IV RT 744.) Spidle described his reply as follows:

> I explained to him -- took a minute or two and explained to him the process under which he would be assigned a lawyer relative to a criminal Complaint being filed by the District Attorney's Office*: if he's charged with a crime*. Formal arraignment. At his arraignment, how the charges against him are read to him. He's advised of the charges. And how, *at that point in the formal arraignment process*, that -- *if he's charged formally with the crime, that at that point they would make a determination to assign him a lawyer.*

(IV RT 744:13-21 [emphasis added].) Spidle told Sonny that it "approximated 48 to 72 hours" before an attorney would be appointed to represent him. (IV RT 744:26.) Whether or not he knew about the earlier comments of Schultz and Horton, Spidle's comments dovetailed neatly with their message that it was important that Sonny talk to them now so that they could get information to the

DA before Sonny was charged and that he could not see a lawyer until he was arraigned. Detective Spidle never informed Sonny that he could get a lawyer appointed before he spoke with the police during this period, nor did he inform Sonny that he had right to consult with the Philippine Consulate. (IV RT 841.) To the contrary, Spidle told Sonny, "Once you ask for a lawyer, we're not going to question you any further." (IV RT 749:13-14.)

Believing, as both Schultz and Spidle had erroneously told him, that he could not get a lawyer appointed until he was charged and arraigned, and that it would take 48 to 72 hours before he could talk with a lawyer (and unaware that he had a right to speak with representatives of the Philippine consulate), Sonny began talking with Spidle about what happened that night. Spidle told him that because he had invoked his right to counsel, Spidle could not question him, but that Spidle would tape record a statement made by Sonny and take it to the District Attorney (IV RT 749:26 to 750:6.) Sonny agreed to make such a statement (IV RT 751:5-7); Spidle then got the tape recorder, gave Sonny a cigarette and began questioning him. (IV RT 751:8-13.) During the taped portion of their interaction, Sonny stated that Spidle did not ask him any questions about this and that the only promise Spidle made was that he would provide the tape to the district attorney. (21 CT 5631.) Spidle then asked Sonny "did they read you your damn rights" and Sonny replied that they had and declined a further reading. (21 CT 5631-5632.) The full interchange was:

> Spidle: Okay, and is there something you wanna tell me, you wanna tell me about this go right ahead. And you know what your rights are, too, did they read you your damn rights?
>
> Sonny: Yes.
>
> Spidle: Do you want me to read them again?

Sonny: Nah, I know my rights

Spidle: Okay, you know your rights?

Sonny: Yes.

Spidle: Okay, did one of these detectives read you your rights?

Sonny: Yes

Spidle: Okay, so knowing what your rights are, you want to tell me what happened go right ahead, lay it out.

Sonny: I want to tell this because I just wanted to make it clear not to involve anybody else, I mean I did it and that's the whole thing, my friends are my friends still no matter what.

(*ibid.*)

Sonny then went on to admit that he was the shooter and describe how the shooting took place – he thought the victims had a gun and were going to shoot him. Later that night he rode in a squad car to show the officers where he had discarded the gun. (21 CT 5618-5628 [introduced at trial as Exhibit 55A].) The next day, he went to the scene of the crime with Detectives Spidle and Schultz and reenacted the shootings. (VII RT 1457; XXVII RT 3795 [introduced at trial as Exhibit 3 and played twice for the jury].).

With conflicting testimony from eyewitnesses about who the shooter was, Sonny's statements to Spidle were crucial evidence supporting the conviction.

B Proceedings.

On January 8, 1999, the defense filed a Motion for Appropriate Relief for Past and Continuing Violations of the Vienna Convention Article 36 (5 CT 1195-1226) seeking suppression of Sonny's statements to law enforcement and the dismissal of the death penalty allegations and a Motion to Exclude Defendant's Statements for Violation of Defendant's Rights under Vienna Convention and for

violation of Miranda. (5 CT 1227-1259.) Included in support of the latter motion was a declaration from Maria Lourdes C. Bello, Vice-Consul of the Republic of the Philippines, which stated that had the Philippine Consulate been notified, they would have conferred with him "upon notice" and advised Sonny about his rights to counsel under *Miranda*. (Exhibit C, 5 CT 1249-1250.) Also included in that motion, as Exhibit D, was a declaration of Sonny Enraca which stated:

> When I was arrested on December 12, 1994, I was not told by Detective Schultz that the Philippine consulate would be notified. I was also not told that law enforcement was required to notify my consulate and that most likely the consulate would be available to assist me.
>
> Had I been made aware of my right to having my Philippine consulate notified upon my arrest, I would have waited to speak with them before I would have made any statements to Detective Schultz or Detective Spidle.
>
> ... I would have followed the advice of my Philippine consulate had been notified about my right to their access, and would not have listened to or most assuredly talked to either Detective Schultz or Detective Spidle on either December 12th or December 13th 1994.

(5 CT 1258-1259.)

On January 28, 1999, the prosecution filed People's Response to Defense Motion for Appropriate Relief re Article 36 [of Vienna Convention] (5 CT 1267-1275). On February 3, 1999, the prosecution filed People's Response to Motion to Exclude Defendant's statements. (5 CT 1279-1341.) On February 10, 1999, the trial court held an evidentiary hearing on the motions to exclude defendant's statements to Spidle and Schultz. (5 CT 1357-58; IV RT 687 to 766.)

At the hearing on February 10, 1999, the trial judge refused to allow the Philippine Consul to testify that she would have seen defendant immediately upon notification and would have advised him not to speak to law enforcement, stating,

> "I think they would have ... gotten him counsel or helped ... and would have advised him not to do anything until counsel spoke with him first, just like you would have. And I assume that."

(IV RT 700: 19-22). This hearing was continued until February 16, 1999. (5 CT 1358.)

On February 16, 1999, the trial judge heard further testimony (IV RT 767-845), ordered Defendant's reply brief filed, and continued the hearing on the motions until February 23, 1999. (5 CT 1359.) On February 23, 1999, the court held argument on the motions to exclude testimony under the Vienna Convention and *Miranda* and denied relief under both motions.. (5 CT 1400.) The trial judge found that "looking at the totality," Sonny's waiver was "free and voluntary and knowing and intelligent." (IV RT 898:2-4.) In doing so, the judge, other than complaining that defense counsel should not "dissect it in such small, minute forms and ask the Court to look at it in that lone limited space" (IV RT 898:13-15), ignored defense counsel's argument that Sonny could not have understood his rights because when Sonny asked for clarification of when he would get to see his lawyer, he was told that he would not get one until his arraignment at least 48 hours away and that he could not have one if he wished to talk with law enforcement now. (IV RT 886:8-18.) Having no answer for this cogent argument, the trial judge chose not to address it.

The trial judge did find that there was "a clear violation of" the Vienna Convention (IV RT 898:26), which he found was intended "to assist those persons through the myriad of laws and procedures and possibly stumbling blocks" they face when arrested in a foreign country. (IV RT 899:8-9.) Nonetheless, he denied relief because it "hasn't been shown to me that this violation immediately is a linkage with any statements given." (IV RT 900:16-18.) This ruling was curious in light of the judge's statement on February 10th that had the consulate been notified, they would have "gotten him counsel or helped ... and would have advised him not to do anything until counsel spoke with him first" (IV RT 700: 19-22) and Sonny's declaration of January 8, 1999 that had he been advised of his

right to consular assistance, he would not have spoken to Spidle and Schultz, but rather would have followed the consulate's advice and would not have "talked to Detective Schultz or Detective Spidle on December 12th or December 13, 1994." (Enraca Declaration of January 8, 1999, 5 CT 1259.)

C. Argument

The issue before the Court is whether the trial judge erred in failing to suppress Sonny's statements to law enforcement where Sonny was given false information about when he could see a lawyer as part of an effort to get him to speak without consulting legal counsel and where law enforcement violated his rights under applicable treaties to notification of the Philippine Consul.

It is well settled that an incriminating statement obtained on the basis of a waiver must be excluded unless the State establishes by a preponderance of the evidence that the waiver was voluntarily, knowingly, and intelligently given. (*Colorado v. Connelly*, 479 U.S. 157, 168 (1986).) In the instant case, Sonny was given a standard *Miranda* warning without any additional explanation and initially waived his rights. He began speaking with Detectives Schultz and Horton, but invoked his rights when the questioning became hostile and abusive. Once he invoked his rights, law enforcement were barred from any further questioning of Sonny unless he initiated the discussions ***and*** made an knowing and intelligent waiver of those rights. (See *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1042; *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485.) The record suggests that Sonny did initiate the conversation with Detective Spidle, but that does not end the inquiry because as the Court in *Bradshaw* pointed out:

> But even if a conversation taking place after the accused has "expressed his desire to deal with the police only through counsel," is initiated by the accused, where reinterrogation follows, *the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel*

present during the interrogation.

(462 U.S. at 1044 [emphasis added].) It is well settled that such a waiver must be "knowing and intelligent."(*Bradshaw*, 462 U.S. at 1046; *Edwards,* 451 U.S. at 486, n.9.) In assessing whether the prosecution's burden of showing a knowing and intelligent waiver has been met, the Court must consider "the totality of the circumstances." (*Bradshaw*, 462 U.S. at 1045, quoting *Edwards*, 451 U.S. at 486.) The government's burden to make such a showing "is great," and the court will "indulge every reasonable presumption against waiver of fundamental constitutional rights." *(United States v. Heldt* (9th Cir. 1984) 745 F.2d 1275, 1277 [citing *Johnson v. Zerbst* (1938) 304 U.S. 458, 464]; *North Carolina v. Butler* (1966) 441 U.S. 369, 373 [courts "must presume that a defendant did not waive his rights"].)

The totality of the circumstances includes the fact that Sonny was erroneously advised by law enforcement that he could not have a lawyer if he wanted to make a statement then (and stated "I know my rights" after having been given, without correction, this erroneous explanation that he could not get a lawyer until he was arraigned) and the fact that Sonny was not told that he had a right to speak with the Philippine Consulate, nor was the Philippine Consulate notified. Individually and collectively, each of these circumstances preclude the conclusion that Sonny waived his rights knowingly and intelligently. Each is discussed in turn.

1. The erroneous advice that Sonny could not consult with a lawyer until he was arraigned precludes a finding that Sonny's waiver of his rights under *Miranda* and *Edwards* was "knowing and intelligent." Sonny's waiver, if any, was done after Schultz, Horton and Spidle all exerted pressure on Sonny to speak with them rather than consult a lawyer. Sonny's response to each was to

seek clarification of his right to consult an attorney. Sonny asked two different law enforcement officers when he would get to see his lawyer: after he initially invoked his right (Schultz conversation, *supra*); and then when he spoke with Spidle, this was the first question Sonny asked him. In each case, the officer told Sonny that he could not speak to a lawyer until he was formally arraigned, which would not be for 48 to 72 hours. Thus, although Sonny was informed in the initial *Miranda* warning given by Detective Schultz that:

> you have the right to talk to [a] lawyer and have him present with you while you're being questioned. If you cannot afford a lawyer, one will be appointed to represent you before any questioning, if you wish one

(IV RT 713:13-16), when Sonny sought to clarify that right and attempt to assert it, he was advised that he could not get a lawyer until he was arraigned and that this would not be for 48 to 72 hours (by which point, the officers had made clear, the charging decision would have been made). This advice was clearly inconsistent with *Miranda* which requires that the accused get "an effective and express explanation" of his rights (384 U.S. at 473), including that he understand that he has "a right to an attorney 'now' before speaking" with law enforcement officers. (See *United States v. Vasquez-Lopez* (9th Cir. 1968) 400 F.2d 593, 594.) As the Ninth Circuit has made clear in *United States v. Garcai*, reversing a conviction obtained after similarly inconsistent statements by law enforcement, such conflicting warnings are not sufficient to assure that the accused knowingly relinquished his or her rights:

> Taken together, the warnings were inconsistent. At one point she was told that she had a right to the presence of counsel "when she answered any questions"; on another, she was told that she could "have an attorney appointed to represent you when you first appear before the U.S. Commissioner or the Court."
>
> The warnings failed adequately to inform Garcia of her right to

> counsel before she said a word. "The offer of counsel must be clarion and firm, not one of mere impressionism." *Lathers v. United States* (5th Cir. 1968) 396 F.2d 524, 535. (Accord, *United States v. Vasquez-Lopez* (9th Cir. 1968) 400 F.2d 593; *Gilpin v. United States* (5th Cir. 1969) 415 F.2d 638.)

(United States v. Garcia (9th Cir. 1970) 431 F.2d 134.)

In the instant case, the inconsistency was much more significant than in the cited cases. It was not merely a defect in the warning as in *Garcia* or *Vasquez-Lopez*, but rather erroneous responses to Sonny's repeated question about the nature of his right to meet with a lawyer; indeed given both officers' statements that Sonny would get a lawyer appointed when he only when he was arraigned, a fair reading of Schultz' and Spidle's advice to Sonny was that he could either speak with them now or wait until he was arraigned to speak with a lawyer, but he could not speak with a lawyer now and he could not have one if he wished to speak with law enforcement officers *before* he was arraigned some 48 to 72 hours later. This repeated erroneous advice violates *Miranda* and *Edwards* and by itself is a circumstance preventing Sonny's decision to make statements to Spidle from being the "knowing and intelligent waiver" required.

As the U.S. Supreme Court has stated, such a waiver can only be made with a "full awareness of the *nature of the right being abandoned* and the consequences of the decision to abandon it." (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [emphasis added].). Here, the statements of both Schultz and Spidle misled Sonny about the nature of his right to see a lawyer before speaking with Spidle; they left with him the impression that he was not entitled to see a lawyer before he was arraigned; that if he wished to speak with law enforcement before the arraignment, he could not speak with a lawyer first; and that he could not have a lawyer there if he spoke before he was arraigned. These false impressions given to Sonny when he sought to explore the nature of his rights preclude the waiver

from being knowing or intelligent. (*Cf. United States v. Rangel-Gonzalez* (9th Cir. 1980) 617 F.2d 529, 533 n. 5 [fact that there is "no indication that ... he was given any idea how he might contact an attorney" was a circumstance which weighed against the waiver being found to be knowing or intelligent].) Given what Sonny had been told by Schultz and Spidle, Sonny, when he agreed to talk with Spidle, would not have understood that he had the "right to have counsel present during the interrogation." (*Bradshaw, supra*, 462 U.S. at 1044.)

Moreover, Spidle could have avoided the confusion by re-advising Sonny of his rights and offering him the opportunity to speak with a lawyer then and there before Sonny gave his statement. Such accurate re-advice would appear to be necessary under *People v. Sims* ((1993) 5 Cal.4th 405, 438- 444 [imposing duty on police to re-advise arrestee of *Miranda* rights after he invokes them even where he initiates conversation with police after invoking them]), particularly in light of the erroneous statements by both Schultz and Spidle that Sonny could not see a lawyer until after he was arraigned. On this ground alone, the waiver should be considered invalid. But even if the *Sims* violation were not determinative, the failure to clarify Sonny's rights before he made the tape-recorded statement is another circumstance making it clear that the state did not meet is burden of showing the waiver was knowing and intelligent. Had Spidle taken the time to go over Sonny's rights with him at that time, he could have cured the mistaken information he (and Schultz) had imparted to Sonny that his right to counsel did not attach until he was arraigned. Given the failure to do so, it seems clear that Sonny believed Schultz and Spidle that he could not talk to a lawyer until he was arraigned 48 to 72 hours away and did not understand his right to speak to an attorney "now." Certainly, on this record, the state cannot meet its burden to show that Sonny understood the nature of the rights he was giving up.

Given the false and misleading information conveyed to Sonny and the failure by Spidle to clarify with Sonny what his rights were, any waiver made by Sonny could not be considered knowing and intelligent. Certainly, the prosecution failed to meet its burden to demonstrate that Sonny made his statements with a "full awareness of the nature of the right being abandoned" and the consequences of the decision to abandon it." (*Moran v. Burbine, supra*, 475 U.S. at 421 (1986).)

2. Sonny's status as a young foreign national with no prior experience with the criminal justice system whose rights to consult with his country's consulate were violated weigh against any finding that a knowing and intelligent waiver was obtained.

a. Relevant Treaty Provisions and Implementing Regulations

i. Vienna Convention. The Vienna Convention on Consular Relations ("VCCR") is a multilateral treaty regulating consular rights, functions and obligations for some 170 nations, including the Philippines and the United States. (Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77.) The United States unconditionally ratified the treaty in 1969; as a result, it became binding on all local and state authorities under the Supremacy Clause of the United States Constitution. (U.S. Const. Art. VI, cl. 2; *Hines v. Davidowitz* (1941) 312 U.S. 52, 62-63 [a treaty establishing rules governing the rights or privileges of aliens "is the supreme law of the land"].)

Article 36(1)(b) of the VCCR requires that the detaining authorities must advise a foreign national without delay of his right to consular notification:

> if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any

communication addressed to the consular post by the person arrested in prison, custody or detention shall also be forwarded by the said authorities without delay. ***The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.***

(Emphasis added.)

Article 36(1)(c) grants consular officers the right "to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Finally, Article 36(2) provides that local laws and regulations "must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

ii. 1948 Convention Between the United States and the Philippines on Consular Relations[17] [Hereafter, "The 1948 Convention".] The 1948 Convention between the Philippines and the United States requires that the Philippine consulate be notified and given the opportunity to consult with persons under arrest. Specifically, Article VII.2. of the 1948 Convention provides that "**Consular officers of either High Contracting Party *shall be informed immediately* whenever nationals of their country are under detention or arrest or in prison** or are awaiting trial in their consular districts **and** they shall, upon notification to the appropriate authorities, **be permitted without delay to visit and communicate with any such national.**" Moreover Article VII.3. of the convention further provides that: "communications to their consular officers from nationals of either High Contracting Party who are under detention or arrest or in prison or are awaiting trial in the territories of the other High Contracting Party shall be forwarded without delay to such consular officers by the local authorities."

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[17] Signed at Manila March14, 1947; entered into force November 18, 1948, 62 Stat. 1593; TIAS 1741; 11 Bevans 74; 45 UNTS 23. In the record at 5 CT 1242-1243.

iii. U.S. State Department Instruction to Law Enforcement on Consular Notification and Access Instructions. (5 CT 1244-1248.)[18]

In compliance with the Convention, the State Department's specific instructions to law enforcement personnel who arrest foreign nationals from the Philippines include the following:

1. When foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified
2. .... the nearest consular officials must be notified of the arrest of a foreign national, regardless of the national's wishes.[19]

b. Clear violations of Sonny's rights under applicable treaties. It is undisputed in this record that Sonny was never notified of his right to consult with consular officials. As the trial judge found, this was a clear violation of

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[18] The full title of the version in the record is "U.S. State Department, Consular Notification and Access Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them" is dated, January 1998. (5 CT 1244-1248.) The instructions in effect at the time of Sonny's arrest and interrogation were virtually identical. See United States Department of State, *Notice for Law Enforcement Officials on Detention of Foreign Nationals* (April 20, 1993) http://www.cesarfierro.info/state93.pdf (Attached as Supplement to this Brief for Court's convenience) which directed law enforcement officials as to how to proceed "whenever they arrest[ed] or otherwise detain[ed] a foreign national in the United States," and that foreign national's country (like the Philippines) had a bilateral agreement establishing "a legal obligation to notify the diplomatic or consular representatives of that person's government in this country." (The instructions directed that in such cases, "the nearest consulate or embassy should be notified without delay and the detainee so informed." The Appendix to these instructions listed the Philippines as one of the countries for which the notification of the consular officials was "mandatory" and gives the phone number of the Philippine Consulate in Los Angeles.

[19] The Philippines is one of a number of countries to which this mandatory notification procedure applies. (5 CT 1247-1248 [State Department Instructions]; See also Penal Code section 834c [effective January 1, 2000, notification of the foreign national and the Philippine consulate is required].)

Article 36(1)(b) of the Vienna Convention. that law enforcement "inform the person concerned without delay of his rights under this sub-paragraph." (See IV RT 898:26.) Moreover, it is also clear that because law enforcement never notified the Philippine consulate of Sonny's arrest, they violated Article VII.2. of the 1948 Convention which requires that "Consular officers *shall be informed immediately* whenever nationals of their country are under detention or arrest or in prison."[20] Thus, the right under the 1948 convention to immediate notification goes beyond the rights conferred by the Vienna convention and was violated. Finally, law enforcement officers violated State Department instructions which required them to notify Sonny of his right to have consular officials notified and to notify the Philippine Consulate that Sonny had been arrested.

c. Legal effect of the treaty violations. The United States Supreme Court has recently made clear that although federal courts do not have authority to order suppression solely as a remedy for violations of article 36 of the Vienna convention, the suppression remedy is available for violations of a defendant's Fifth Amendment rights and that "a defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police." *(Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 126 S.Ct. 2669, 2682.) As the Minnesota Supreme Court has recognized, this language in *Sanchez-Llamas* confirms that violations of Article 36 "may be considered in assessing whether a statement was voluntary, knowing, and intelligent." (*State v. Morales-Mulato* (2008) 744 N.W.2d 679, 686.) Thus, the clear violations of the Vienna

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[20]The "Mandatory Notification Provisions" section of the State Department's 1998 manual (*Consular Notification and Access*) quotes the "shall be informed immediately" language from the bilateral consular convention with the Philippines on page 48. The same language is quoted in the on-line version, at http://travel.state.gov/law/consular/consular_744.html#provisions.

Convention as well as of the 1948 Convention and the State Department Instructions are relevant to the issue of whether Sonny's actions in speaking to Spidle and later to Schultz were a legally effective waiver of his Fifth Amendment rights. To that issue, we now turn.

d. The treaty violations and other considerations preclude a finding that Sonny knowingly and intelligently waived his rights. The U.S. Supreme Court has recognized that the determination of whether a waiver is knowing and intelligent requires an evaluation of "age, experience, education, background, and intelligence, and into whether [the suspect] has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." (*Fare* v *Michael C.* (1979) 442 U.S. 707, 725.) Sonny was twenty-two years old at the time of the interrogation, had no prior arrests, and was a foreign national entitled to be notified of his right to consult with the Philippine Consulate. Sonny's relatively young age, his relatively limited time in the United States (eight years) and his lack of experience with the criminal justice system made him more susceptible to Schultz' and Spidle's erroneous advice that he could not get counsel until he was arraigned. These disabilities might have been overcome had Sonny been informed of his right to consult with the Philippine Consulate.

As the trial judge stated, the purpose of the Vienna Convention is "to assist those persons through the myriad of laws and procedures and possibly stumbling blocks" they face when arrested in a foreign country. (IV RT 899:8-9.) That core purpose was frustrated in this case because at the very time when he needed guidance on the nature of his rights to consult with a lawyer (about which he asked both Schultz and Spidle), at the time when both Schultz and Spidle had each given him erroneous information inconsistent with *Miranda* that he could

not get a lawyer until he was arraigned, Sonny needed the advice of the consulate, but was unlawfully denied it.

Moreover, on the record before the trial judge, the denial to Sonny of his rights under Vienna Convention and the 1948 Convention, it is undisputed that the notification would have been effective in causing Sonny to refrain from making statements to Spidle or Shultz. Sonny gave a declaration, undisputed in the record, that had he been advised of his right to consult with the Philippine consulate, he would have done so before speaking with Spidle. (5 CT 1258). The Vice-Consul made a declaration that had the consulate been notified, it would have advised Sonny "of his rights under the Miranda Doctrine, particularly the right to counsel during custodial interrogation and the right against self-incrimination." (5 CT 1249). The trial court found with respect to this advice that "I think they would have ... gotten him counsel or helped ... and would have advised him not to do anything until counsel spoke with him first." (IV RT 700: 19-22) Finally, Sonny declared:

> I would have followed the advice of my Philippine consulate had I been notified about my right to their access, and would have not listened to or more assuredly talked to either Detective Schultz of Detective Spidle on either December 12th or December 13th.

(5 CT 1259.) In other words, Sonny would have invoked his rights under the Vienna Convention and the 1948 Convention to consult with the Philippine Consulate and refused to speak with Schultz or Spidle until he had the opportunity to consult with consular officials; they would have advised him to speak to an attorney before speaking to the police; and Sonny would have followed their advice.

Thus, it appears that the failure of Schultz and Spidle to notify Sonny and the Consulate had a material effect on his behavior, causing him to make a

statement to law enforcement rather than speak with the consular officials first and preventing the consulate from doing precisely what the treaties between the United States and the Philippines were designed to do: assist citizens arrested in a foreign country in understanding and exercising their legal rights particularly where they may be confused about the nature of their rights. Where, as here, the rights involved were Sonny's *Miranda* rights about which he had been misinformed by both detectives, the treaty violations are a circumstance weighing strongly against a conclusion that his waiver was knowing and intelligent.

Given the totality of circumstances in this case – the erroneous explanations by Schultz and Spidle that informed Sonny that he had no right to counsel until he was arraigned, that he was a young foreign national with limited education, that he not only invoked his right to counsel, but asked both Schultz and Spidle when he would get a lawyer and was given false information limiting his right to see counsel, that Spidle did not readvise Sonny of his rights or check what Sonny's understanding of his rights was, that his rights to notification under the Vienna Convention and the 1948 Convention were violated, and had he been notified he would not have made statements to either Schultz or Spidle – the prosecution did not and could not meet its burden of showing that Sonny made a knowing and intelligent wavier of rights under *Miranda* and *Edwards*. Accordingly, the trial judge erred in refusing to suppress Sonny's three statements: the initial statements to Spidle on December 12, 1994, the statements in the car on December 12, 1994 and the re-enactment on December 13, 1994.

3. The trial judge's failure to suppress Sonny's statements requires reversal because the error was not harmless beyond a reasonable doubt. It is clear that an error involving denial of constitutional rights requires reversal

unless the prosecution can demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 385 U.S. 18, 24.) The admission of Sonny's three recorded statements – the initial statement to Spidle on December 12, 1994, the statements in the police car on December 12, 1994, and the videotaped re-enactment on December 13, 1994 – obtained in violation of his rights under *Miranda* is clearly a violation of his Fifth Amendment rights requiring *Chapman* analysis.

Because it is clear that Sonny's three statements were critical to his conviction, there is no way that the prosecution can establish that they were harmless beyond a reasonable doubt. At the guilt phase, the defense presented two theories to the jury: (a) whether Sonny was the actual shooter and (b) if he was the shooter, with what state of mind did he shoot. As discussed below, Sonny's statements were highly prejudicial with respect to each theory.

a. The statements were prejudicial with regard to the identity of the shooter. As to the issue of the identity of the shooter, there was conflicting evidence. Although the prosecution produced two ABC members who were close associates of Sonny, Lester Maliwat and Roger Boring, who testified that Sonny was the shooter, the credibility of each was in serious question. Each admitting lying on the witness stand and Maliwat, in particular had a motive to lie about the identity of the shooter because he resembled the shooter described by other witnesses. (See Statement of Facts, at p. 27 fn. 11.).[21] None of the members of Gobert's group (Christine Guilleres, Jenny Hyon, and Herman Flores) thought Sonny was the shooter. Christine Gilleres, Gobert's girl friend,

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[21] For a marshaling of the evidence and defense arguments concerning the credibility of Maliwat and Boring, see XXVIII RT 3815-3821 (defense guilt phase closing argument).

who was an eyewitness to the shootings testified that Sonny Enraca was not the shooter. (VIII RT 1687 [states that the person shown in Exhibits 16 and 17 (line up photos of Sonny Enraca) was not the shooter].) According to Gilleres, the shooter was the same guy who had pointed the gun at Jenny Hyon previously in the confrontation with the first group they encountered in front of the pizza parlor. (VIII RT 1630). Jenny Hyon did not know if it was the same guy, but thought it was possible. (XVI RT 2671.) According to Detective John Schultz, Herman Flores, another member of Gobert's group, described the shooter as five feet tall, about 100 pounds and age 17, Asian, wearing a white sweatshirt with a hood, beige jeans with ragged bottoms. [22] (XXIII RT 3486.) Flores picked out the photo of John Labatton as the one which resembled the shooter (XXIII RT 3480). Flores also said that the shooter drove away in a white tercel with the license plate with "LSR" (rival gang to ABC which suggested that Sonny could not have been the shooter). (XXIII RT 3482.)

The defense called two other eyewitnesses both of whom described the shooter as someone who could not have been Sonny Enraca. Marcus Freeman, who witnessed the shooting from his car which was stopped on Etiwanda because the fight had spilled out into the street directly in front of his car, described the shooter in terms remarkably similar to the description provided by Herman Flores: "five foot, 110 pounds wearing a white hooded sweatshirt and beige Levi's." (XX RT 3371; see also XX RT 3381.)

Alfred Ward testified that the shooter had a "buzzed head" on top with a

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[22] Defense counsel noted that videotape evidence played for the jury showed that Sonny is 5'6" tall and weighs 130 pounds (VII RT 1464.) Lester Maliwat, who testified that Sonny did the shooting, weighed 110 pounds. (XXVII RT 3816) Maliwat testified that Sonny was wearing dark pants and a light blue shirt the night of the shootings. (X RT 1972.)

multicolored pony tail in back (XVIII RT 2939)[23] and wore a white hooded sweatshirt. (XVIII RT 2948); in fact what made the shooter stand out that night was that white hooded sweatshirt (XVIII RT 2961-2962). According to Ward, the shots were fired after a voice said, "Fuck it, John, just shoot them." (XVIII RT 2940.)

In this state of conflicting evidence, the identity of the shooter would not have been an easy issue for the jury. Sonny's statements made that issue dramatically easier to decide and this is why the prosecution cannot meet its burden of showing that the statements were harmless beyond a reasonable doubt. Without Sonny's statements, the jury had conflicting testimony which would have justified a reasonable doubt at to the identity of the shooter. Despite Sonny's extended admissions in the three recorded statements by Sonny introduced into evidence, the defense vigorously argued that he was not the shooter and that his admissions to the police were made to protect his friends; indeed, one of Sonny's two defense counsel devoted her entire closing argument to the theory that Sonny was not the shooter. (See XXVII RT 3815 - 3837.) Though they had substantial self-defense, imperfect self-defense, and second-degree murder defenses, defense counsel thought the evidence that Sonny was the shooter was so conflicting that they chose to contest that issue in spite of his three statements to law enforcement admitting that he was the shooter. This is an indication of how conflicting the evidence was. The conclusion seems inescapable that had Sonny's statements not been erroneously admitted, the jury would have had difficulty determining that he was shooter beyond a reasonable

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[23]The video of Sonny's statement shows Sonny had a full head of hair when questioned three weeks after the shootings. (Exhibit 3.)

doubt. Certainly, the prosecution[24] cannot show that admitting Sonny's statements in which he repeatedly stated that he was the shooter was harmless beyond a reasonable doubt.

b. Sonny's state of mind at the time of the shooting. In addition to the identity issue, the defense contended that if Sonny were the shooter, he fired the fatal shots in self-defense, or in the unreasonable belief that he was acting in self-defense or that the shooting was done without deliberation and was therefore at most murder in the second degree. The prosecution relied heavily on Sonny's statements on the tape to rebut these contentions. Indeed the prosecutor played the videotape of Sonny's re-enactment of the events which was done on December 13, 1994 for the jury during his closing argument. (See 27 RT 3799.) And he relied repeatedly on Sonny's statement to Detective Spidle on December 12, 1994 tape that Sonny had walked over to Hernandez while he was lying on the ground and asked him "where you from"; the prosecutor's argument was as follows.

> Remember when – on the video tape when you saw that videotape for the first time, the defendant walks over — *and this is his own admission* – walks over and he picks the Mexican guy up by the hair and says, "Where you from?" And Eric feeds him a little more rope and says "You really asked him, 'Where you from?'" He recognizes the significance of this. He picks him up by the hair and says "Where you from now, motherfucker?" That's the way it went down.
>
> What person, thinking that two people laying on the ground might have a gun walks up, grabs one of them by the hair and says, "Oh, gee. Where ya from? Because I didn't recognize you and I wanted to know where you were from," while you laid [sic] on the street? Nobody. Nobody. Nobody

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[24]The two witnesses who identified Sonny as the shooter, Maliwat and Boring, were the subject of accomplice-corroboration instructions. (22 CT 5842-5846.) The prosecutor relied upon Sonny's statements as the required corroboration. (XXVIII RT 3950.)

does that. Your common sense tells you that.

(XXVII RT 3799:18 to 3800:10 [emphasis added].) See also *id* at 3864: 10-28 [arguing that Sonny's statement that he picked up one of the victims by the hair and asked him where you from is inconsistent with the mental state defenses advanced by Sonny].)

Indeed as part of his final moment of argument to the jury the prosecutor used Sonny's statement to law enforcement as rebuttal to the defense evidence:

> This case boils down to respect. *Play the tape. Look at it where I stopped it*, when he says, "See, he's disrespecting us already." Look at his state of mind. He doesn't say he was freaked out. He doesn't say he was afraid of the guy. He says, "Man, the guy didn't even look like a gang member." *Play that tape. Those are his own words.*

(XXVII RT 3966: 11-17 [emphasis added].)

There was ample evidence in this case, based on victim Gobert's provocative and insulting behavior, his gestures suggesting that he had a gun and was willing to use it, Sonny Enraca's methamphetamine intoxication, and the very briefness of the entire encounter, to support verdicts of less than first-degree murder. The prosecution used Sonny's statements to law enforcement as crucial evidence to overcome the jury's doubts over Sonny's state of mind. It is clear that the statements could have had a substantial impact on the jury's determination. Certainly, the prosecution cannot meet the burden of showing that its use of Sonny's own words on the tape was harmless beyond a reasonable doubt.

4. Conclusion. In summary, Sonny's statements to the police were critically important to undermine the conflicting evidence over who was the actual shooter and were used to rebut defense arguments that if Sonny did the shootings, the killings were not first-degree murder. The erroneous admission of the statements was highly prejudicial and in no way can the error in admitting

them be considered harmless beyond a reasonable doubt.

II.

WHERE THERE WAS EXTENSIVE EVIDENCE OF PROVOCATION, THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON SUDDEN QUARREL AND HEAT OF PASSION AS A BASIS FOR A MANSLAUGHTER CONVICTION AND IN REFUSING TO INSTRUCT THE JURY ON THE POSSIBLE IMPACT OF PROVOCATION ON WHETHER A HOMICIDE WAS DELIBERATE AND PREMEDITATED, AND THEREBY DENIED APPELLANT HIS RIGHTS TO DUE PROCESS AND TO TRIAL BY JURY ON THE ISSUES OF WHETHER HE COMMITTED MANSLAUGHTER OR SECOND-DEGREE MURDER RATHER THAN FIRST-DEGREE MURDER

A. Extensive Evidence of Provocation.

During the guilt phase trial, witnesses for the prosecution and the defense testified to numerous provocative acts by decedent Dedrick Gobert, including inflammatory conduct (belligerent behavior and words, gang-related threats and insults, acting as if he had a gun) and physical fighting (in which Sonny was involved). Those same witnesses also testified that the shooting occurred within as little as one minute from the inception of the physical fighting, and a defense expert testified that explosive outbursts of temper were typical of individuals who used methamphetamines as Sonny had that day. The evidence of provocation and of the impact of Sonny's methamphetamine use is summarized below.

1. Inflammatory actions by Gobert.

a. Belligerent behavior and words by Gobert. Gobert, enraged by an earlier incident in which one member of a different group of Asians pulled a gun on one of his companions (Jenny Hyon), drove around in a noticeably erratic manner making u-turns at high speed. (XV RT 2509-10) [Testimony of Roger Boring]; IX RT 1842 [Testimony of Lester Mailiwat]; XX RT 3226 [Testimony

of Darryl Arquero]; but see VIII RT 1618 [Gilleres testifies that Gobert was driving at a normal rate of speed and not erratically].) Gobert then parked his car on Etiwanda and ran from the street toward the sidewalk in front of the pizza parlor and confronted defendant's group (VIII RT 1676), Gilleres tried to stop Gobert (VIII RT 1677-78) and witnesses heard her or Hyon yell to Gobert that these were the "wrong guys." (XV RT 2514 [Testimony of Roger Boring]; XIX RT 3063, 3084 [John Frick]; XX RT 3233-3234 [Daryl Arquero].) Gobert appeared drunk at this time. (See XV RT 2465, 2513 [Roger Boring]); "visibly drunk," smelled of alcohol and"belligerent." (XIX RT 3052 [John Frick].) Toxicologist Maureen Black testified that she tested blood samples taken from Gobert and that he had a blood alcohol level of .16 (twice the legal limit for driving under the influence). (XVII RT 2741). She further testified that people with levels of blood alcohol this high exhibit exaggerated emotional states such as belligerence, anger, impaired judgment and unwarranted confidence. (XVII RT 2747-2748.)

b. Gang-related insults and threats. Gobert's manner was consistent with behavior described by toxicologist Black. He was flamboyant and confrontational: he strutted with a "gangsterly walk" (XX RT 3274 [Testimony of Daryl Arquero]), was ready to take on a whole group by himself and uttered gang insults, gang signs and identifications of himself as a Crips gang member. Gobert made gestures with his hands including stretching his arms out with his palms up and making the letter "C" (for Crips) with his fingers (IX RT 2030-31, 2042-43 [Lester Maliwat]; he was very angry and yelled that he was "not afraid to die" (XVII RT 3084-85 [John Frick]), asked "What's up cuz?" (VIII RT 1709 [Gilleres]), yelled at the ABC group (that identified itself as Bloods) that he, Gobert, was a Mafia Crip (XIV RT 2446 (Roger Boring]; XVI RT 2622 (Investigator Bernie Skiles testifying to what Roger Boring had said during an

interrogation]) and then told them "fuck you slobs"[25] and "fuck Bloods." (See XI RT 1972-73, 2004 [Lester Maliwat].) Alfred Belamide testified that Gobert was dressed like a gang member and had a blue rag bandana. (XVII RT 2818.)

Lester Maliwat testified that saying "What's up cuz" is a sign of disrespect for ABC. (XI RT 1972-1973; 2004, 2047.) Prosecution gang expert Michael Martin testified that if the terms "What's up Blood?" was used by ABC,

> it is a way of identifying themselves as Bloods and it is also a derogatory statement to any Crips around. And normally the response back would be "What's up cuz?"whatever. And if those two statements go on, the verbal confrontation can then become violent.
>
> ....
>
> And by saying "what up, slob?"it's derogatory towards the Blood set or that particular Blood gang member. And by showing the C, he's saying, you know, "I am a Crip." And more than likely they're going to fight.

XI RT 2072-73)

c. Acting as if he had a gun. Jenny Hyon testified that she yelled to the group Gobert was confronting not to pay any attention to him. (XVI RT 2672) Neither Roger Boring, nor Lester Maliwat, both members of ABC at the scene, initially took Gobert, alone confronting a group of 10 to 25 ABC members, as a serious threat. (IX RT 1978 (Maliwat).) But Gobert then put his hands to his waistband in a gesture that made many witnesses believe Gobert had a gun. (XV RT 2513-2514, 2531 [Roger Boring]); XIX RT 3110 [John Frick]); XX RT 3168 [Cedrick Lopez]); XXIII RT 3460 [Detective John Schultz testifying to what Lester Maliwat told him during an interrogation]); XVII RT 2820 [Alfred Belamide]); XIV RT 2450 [Roger Boring].) Officer Michael Martin, the

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[25] In gang parlance, "Slobs" is a derogatory term used by Crips members to insult Bloods. (IX RT 1846:9-22; XIV RT 2446.)

prosecution's expert witness on gangs testified that it would have been reasonable to infer from Gobert's gang signs, the fact that he was claiming to be a member of Crips and his gestures that Gobert had a gun and/or that he wanted the others he was confronting to think that he had a gun. (XII RT 2143-2146.)

Just before he was shot, Gobert looked at Sonny and said "fuck you asshole,"and grabbed his friend, and Sonny thought Gobert was grabbing his gun. (21 CT 5653-5654; 5655 [Sonny's statement to Detective Spidle].)

2. Evidence that Sonny was directly involved in the fighting before the shooting. Although in his statements to Detective Spidle, Sonny claimed that he was trying to break up the fight and not involved in the fighting (21 CT 5650), three eyewitnesses testified that the shooter was in the fight:

- Marcus Freeman told Detective Schultz that the shooter was involved in the fight and got off the ground just prior to shooting. (XXIII RT 3484);
- Detective Schultz testified that Lester Maliwat told him that Sonny was involved in the fighting] (XXIII RT 3459 .)
- Roger Boring testified that Sonny was involved in the fighting (XV RT 2492) and Detective Schultz testified that Boring listed Sonny's and Maliwat's name on Exhibit 59 as involved in the fighting when Schultz interviewed Boring

(XXIII RT 3462), but see XV RT 2519 [not involved after Gobert broke away and went out on the street].)

3. The short time between Gobert's provocative behavior and the shootings Arnold Belamide testified that the fight lasted only about one minute (XVII RT 2847.) Herman Flores testified that the fight lasted only a minute or

two. (XXIII RT 3342.)

4. Evidence of the impact of Sonny's use of methamphetamine on his responses to provocations. Defense expert Dr. Rosenberg testified that typical symptoms of methamphetamine intoxication include loss of impulse control, easy loss of temper, things done in an explosive way, outbursts of anger or physical outbursts. (XVIII RT 2881.) Thus, use of methamphetamine may have caused Sonny to have reacted impulsively and angrily to Gobert's confrontational and provocative behavior in a way that was inconsistent with premeditation.

B. Proceedings

In light of the substantial evidence of provocative behavior by Gobert, ***both*** the prosecution and the defense requested jury instructions on **voluntary manslaughter**, including voluntary manslaughter as a result of a sudden quarrel or in the heat of passion (CALJIC 8.40 Voluntary Manslaughter (22 CT 5827)) as well as CALJIC 8.42 (Sudden Quarrel or Heat of Passion Explained) (22 CT 5920), 8.43 (Cooling Period Explained) (22 CT 5922), and 8.44 (No Specific Emotion Alone Constitutes Heat of Passion) (22 CT 5923). Both sides also requested instructions on the degree to which **provocation mitigated the degree of murder**, CALJIC 8.73 (Evidence of Provocation May be Considered in Determining the Degree of Murder). (22 CT 5924.) Despite the agreement of counsel for both sides that instructions relating to the impact of provocation were warranted both with respect to voluntary manslaughter and with respect to second-degree murder, the trial judge struck from the manslaughter instruction any reference to sudden quarrel or heat of passion (XXVI RT 3734:24-26), refused to give the CALJIC 8.42 through 8.44 (XXVI RT 3735) which explained these mitigating defenses, and also refused to give either CALJIC 8.73 (XXVI

RT 3728-3730) which instructs the jury that "where provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation or premeditation" or an instruction advising that "Evidence of provocation may by itself raise a reasonable doubt in your mind that the killing was first degree." (22 CT 5937.)

1. Court's explanation regarding provocation and manslaughter. The trial judge stated that with respect to sudden quarrel or heat of passion theories (that Sonny's actions were manslaughter, not first-degree murder), there were two holes in the defense evidence which caused him to refuse the instructions requested by both sides: (1) there was no heat of passion ("His passions weren't aroused. It was either self-defense or he killed somebody .... isn't involved in a heated argument, pushing match anything like that .... I don't think there was a heat of passion behind anybody. They were laughing at this guy until they had a belief that they were going to get shot at." (XXVI RT 3721:20 to 3722:10) and (2) there had to be specific evidence, independent from the provocation itself, that defendant was actually affected by the provocative behavior. (XXVI RT 3726.) The court cited no authority during the discussions of the instructions.

As the trial judge viewed the evidence; there was no evidence that defendant or anyone else was angered by Gobert's actions until he made gestures suggesting that he had a gun. Therefore, in the judge's view, none of the instructions regarding manslaughter as a result of a sudden quarrel or heat of passion were warranted; the only instructions which were warranted were with respect to self-defense and manslaughter as a result of actions taken under the unreasonable belief that they were necessary for self-defense. (XXVI RT 3722-3727). In reaching this conclusion, the trial judge analyzed the evidence as

follows:

> ... People use the word "nigger." They always say "the 'N' word." That could engender, in someone using it enough, that that person gets so angry -- that isn't the situation we have here. We have the situation here where they're laughing at this guy, trying to blow him off. Until -- if they think he's going for something..... And your... client's not even involved -- not even involved -- until he tries to, in your theory, protect himself or the others. I'm not going to give it.

(XXVI RT 3722:18-27.)

In the extended colloquy on whether the sudden-quarrel–heat-of-passion instruction was appropriate, the trial judge further explained that it was not enough that inflammatory words were used, "you have to establish evidence *after the use of the word.*" (XXVI RT 3726:24-25 [emphasis added].). When defense counsel pointed out that the prosecution's expert had testified that Gobert's language was a sign of total disrespect in gang parlance (XXVI RT 3726:28 to 3727:1), the trial judge interrupted and said:

> It's the word "nigger" again. You don't have to have an expert. A black man in today's society, or woman, can tell us that that is probably the height of a derogatory statement to them. But let's say we had an expert say that. Probably a black man or woman. That doesn't mean the use of it on an occasion will get you shot or get you in a fight. You have to have evidence of it.

(XXVI RT 3727.)

2. Court explanation regarding provocation evidence being insufficient to inform jury that provocation can mitigate first-degree murder. The trial judge believed that the identical analysis supported its decision to refuse to give CALJIC 8.73, despite the defense's clear and accurate argument that mitigating first- to second-degree murder required a much lower level of provocation than to mitigate murder to manslaughter. The trial judge explained that in his view the only provocative conduct was gesturing toward an

apparent weapon and that this was covered by the self-defense instructions. (XXVI RT 3728-3730.) Defense counsel specifically argued that the levels of provocation were different:

> When the Court talked about provocation, I think, it's a different level of provocation for this instruction than, necessarily, provocation for purposes of voluntary manslaughter. Because here, you're just talking about reducing it from first degree to second degree, as opposed to from murder to manslaughter. I think there's different degrees of provocation. And, respectfully, I think the Court is limiting us. And I think there's overwhelming evidence here there was some kind of provocation that could have certainly militated against the first-degree finding.

(XXVI RT 3729:27 to 3730:8.)

The trial judge responded that the only provocation evidence in the record was evidence of Gobert's gestures suggesting that he had a gun and that instructions dealing with imperfect self-defense covered this kind of provocation, so that including the CALJIC instruction on provocation and degree of murder was not justified by any evidence and that to get such an instruction: "The only provocation that would do that is not provocation in self-defense." (XXVI RT 3740:9-10)

C. The Trial Judge Erred in Refusing to Instruct on Manslaughter in the Heat of Passion or Because of a Sudden Quarrel.

1. The Trial Judge Misunderstood the Applicable Law. As this Court held in *People v. Breverman* (1998) 19 Cal.4th 142, 160:

> In a murder case, . . . both heat of passion and unreasonable self-defense, as forms of voluntary manslaughter, must be presented to the jury if both have substantial evidentiary support.

In the instant case the trial judge instructed the jury on imperfect self-defense, but refused instructions on "heat of passion" because in his view there was no evidence of heat of passion (he did not comment on the alternative "sudden

quarrel" language in the instruction) or of any provocation not covered by the imperfect self-defense instruction. The trial judge's failure to realize that a rival gang member's actions suggesting that he has a gun and is reaching for it are provocative, whether or not they present the kind of imminent threat necessary for a lethal self-defense or unreasonable-self-defense instruction and the judge's focus on requiring evidence of provocation beyond the gun-related gestures and independent evidence that Gobert's provocative behavior made Sonny angry are off target, both legally and factually. Legally, this Court has made clear that the key issue for a heat of passion manslaughter instruction is whether the victim's behavior was such that it would provoke the reasonable person, an objective test:

> The provocative conduct by the victim may be physical or verbal, but the conduct must be *sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection*. (People v. Berry (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 556 P.2d 777]; *People v. Valentine* (1946) 28 Cal.2d 121, 138-139 [169 P.2d 1].... "*and from such passion rather than judgment*." *People v. Barton*, *supra*, 12 Cal.4th at p. 201.)

(*People v. Lee* (1999) 20 Cal.4th 47, 58-59 [emphasis added].) Thus, the trial court failed to focus on the issue critical to the determination of whether voluntary manslaughter instructions – whether the victim's conduct was "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation ... and from such passion rather than judgment."

Had the trial court focused on the appropriate criteria, it would have had to conclude that there was substantial evidence from which a jury could conclude that the situation would have caused a reasonable person to act rashly: the trial judge concluded that Sonny's group "had a belief that they were going to get shot at" (XXVI RT 3722:2) and there were gang threats of violence, all of which resulted in a street brawl involving some 10 to 25 persons, but which

lasted no more than a minute of two from the time the first blow was struck until the fatal shots were fired. The trial judge was fixated on his belief that any response to this threat to shoot at Sonny's group was in the nature of self-defense and he completely ignored the obvious – reasonable people who are in a confrontation with someone who gestures as if he has a gun can become frightened, angry, and act rashly. (See e.g. Aaron T. Beck, Gary Emery, Ruth L. Greenberg (2005) Anxiety Disorders and Phobias: A Cognitive Perspective 42-43 [Anger is commonly associated with a physical threat].) Their reasonable reactions include not only defending themselves from an imminent threat of danger, but also anger at being threatened.

Thus, while the instructions relating to imperfect self-defense direct the jury to consider only whether the killing was done "in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury," (CALJIC 8.50), they do not address the anger created by the perception of a hostile threat, an anger which can influence the recipient of the threat even when the imminent peril to life either had not yet materialized or was no longer be present. Thus, if an ordinarily person would be so angered by the combination of hostile gang insults and threats and the gesture suggesting Gobert had a gun, that they would react angrily and rashly, and without deliberation, that would be enough to satisfy the requirements for manslaughter on the ground of sudden quarrel or heat of passion, even if the imminent danger of being shot by Gobert had passed. Thus, this case is like *People v. Breverman, supra,* 19 Cal.4th at 163, where defendant shot at fleeing gang members who had threatened him and vandalized his car and killed one of them, but the court concluded that:

> the intimidating conduct included challenges to the defendant to fight, followed by use of the weapons to batter and smash defendant's vehicle

> parked in the driveway of his residence, within a short distance from the front door. Defendant and the other persons in the house all indicated that the number and behavior of the intruders, which defendant characterized as a "mob," caused immediate fear and panic. Under these circumstances, a reasonable jury could infer that defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition.

(19 Cal.4th at 163-64.)

Moreover, *Breverman* also recognizes that the fact that defendant shot as the gang threatening him was fleeing did not mean that his shooting after the direct threat of imminent attack had passed deprived him of the heat of passion defense:

> A rational jury could also find that the intense and high-wrought emotions aroused by the initial threat had not had time to cool or subside by the time defendant fired the first few shots from inside the house, then emerged and fired the fatal second volley after the fleeing intruders. At one point in his police statement, defendant suggested that he acted in one continuous, chaotic response to the riotous events outside his door.

(19 Cal.4th at 164.) Thus, even though the jury in *Breverman* was instructed on manslaughter in unreasonable self-defense, it was error to fail to instruct them on the heat of passion defense.

The trial judge in the present case appeared so fixated on the evidence that suggested that the reaction of ABC members was to Gobert's gesture signifying that he had a gun and the correct conclusion that this fact justified the imperfect self-defense instructions, that the judge ignored the threats and gang signs and other provocative behavior which preceded it; the combination of these behaviors with the suggestion that he had a gun was sufficient to raise the passions of an ordinarily reasonable person regardless of whether the weapon was in a position to cause imminent death. *Breverman, supra.* See also. *People v. Flannel* (1979) 25 Cal.3d 668, 677-678 (distinguishing manslaughter in heat

of passion which requires objective provocation from honest, but unreasonable self-defense which requires only a subjective belief that there is an imminent threat of great bodily injury.) Moreover, the evidence that Sonny was directly involved in the brawl that ensued certainly suggested that this was a sudden quarrel (according to two witnesses, it lasted only a minute or two). Thus, there was substantial evidence from which a jury could have found that the shooting resulted from a sudden quarrel in the heat of the passions created by Gobert's provocative conduct and that an ordinarily reasonable person of average disposition could react "rashly and without deliberation and reflection" in response to this provocation. There was clearly enough evidence to let the jury, not the trial judge, decide this question.

2. The trial judge erroneously placed the burden on the defense. In addition to the requirement that there be evidence meeting the objective standard that an ordinarily reasonable person would have reacted rashly and without deliberation in the circumstances, there is a subjective requirement for the sudden quarrel-heat of passion instruction: "The defendant must actually, subjectively, kill under the heat of passion." *(People v. Steele* (2002) 27 Cal.4th 1230, 1252 (quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 327).) Nonetheless, the trial judge's requirement that there be evidence independent of the evidence of what would provoke a reasonable person was error. Because of the relationship between the element of malice required for murder and heat of passion, which reduces what would otherwise be murder to voluntary manslaughter, the burden is clearly on the prosecution to show the absence of heat of passion, and requiring such evidence to be produced beyond evidence of the provocation itself in effect shifts the burden of disproving malice to defendant in violation of his constitutional rights to due process (*In re Winship* (1970) 397 U.S. 358, 364) and to trial by jury on every element of the murder

charge. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, *People v. Breverman, supra,* 19 Cal.4th at 188-190 (Kennard, J., dissenting).) Thus, this requirement deprived Sonny of his right to due process and to trial by jury on every element of the offense of murder.

3. The trial judge usurped the jury's role in finding facts. Moreover, the trial judge's analysis of the evidence under that erroneous standard was also erroneous: his conclusion that there was no evidence from which the jury could find that Sonny's shooting of Gobert and Hernandez was the result of the passions raised by a sudden quarrel is wrong. The same evidence which demonstrates that an ordinarily reasonable person would react rashly and without deliberation is sufficient for a jury to find that the defendant who experienced this kind of provocation reacted the way an ordinary person would. (Cf. *People v. Manriquez* (2005) 37 Cal.4th 547, 585-86 [Assumes that even in the face of testimony that defendant was trying to calm the victim down, defendant could pass the subjective test if the actions of the victim were sufficient that "an average, sober person would be so inflamed that he or she would lose reason and judgment."].) Indeed, there appears to be no decision of this Court in which the provocation passed the objective test and this Court held that heat of passion instructions were inappropriate for lack of proof of subjective heat of passion. (See e.g. *Manriquez, supra,* 37 Cal.4th at 585-86 [objective test not satisfied]; *People v. Steele* (2002) 27 Cal.4th 1230, 1252 (that defendant may have personally been enraged [subjective test met] insufficient because "no defendant may set up his own standard of conduct [objective test not met]).

Ultimately, the error that the trial judge made was to not let the jury decide whether the course of provocative behavior by Gobert – drunken, belligerent behavior, gang signs, verbal gang insults (which the prosecution gang

expert testified would lead to violence (XII RT 2143-2146)) and the gestures suggesting he had a gun in his waistband – were sufficient provocation to qualify Sonny's reaction as manslaughter as a result of a sudden quarrel or in the heat of passion. In essence, the trial judge agreed with the prosecution tactic of segregating into distinct phases what a jury might have found was a continuous, one-to-two-minute confrontation and decided to allow the jury to consider the facts only through the lens of prosecution theory. In doing so, he not only erred, but deprived Sonny of his right to a trial by jury on the provocation issue and by doing so on the malice element of murder.

D. The Court Clearly Erred in Refusing to Instruct the Jury to Consider the Evidence of Provocation on the Issue of Whether Sonny Acted with Premeditation and Deliberation.

Whatever this Court's view of the trial judge's refusal to let the jury decide whether the extensive provocation by Gobert justified a finding of manslaughter in a sudden quarrel or in the heat of passion, it is clear that trial judge erred when he refused to give *both* CALJIC 8.73 which informs the jury that "where provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation or premeditation," *and* an instruction advising that "[e]vidence of provocation may by itself raise a reasonable doubt in your mind that the killing was first degree." (22 CT 5924, 5937 [Defense Requested Instruction No.3].)

In *People v. Valentine* (1946) 28 Cal.2d 121, 132, this Court held that instructions regarding second-degree murder were erroneously incomplete where the jury "were not advised that the existence of provocation which is not 'adequate' to reduce the class of the offense may nevertheless raise a reasonable

doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation."

Subsequent to *Valentine*, its holding was incorporated in CALJIC 8.73. This Court has held that CALJIC 8.73 is a pinpoint instruction

> *to which a defendant is entitled upon request.* Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case.... *They are required to be given upon request when there is evidence supportive of the theory*, but they are not required to be given sua sponte."

(People v. Rogers (2006) 39.Cal.4th 826, 878 citing *People v. Saille*, supra, 54 Cal.3d at p. 1119[emphasis added].)

Sonny's lawyers requested that the Court give CALJIC 8.73. There was extensive evidence of provocative behavior by Gobert, and there was evidence that Sonny was under the influence of methamphetamine which left him prone to angry, paranoid reactions to such provocations. Under *Valentine*, *Rogers* and *Saile*, it was error not to give CALJIC 8.73 and the requested instruction that evidence of provocation may support a reasonable doubt as to whether a killing was deliberate and premeditated.

E. The Court's Errors Were Prejudicial.

1. The Refusal to Instruct the Jury on Voluntary Manslaughter as a result of a sudden quarrel or in the heat of passion requires reversal. By erroneously refusing to instruct the jury on voluntary manslaughter as a result of a sudden quarrel or in the heat of passion, the trial judge deprived Sonny of his constitutional right to accurate instructions on all elements of the charged offense and any lesser included offense supported by the evidence (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523, *Mullaney v. Wilbur* (1975) 421 U.S. 684, *Beck v. Alabama* (1980) 447 U.S. 625, *People v. Breverman, supra,* 19

Cal.4th at 188-190 (Kennard, J., dissenting)), as well as his constitutional rights to have the jury adequately instructed on the defendant's factually supported theory of the case (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740), to a jury determination of all elements of the charged offense (*Mullaney v. Wilbur, supra.*), to reliable capital guilt and sentencing determinations (*Beck v. Alabama* (1980) 447 U.S. 625, *Zant v. Stephens* (1983) 462 U.S. 862, 879)), and to fundamental fairness under the due process clause, in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Accordingly, he is entitled to reversal unless the state can demonstrate that this error was harmless beyond a reasonable doubt. *(Chapman v. California* (1967) 385 U.S. 18, 24.) The state cannot meet that burden; indeed, it cannot meet the lesser burden of showing that it is not "reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.3d 818, 836);

Although the jury was instructed on manslaughter, all references to provocation were struck from the manslaughter instructions. Thus, the case was submitted to the jury with instructions allowing them to find manslaughter only on the theory of unreasonable self-defense. As discussed above, those instructions restrict the jury from finding manslaughter unless they find that defendant killed "in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury," (CALJIC 8.50). Thus, the instructions precluded the jury from finding that Gobert's extensive course of belligerent behavior was "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." *(People v. Lee, supra,* 20 Cal.4th at 58-59.) Thus, this jury, like the jury in *Breverman*, could have found that even if the threatening behavior by the victim did not pose a threat of imminent death or

bodily injury (in *Breverman* the victim and his gang were fleeing the scene when shot), defendant still shot in the heat of passion occasioned by the provocative actions which put defendant in anger and fear. This Court's words in *Breverman* are equally applicable here: "*A rational jury could also find that the intense and high-wrought emotions aroused by the initial threat had not had time to cool or subside by the time defendant fired.*" (19 Cal. 4th at 164 [emphasis added].). Under these circumstances, the failure to instruct on voluntary manslaughter was prejudicial error under either the *Chapman* or *Watson* standards.

Nor does the fact that the jury was instructed that to find deliberate and premeditated murder the intent to kill "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation" (CALJIC 8.20, 22 CT 5818) render the error harmless. None of the standard instructions defining heat of passion and sudden quarrel were given. CALJIC 8.42 [Sudden quarrel or heat of passion and provocation explained], CALJIC 8.43 [Murder or manslaughter – cooling period]; CALJIC 8.44 [No specific emotion alone constitutes heat of passion] were all requested by both prosecution and defense, but refused by the court. (See 22 CT 5920-5923.) Without these critical definitions, the jury had no reliable basis for deciding the provocation issue and any implicit finding that there was no provocation is unreliable.

2. The refusal to instruct the jury that it could consider provocation in determining whether the killing was committed with deliberation was prejudicial. Similarly, the error in refusing to instruct the jury under CALJIC 8.73 or to advise the jury that provocation could support a reasonable doubt as to premeditation and deliberation violated Sonny's Sixth and Fourteenth

Amendment right to have the jury adequately instructed on the defendant's factually supported theory of the case (*Conde v. Henry*, 198 F.3d at 739-740) and deprived Sonny of his Eighth and Fourteenth Amendment right to reliable guilt and sentencing verdicts in a capital case (*Beck v. Alabama* (1980) 447 U.S. 625; *Zant v. Stephens* (1983) 462 U.S. 862, 879) and should be judged by the *Chapman* standard of harmless beyond a reasonable doubt.

There is little doubt that the error in denying instructions which would have assisted the jury in evaluating the impact of the extensive provocation on the issue of whether the killing was done with reflection and deliberation was prejudicial. Given the substantial evidence of provocative behavior by Gobert, Sonny was entitled to have the jury understand the legal relevance of that evidence. Although the jury was instructed that to find deliberate and premeditated murder the intent to kill "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation" (CALJIC 8.20, 22 CT 5818), this did not render the error harmless. None of the standard instructions defining heat of passion and sudden quarrel were given. CALJIC 8.42 [Sudden quarrel or heat of passion and provocation explained], CALJIC 8.43 [Murder or manslaughter – cooling period]; CALJIC 8.44 [No specific emotion alone constitutes heat of passion] were all requested by both prosecution and defense, but refused by the court. (See 22 CT 5920-5923.) Thus, *the jury had no basis for evaluating the evidence of provocation.* For all that appears in the record, the jury may have understood "sudden heat of passion" to be a much higher standard than *People v Valentine* and CALJIC 8.73 require. Thus, *the crucial finding of deliberate and premeditated murder may have been rendered by a jury which did not understand the applicable legal principles*. Such an unreliable verdict is impermissible under the Eighth and Fourteenth Amendments (*Beck v. Alabama*

(1980) 447 U.S. 625) and prejudicial under any standard.

Further, the requested instructions clarifying the relevance of the provocation evidence to the issue of premeditation and deliberation would have provided a much needed antidote to prosecution closing argument minimizing these required mental states. The prosecutor analogized the thought process required for first-degree murder to the thought process we engage in when approaching an intersection as the traffic signal turns yellow and we decide whether to stop or continue, and referred to the required deliberation as "intersection thinking on the issue of killing." (XXVII RT 3944-45, 3948.) By equating the mental state required for first-degree murder with the thinking we all do quickly and almost instinctively when driving, the prosecutor diminished the basis upon which we distinguish between second- and first-degree murder and the relative moral culpability of persons guilty of those offenses – in this case a distinction which determined the defendant's exposure to a death sentence. Instructions advising the jury to consider provocation evidence on the issue of premeditation and deliberation, and informing the jury that provocation could itself raise a reasonable doubt as to whether the defendant acted with such a mental state would have helped the jury to understand that something more than "intersection thinking" was at issue. In light of the evidence presented at trial, it's difficult to believe that the requested instructions would not have made a difference. Certainly there is no basis for concluding beyond a reasonable doubt that the trial judge's error in refusing provocation instructions did not contribute to the verdict.

III.

CALJIC 5.17 AND 5.55 WERE AMBIGUOUS AS APPLIED TO THE EVIDENCE THAT SONNY ENTERED THE FIGHT SCENE AND, WHEN COMBINED WITH THE PROSECUTOR'S CLOSING ARGUMENT, DENIED SONNY A FAIR TRIAL ON HIS DEFENSES OF SELF-DEFENSE AND IMPERFECT SELF-DEFENSE

A. The Record

The prosecution's theory of the case was that Sonny forced his way through the crowd and shot Hernandez and Gobert without having personally fought with either of them prior to firing the fatal shots. (XXVII RT 3938:6-11; XXVII RT 3946:4-6.) In refusing to instruct the jury on manslaughter in the heat of passion, the trial judge found "your client's not even involved – not even involved – until he tries to, your theory, protect himself or others." (XXVI RT 3722:24-26.)[26] In his statement to Detective Spidle, Sonny stated that he got involved in the brawl trying to break it up and get his friends to leave (21 CT 5650) and he had his gun out, expecting to "shoot in the air and everybody would just run ... so the whole fight would break up" (21 CT 5652), but as he saw Hernandez lying on the ground, Sonny lifted Hernandez' head to see if he could recognize him and, as he did that, Hernandez slapped the gun in Sonny's hand, and got to one knee with his back to Sonny. (21 CT 5653). Then "I thought he was going to turn over and shoot me right away," so Sonny shot him once in the shoulder and then again when he leaned over as if to shoot Sonny. (*Ibid.*) After

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[26] In Argument II, above, we demonstrated that the trial judge was incorrect in this analysis. There was evidence from three witnesses that Sonny – or at any rate, the shooter – had been involved in the fighting (see pp. 85-86, *supra*), but no witness suggested that Sonny initiated the fight or did anything that would properly invoke the defense-restricting language in CALJIC 5.17 and CALJIC 5.55, discussed below.

this, Gobert said "fuck you asshole" to Sonny and he grabbed his friend Hernandez and Sonny thought he was going to grab his gun, so Sonny shot him. (21 CT 5653-5654).

If Sonny's description of how and why the shootings occurred was believed, it established a defense to the charge of first-degree murder: either a complete defense if the jury deemed Sonny's fear of being shot to be both genuine and reasonable, or a mitigating, malice-negating defense reducing the crimes to voluntary manslaughter if the jury deemed Sonny's fear of being shot to be genuine but unreasonable. (*People v. Flannel* (1979) 25 Cal.3d 668, 675-680.) Defense counsel argued both theories of defense (self-defense and unreasonable self-defense) in closing argument. (XXVIII RT 3858-3863,3872-3877, 3900-3912, 3917-3924.)

Despite the lack of any evidence that Sonny had initiated or threatened an assault on Hernandez or Gobert prior to the events which Sonny claimed had triggered his fear of being shot, the trial court's self-defense instructions included language which, particularly in light of the prosecutor's closing argument, was likely understood by the jury to mean that Sonny had engaged in conduct which precluded his reliance on self-defense, even if he believed that Hernandez and Gobert were about to shoot him. First, utilizing CALJIC 5.55 (6th ed. 1996), the trial court instructed the jury that the plea of self-defense may not be contrived:

> The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense.

(22 CT 5671.)

In addition, in defining unreasonable self-defense, the trial court utilized the entirety of CALJIC 5.17 (6th ed. 1996), including the final bracketed

paragraph which restricted the jury from using the manslaughter instruction for actual, but unreasonable belief in necessity to defend oneself as follows:

> However, this principle is not available, and malice aforethought is not negated, if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force.

(22 CT 5863.)[27]

No instruction or other guidance was given by the court as to the possible scope of the "unlawful or wrongful conduct" that might trigger this limitation. Relying upon the quoted language from CALJIC 5.17 and 5.55,[28] the prosecuting attorney explicitly urged that Sonny, as matter of law, was not entitled to the benefit of any self-defense theory. In closing argument, echoing the language of CALJIC 5.17, the prosecutor told the jury that self-defense as a malice-negating

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[27]CALJIC 5.17 (6th ed. 1996), in full unmodified form, reads as follows:

> A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter.
>
> As used in this instruction, an "imminent" [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer.
>
> [However, this principle is not available, and malice aforethought is not negated, if the defendant by [his] [her] [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his] [her] adversary's [use of force], [attack] [or] [pursuit].]

[28]The prosecutor did not specifically cite to those instructions, but nothing else in the court's instructions provided any support for his argument.

principle did not apply where "the defendant's conduct created the circumstances which he claims justified the shooting" and then argued as follows:

> By all accounts, he [Sonny] is not part of the initial wave that hits -- that hits Dee [Gobert]. The evidence shows and they have not been able to contradict this at all. A defendant who forces his way through people to get to two guys, that's putting yourself in a situation where you can claim you need to use self-defense? And the law says you're not to do that. You're not to get suckered by that.
>
> And think about it. Step back for a second. Some gangbanger can walk around with a loaded gun, and the first person that gives him a wrong look and jumps bad with that guy, and then say [sic], 'Oh, well, I thought he had a gun. I had to shoot him.'
>
> Ladies and gentlemen, we'd all be dropping like files. The streets would be littered with bodies if the law was that stupid, if the law was that ignorant, and if the law was that uncaring and irresponsible.

(XXVII RT 3938:5-20) And later in his argument the prosecutor added:

> The only way he can fashion a threat to himself is to get in there. And that's what they want you to believe is self-defense.

(XXVII RT 3946:4-6.)

B. Argument

Given the state of the record, it was error to give either CALJIC 5.55 or the defense-restricting language of CALJIC 5.17's final paragraph There was no evidence that justified giving either one. There was no contention by either side that Sonny had initiated the fighting or had initiated or threatened an assault prior to the events which he claimed triggered his fear of being shot. Sonny stated that Hernandez and Gobert were rising from being on the ground and about to shoot him when he fired at each. Thus, there is nothing in Sonny's statement or in any other evidence to suggest that he was in the midst of a physical assault or other felonious conduct which would justify the giving of either instruction: there was no evidence that Sonny sought "a quarrel" with either, much less that such

seeking of a quarrel was "with the intent to create a real or apparent necessity of exercising self-defense" within the meaning of CALJIC 5.55. Nor was there any evidence that Sonny engaged in any "unlawful or wrongful conduct" prior to the shooting which created "circumstances which legally justified the adversary's use of force" within the meaning of CALJIC 5.17. Thus, there was no basis on which CALJIC 5.55 should have given; nor was there any basis for including the limiting language of CALJIC 5.17's final paragraph with that instruction.

The leading California authority relevant to these instructions is *In re Christian S.* which holds as follows:

> It is well established that the ordinary self-defense doctrine -- applicable when a defendant *reasonably* believes that his safety is endangered – may not be invoked by a defendant who, **through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony)**, has created circumstances under which his adversary's attack or pursuit is legally justified. (See generally, 1 Witkin & Epstein, Cal.Criminal Law (2d ed. 1988) Defenses, § 245, p. 280; 2 Robinson, Criminal Law Defenses (1984) § 131(b)(2), pp. 74-75.) It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances. For example, the imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction even if the felon killed his pursuer with an actual belief in the need for self-defense.

(1994) 7 Cal.4th 768, 773, fn. 1. [bold underlining added].)

It is clear that under *Christian S.*, the only behavior which deprives a defendant of the right to self-defense under either CALJIC 5.17 for unreasonable self-defense or under settled principles of actual self-defense is "his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony)." And prior cases have made clear that to disqualify a defendant from claiming self-defense, the defendant's conduct must be a direct provocation

which would justify self-defense by his adversary. (See *People v. Barton* (1995) 12 Cal.4th 186, 191-192 202-203 [fact that defendant carried a concealed weapon to an aggressive encounter, threatened to damage the victim's car and waited for the victim did not deprive defendant of right to imperfect self-defense instruction]. See also *People v. Randle* (2005) 35 Cal.4th 987, 1002 [fact that defendant had engaged in car burglary which in set in motion a chain of circumstances which led to his shooting the owner of the car, did not deprive him of the right to assert imperfect self-defense of others when he had retreated from the scene and victims were no longer justified in using force].) Because there was no evidence that Sonny had initiated a physical assault on Hernandez or Gobert prior to the shooting, nor any evidence that either Hernandez or Gobert were responding to a physical assault or other felony by Sonny, the defense-restrictive language of CALJIC 5.17's final paragraph was inapplicable and should not have been given. Nor, as already discussed, was there any factual predicate for CALJIC 5.55. Neither should have been given.

The giving of factually unsupported instructions may not in all instances be prejudicial. But here there is reason to believe that the instructions undermined appellant's right to a fair trial. Self-defense, reasonable and/or unreasonable, was an important part of the defense case; and these unsupported instructions, coupled with the prosecutor's interpretative commentary, were likely to have deprived appellant of consideration of the evidence supporting these defense theories. The jury was given no instruction or other guidance by the trial court as to the nature of the "wrongful or illegal conduct" that might trigger the bar to reliance on unreasonable self-defense set forth in CALJIC 5.17's final paragraph. But the prosecutor offered a construction which, as a matter of law, precluded reliance on self-defense. Indeed, the prosecutor argued that the law was not so "stupid, . . . ignorant, . . .uncaring [or] irresponsible" as

to permit reliance on self-defense in a situation like that described by Sonny and his counsel. (27 RT 3938:5-20) And the prosecutor offered policy reasons why the law would not permit reliance on self-defense in such a situation, where an armed "gangbanger" forced his way into the center of an altercation. "Ladies and gentlemen, we'd all be dropping like files. The streets would be littered with bodies . . . ." (*Ibid.*)

The combination of the unsupported instructions and the prosecutor's argument was likely to have led the jury to believe that they did not have to even reach the issue of Sonny's belief in his need to defend himself when he fired because, even accepting that he believed (reasonably or unreasonably) that he was about to be shot, he was not entitled to either the defense of self-defense or a finding of manslaughter (in unreasonable self-defense) because he "fashion[ed] the threat to himself" by forcing himself through people to get to two guys, putting himself "in a situation where you can claim self-defense." (XXVII RT 3938:5-20; 3946:4-6.) A lay jury, encouraged by the prosecutor's argument, was likely to have interpreted CALJIC 5.55 to preclude self-defense at all and/or to have concluded that Sonny's drawing of his gun and entering the center of the altercation was "wrongful conduct" which under CALJIC 5.17 deprived him of the right to imperfect self-defense. Under *Christian S.,* such a conclusion would have been erroneous since drawing a gun was neither a physical assault nor the kind of felony which would deprive Sonny of self-defense; but the jury was never instructed on the law set forth in *Christian S.*

It is thus reasonably likely[29] that the jury accepted the prosecutor's

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[29]Where an instruction is not per se incorrect but is challenged as ambiguous and subject to erroneous interpretation, " the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *(Boyde v. California*

argument as a gloss on CALJIC 5.17 and 5.55, and erroneously interpreted those instructions to require rejection of the defense theories of self-defense and unreasonable self-defense without regard to whether Sonny, reasonably or unreasonably, believed that both victims were about to shoot him. Appellant, in violation of the 6th, 8th, and 14th Amendments, was thus deprived of his constitutional rights to jury consideration of his defense, to due process and a fair trial, and to reliable capital guilt and sentencing verdicts. (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740; *Boyde v. California* (1994) 494 U.S. 370, 380; *Beck v. Alabama* (1980) 447 U.S. 625; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Further, given the state of the evidence, there is no basis for concluding beyond a reasonable doubt that if the evidence supporting these defenses had been considered by the jury, the result of the trial would have been the same. Accordingly, appellant's convictions and sentence must be set aside.

(1994) 494 U.S. 370, 380.) A "reasonable likelihood" is something less than "more likely than not," but more than a mere "possibility." (*Ibid.*)

IV.

THE CONVICTION SHOULD BE REVERSED BECAUSE SONNY WAS DENIED HIS CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE

A. The Record.

The record in this case is barren of any indication that defendant Sonny Enraca (1) testified or (2) was informed of his right to testify or made any express waiver of that right.

B. This Court Should Reconsider Its Rulings and Hold that an on-the-record Waiver of the Right to Testify is Constitutionally Required

This Court has repeatedly held that:

> A defendant in a criminal case has the right to testify in his or her own behalf. *(People v. Frierson* (1985) 39 Cal.3d 803, 813, 218 Cal.Rptr. 73, 705 P.2d 396; *People v. Robles* (1970) 2 Cal.3d 205, 214-215, 85 Cal.Rptr. 166, 466 P.2d 710.) The defendant may exercise the right to testify over the objection of, and contrary to the advice of, defense counsel. (*People v. Lucas* (1995) 12 Cal.4th 415, 444, 48 Cal.Rptr.2d 525, 907 P.2d 373; *People v. Lucky* (1988) 45 Cal.3d 259, 282, 247 Cal.Rptr. 1, 753 P.2d 1052.)

(*People v. Bradford* (1997) 15 Cal.4th 1229, 1332.) Nonetheless, this Court has also held that:

> there is no duty to admonish and secure an on-the-record waiver unless the conflict comes to the court's attention. [Citation.]" (*In re Horton* (1991) 54 Cal.3d 82, 95, 284 Cal.Rptr. 305, 813 P.2d 1335; *People v. Guzman* (1988) 45 Cal.3d 915, 935-936, 248 Cal.Rptr. 467, 755 P.2d 917; see *People v. Frierson, supra,* 39 Cal.3d 803, 818, fn. 8, 218 Cal.Rptr. 73, 705 P.2d 396.)

(*Ibid.)* Thus, even though the accused in a criminal case has a federal constitutional right to testify under *Rock v. Arkansas* ((1987) 483 U.S. 44, 51-52) and an effective waiver of a fundamental constitutional right requires knowledge of the existence of the right (*Johnson v. Zerbst* (1938) 304 U.S. 458,

464), the law of California as annunciated by this Court is that there is no duty to advise the defendant of that right and he waives that right on appeal if he does not assert it at trial by requesting to testify. Thus, *Bradford* holds that a criminal defendant may waive this constitutional right to testify without knowing that it exists. This contravenes seventy years of jurisprudence since *Johnson v. Zerbst.* The Ninth Circuit is also a proponent of the so-called demand rule that a criminal defendant's right to testify is waived unless he makes a demand to testify during the trial court, whether or not he knew he had the right to do so. (See *United States v. Edwards,* 897 F.2d 445 (9th Cir. 1990); *United States v. Martinez,* 883 F.2d 750 (9th Cir. 1989), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991).) The Sixth and Eighth Circuits have also adopted the demand rule in response to claims that the right to testify was violated. *(See United States v. Webber,* 208 F.3d 545, 551 (6th Cir. 2000) ("Waiver is presumed from the defendant's failure to testify or notify the trial court of the desire to do so"); *United States v. Kamerud,* 326 F.3d 1008, 1017 (8th Cir. 2003) (stating that, if an accused wishes to exercise the right to testify, the accused must express the desire to do so at the appropriate time " 'or a knowing and voluntary waiver of the right is deemed to have occurred' ") (quoting *United States v. Blum,* 65 F.3d 1436, 1444 (8th Cir. 1995)).)

Nonetheless, appellant asks that this Court reconsider its adherence to a rule which purports to permit a criminal defendant to waive a fundamental constitutional right without knowing of that right. The rule is at odds with the requirement of a knowing and voluntary waiver of fundamental constitutional rights. Further, the failure to adopt the procedural rule that the trial court should inform defendant of his right to testify on the record and put any waiver of that right on the record spawns *habeas* litigation in which post-conviction courts, both state and federal, must attempt to reconstruct the facts and defendant's and

counsel's state of mind years later. Adopting the rule requiring the trial court to inform the defendant of his right to testify and take a waiver on the record would not only assure the constitutionally guaranteed right was knowingly waived, but also preclude most of that post-conviction litigation on this issue.

1. Allowing an Unknowing Waiver is Inconsistent with Settled Principles of Constitutional Law. Neither this Court, nor any of the federal circuit courts that have adopted the demand rule with respect to the right to testify have reconciled (or attempted to reconcile) the rule with the waiver requirement of *Johnson v. Zerbst.* Any thoughtful consideration of the constitutional principles enunciated in *Rock* and *Zerbst* reveals that they cannot be reconciled with the demand rule. In *Rock*, the Court explained that the right to testify is guaranteed by, *inter alia*, the Sixth Amendment of the Constitution. (483 U.S. at 52.) Those courts that have concluded that the right to testify is not a fundamental right, then, must also conclude that the right to testify is the only Sixth Amendment right which is not fundamental in nature. *(See, e.g., Klopfer v. North Carolina,* 386 U.S. 213, 223 (1967) ("We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment."); *Gideon v. Wainright,* 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."); *Toth v. Quarles,* 350 U.S. 11, 16 (1955) ("[The] right of trial by jury ranks very high in our catalogue of constitutional safeguards."). The demand rule, however, is not supported by any United States Supreme Court authority, nor can it be harmonized with the high court's observation in *Rock* that, "[a]t this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." (483 U.S. at 49.)

Moreover, the demand rule, "by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncement on waiver of constitutional rights." *(Barker v. Wingo,* 407 U.S. 514, 525 (1972).) In *Barker*, the U.S. Supreme Court rejected a "demand-waiver" rule in the context of the Sixth Amendment right to a speedy trial as "insensitive to a right which [it] deemed fundamental." (407 U.S. at 529-30.) The demand-waiver rule employed by the lower court in *Barker* purported to waive any consideration of the right to a speedy trial for any period prior to the defendant's demand for a trial. *(Id.* at 525.) In finding the demand-waiver rule constitutionally invalid, the high court noted that a defendant " 'should not be presumed to have exercised a deliberate choice because of silence or inaction that could equally mean that he is unaware of the necessity for a demand.'" *(Id.* at 526 n.5 (citations omitted).) As the high court explained: "the better rule is that the defendant's assertion or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of that right." *(Id.* at 528.) As *Barker* makes clear, the Sixth Amendment right to a speedy trial cannot be subjected to a demand-waiver rule, and the Court's reasoning in that case logically extends to all Sixth Amendment rights, including the right to testify.

This Court has joined those jurisdictions which have declined to require trial courts to advise defendants on the record of the right to testify, and instead require defendants to make their desire to testify a matter of record or lose the right to do so, even if unaware that they had such a right. This judicial deck-stacking violates any standard of fundamental fairness and reflects blatant disregard of a constitutional right. If a defendant is to be charged with perfecting the record with respect to his or her desire to testify, then the record must fairly demonstrate actual knowledge of the right to do so. As the Court stated in *Rock v. Arkansas*: "There is no justification today for a rule that denies an accused the

opportunity to offer his own testimony." (483 U.S. at 52.)

This is why federal appellate courts in three circuits and at least five states and the District of Columbia adhere to the rule that the trial court must advise the defendant of his right to testify on the record and put any waiver on the record. The Second Circuit regards as "'highly questionable the proposition that a defendant's failure to object at trial to counsel's refusal to allow him to take the stand constitutes waiver of the defendant's constitutional right to testify on his own behalf.' " (*Chang v. United States,* 250 F.3d 79, 83-84 (2d Cir. 2001) (quoting *United States v. Vargas,* 920 F.2d 167, 170 (2d Cir. 1990).) In *Chang,* the court reviewed the trial court's dismissal of the defendant's petition for a writ of habeas corpus in which he alleged that his trial attorney prevented his from testifying. (250 F.2d at 80.) The court began its analysis by discussing the demand rule and noting that "[o]ther circuits that have addressed [the demand rule] have not reached uniform results." *(Id.* at 83.) In rejecting the demand rule, the court in *Chang* explained:

> We ... agree with those circuits that have refused to find a waiver or forfeiture solely from a defendant's silence at trial. At trial, defendants must generally speak only through counsel, and, absent something in the record suggesting a knowing waiver, silence alone cannot support an inference of such a waiver ... A defendant who is ignorant of the right to testify has no reason to seek to interrupt the proceedings to assert that right, and we see no reason to impose what would in effect be a penalty on such a defendant.

(*Id.* at 84.)

Although the court in *Chang* ultimately affirmed the dismissal of the defendant's claim based on the trial attorney's affidavit (submitted in response to the defendant's petition) stating that the attorney fully apprised the defendant of his constitutional right to testify, *id.* at 86, the court made clear that the defendant "did not waive or forfeit his [right to testify] by failing to object at trial." (*Id.* at

84.)

Joining those circuits rejecting the demand rule, the District of Columbia Circuit recognized "the impracticability of placing a burden on the defendant to assert a right of which he might not be aware or to do so in contravention of the court's instructions that the defendant speak to the court through counsel." (*United States v. Ortiz,* 82 F.3d 1066, 1071 (D.C. Cir. 1996).) In addition, the Fifth Circuit has rejected the demand rule, noting that "[d]eclining to place upon the defendant the responsibility to address the court directly is consistent with the reality that routine instructions to defendants regarding the protocols of the court often include the admonition that they are to address the court only when asked to do so." (*United States v. Mullins,* 315 F.3d 449, 455 (5th Cir. 2002).)

Five state courts and the District of Columbia also reject the demand rule:

Colorado: See, *People v. Blehm*, 983 P.2d 779, 786 (Colo. 1999) ("the right to testify is sufficiently fundamental to share the procedural safeguards concerning waiver previously reserved for the right to counsel") (citing *People v. Curtis,* 681 P.2d 504, 511 (Colo. 1984));

Alaska: *LaVigne v. State*, 812 P.2d 217 (Alaska 1991)

Hawaii: *Tachibana v. State*, 79 Haw. 226, 900 P.2d 1293 (Haw. 1995)

South Carolina: *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992)

West Virginia: *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988)

District of Columbia:*Boyd v. United States* (D.C.App.1991) 586 A.2d 670.

As the court in *Boyd v. United States* said:

> We conclude further that the 'demand rule' advocated by the government is fatally flawed. The demand rule ignores basic realities faced by the defendant and the courts. Many defendants are unaware that they have a constitutional right to testify which no one, not even their lawyer, may

> take away from them. In addition, the demand rule "requires the defendant to ignore the admonishments of counsel, interrupt the trial proceedings, and interject [herself], uninvited, into the fray." Such a rule ignores the courtroom reality that "defendants who speak out of turn at their own trials are quickly reprimanded, and sometimes banned from the courtroom by the court," as was Boyd. To the extent a defendant may have been "educated by television" to realize that he or she has such a right, as one opinion, on which the government relies, suggested, the defendant still may not know that an objection must be made during trial or that right is forever lost. Further, in *Johnson v. Zerbst,* the Court was unwilling to "presume acquiescence in the loss of fundamental rights." In sum, the demand rule requires a defendant to assert a right of which the defendant may not be aware by objecting in a manner the defendant has been told is inappropriate. We decline to adopt a rule which places such burdens on the defendant.

(586 A.2d at 677 [footnote omitted].)

The demand rule violates the principles of *Rock* and *Johnson v. Zerbst* and is therefore unconstitutional. This Court should reconsider *Bradford* and join the growing number of courts which give appropriate constitutional protection to the fundamental constitutional right of an accused to testify in his or her own behalf.

2. Requiring the trial judge to inform the defendant on the record of his right to testify and to put any waiver on the record is an appropriate prophylactic rule which would obviate much unnecessary post-conviction litigation. By adopting a rule that in any case in which defendant does not testify, the trial court must inform the defendant of his right to testify and put any waiver on the record would not only protect defendant's fundamental constitutional right to testify, but also ease the burden on the judicial system. (*Cf. McCarthy v. U.S.* (1969) 394 U.S. 459, 469-70 [rule designed to assure that defendant fully understands his rights when pleading guilty].) By providing post-conviction courts with a clear record, such a rule would usually obviate the

necessity for a post-trial evidentiary hearing on waiver. (*Compare Mute v. State* (Alaska Ct.App.1998) 954 P.2d 1389 [advisement record showed that defendant understood and waived his right to testify; this record precluded further inquiry] *with Chang v. United States, supra* [post-trial litigation concerning whether the defendant waived the right].)

C. This Court Should Rule Prospectively that Advisement and Waiver on the Record are Constitutionally Required and that Failure to do so requires reversal per se.

The U.S. Supreme Court has made it clear that "[e]ven more fundamental to a personal defense than the right of self-representation, which was found to be 'necessarily implied by the structure of the Amendment,' ... is an accused's right to present his own version of events in his own words." (*Rock v. Arkansas, supra,* 483 U.S. at 52 (quoting *Faretta v. California* (1975) 422 U.S. 806, 819). Because violations of the *Faretta* right to counsel are reversible error *per se* (See *Chapman* v. *United States* (5th Cir.1977) 553 F.3d 886, 891; *People v. Ruiz* (1983) 143 Cal.App.3d 780, 788), the *per se* standard must therefore also be applied to denial of the right to testify.

Given this Court's explicit ruling in *Bradford*, that advisement and waiver on the record were not required, this Court might not consider it appropriate to apply the new rule to cases prior to the date of the decision in this case. Assuming that it overrules *Bradford* prospectively, it should still apply its newly announced rule to the present case and grant Sonny relief. As the U.S. Supreme Court has held:

> sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against

> denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.

(*Stovall v. Denno* (1967) 388 U.S. 293, 298-299) Accordingly, Sonny's convictions should be reversed *per se*.

PENALTY PHASE ISSUES

V.

THE STRUCTURE OF CALIFORNIA LAW WHICH MAKES VICTIM IMPACT EVIDENCE AN AGGRAVATING "CIRCUMSTANCE OF THE CRIME" AND FAILS TO GIVE THE JURY ANY GUIDELINES ON HOW TO EVALUATE IT DENIED SONNY HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND RELIABLE PENALTY DETERMINATION WHEN EVIDENCE WAS GIVEN BY FAMILY MEMBERS WHO WERE NOT AT THE CRIME SCENE AND TESTIFIED ABOUT ASPECTS OF BOTH THEIR OWN AND THE VICTIMS' LIVES ABOUT WHICH SONNY COULD NOT HAVE KNOWN AT THE TIME OF THE CRIME AND THERE WAS A SUBSTANTIAL RISK THE JURY USED INFORMATION ABOUT THE SOCIAL STATUS OF THE VICTIMS AS AGGRAVATING EVIDENCE

A. The Record.

1. Defense Pre-Trial Attempts to Limit Victim Impact

Evidence. Eighteen months prior to to the commencement of the penalty trial, the defense sought to limit victim impact evidence, filing a twenty-nine-page Memorandum of Points and Authorities in Opposition to Admission of Victim Impact Evidence. (3 CT 608-629.) The memo argued that (1) the only victim evidence admissible as "circumstances of the crime" under Penal Code section 190.3(a) is evidence of facts actually known by defendant when the crime was committed or evidence of the crime's impact on actual victims of the crime (3 CT 609-618); (2) that interpreting "circumstances of the crime" more broadly to allow all types of victim impact evidence, renders the statute impermissibly broad and vague in violation of federal and state constitutional prohibitions on cruel and unusual punishment (3 CT 618-626); and (3) that the victim evidence offered in this case was unduly prejudicial and its admission violated the due process clause of the 14th Amendment, the California Constitution, art. 1,

sections 7 and 15 and Evidence Code Section 352. (3 CT 626-628) The defense also requested that if the trial court were inclined to admit victim impact evidence, it should hold a hearing under Evidence Code section 402 to afford the defense proper notice of the prosecution evidence and to allow the court to limit any victim impact evidence to that which is not unduly prejudicial. (3 CT 628-631.) The record does not contain any written response by the prosecution.

After the jury's verdict at the guilt phase, the trial court held a brief hearing in which it ruled that it would allow victim impact evidence and denied a preliminary hearing under Evidence Code section 402. (XXVIII RT 4081 to 4084.) Specifically, the court ruled that "Victim impact ....without going into any other argument, it's been upheld." (XXVIII RT 4081:26-27.) The court stated that it would not grant a hearing under section 402 of the Evidence Code because defense counsel knows

> what they are going to be asked. How has the loss of your son affected your life? How could anyone answer, other than it's horrific?

(XXVIII RT 4082:16-18.) When defense counsel argued that the court needed to know the testimony to apply Evidence Code section 352, the Court erroneously stated that "I have to be within the bounds of the Constitution ... but 352 does not apply." (XXVIII RT 4082:22-23.) This was error.[30]

In response to defense counsel's argument that "characterization of the defendant, the crime ... or what possible sentence ought to be," were "out of

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30 *People v. Prince* (2007) 40 Cal.4th 1179, 1296 (in the penalty phase, the trial court retains its traditional discretion under Evidence Code section 352 to exclude particular items of section 190.3, factors (a) or (b) evidence that are to be used in a manner that is misleading, cumulative, or unduly inflammatory).

bounds," the court agreed:

> Possible sentence has nothing to do with the impact. That's correct. But, see if you stick to what is victim impact, then we don't have any problems, in a sense. But, no, he wouldn't elicit that. No one is going to ask what is appropriate, though.

(XXVIII RT 4082:28 to 4083:4.) The court went on to instruct defense counsel that they were not allowed to "ask a relative if they would spare his life because he is ... productive ... intelligent .... has a good side to him." (*Id.* at 4083: 8-10.)

In a subsequent hearing , the trial judge sustained defense objections to the introduction of movie posters from the movie "Boyz in the Hood," in which Gobert had a role. (XXVIII RT 4101.) The court further ruled that neither of the victims' mothers would be allowed to request particular penalties or to invoke religion as a basis for choosing the penalty. (XXVIII RT 4105-4106). The court further ruled that neither mother would be allowed to make a statement and that the testimony would proceed by question and answer; the court declined the defense request for a preliminary 402 hearing, stating that it did not want to put the witnesses through that. (XXVIII RT 4106-4107.)

2. Victim Impact Testimony at Trial. With these guidelines, the prosecutor called the mothers of each of the victims. Ignacio Hernandez' mother, Carmen Vera, testified in Spanish through an interpreter about the impact on her life of losing her son, an impact she found devastating to her and to Ignacio's younger brother, who still misses him. Ignacio was special: a good son, a good student, always showed respect and was always loving at home. He had a lot of ideas for the future; he loved his little brother, Emanuel. Emanuel has been affected because she could not tell him what happened. She told him that his brother was in New York for two and one-half years and worked with the school psychologist to prepare the brother for the information because he could still not

accept it. Over defense objection, she testified that Hernandez had been accepted by a school in Texas for mechanical engineering. The paperwork came in after Hernandez died. (XXVIII RT 4135-36.)

She testified that when her son died, she felt her own life leaving her, that she missed him every day, that she saw a psychiatrist for three years and that she was so distraught over her son's death she had to leave the country for a time at the advice of a psychiatrist and spent many sleepless days waiting for him to come back. (XXVIII RT 4136).

Carolyn Gobert testifed that her son Dee Gobert acted in the Hollywood movies "Boyz in the Hood," "Poetic Justice," and "Higher Learning," all directed by John Singleton. (XXVIII RT 4139-4140.) He also did some commercials and acted in TV sitcoms. (XXVIII RT 4140.) He was a jokester, always making people laugh and he was friendly and kindhearted. (XXVIII RT 4140-4141.) The shooting was hard to believe at the time. She still has flashes. It is still hard to believe he is actually dead. She still sometimes catches herself talking to him. She remembers his voice when he came into the house. She remembers how she used to come in and turn off the TV when Dee would fall asleep in front of it and cover him up. Her younger son does the same thing and it reminds her of that. She sometimes calls her younger son Dee. Her memories of him are always there. When she comes into the house and sees his picture and every time she passes by she says "I love you Dee. I miss you." And she wonders whether he can hear her. It hurt her younger son who has not done well in school since then. (XXVIII RT 4142)

Gobert further testified that she was so focused on Dee that she almost forgot about her younger son and it was like she had just given up on him. She is a single mother and her children are all she had. She just can't have a regular

life like she had before. She had psychiatric care for a while. She wanted to die. Then she would hear Dee saying "You still have Darnay. You have to take care of Darnay" This has had a great impact on her family. She used to live with her mom and Dee was just always there. He used to visit her very day and hang out with her brother. (XXVIII 4143.)

She has never taken her mind off Dee since that night. She visits his grave but it is hard talking to a grave when nobody talks back and hard to put flowers there when nobody sees it, but she sees it. The death has changed her lifestyle. She is alone a lot and does not have visitors. She has had to take off work a couple of times because she just could not be around people. Her personal relationships have not been good because she cannot commit to anybody. It is hard to love someone else right now without both her kids. (XXVIII RT 4144.)

She thinks of the way Dee used to make her laugh. He did a little dance for her. He was so protective of his little brother. Sometimes she can imagine him coming down the stairs. She sees pictures of him and every night she thinks of him. She never stops thinking about Dee. (XXVIII RT 4145.)

3. Jury Instructions. The instructions given to the jury neither delineated what role victim impact could play in jurors' deliberations, nor explained the difference between the permissible and impermissible use of victim impact evidence. The only instructions which related in any way to victim impact were as follows: the jurors were told they should consider "the circumstances of the crime of which the defendant was convicted" (CALJIC 8.85; 23 CT 6028); nothing in the instructions even told that jurors that victim impact was part of the circumstances of the crime. If a juror did perceive that victim impact was part of the circumstances of the crime, the only guidance given on evaluating that impact was: "an aggravating factor is *any* fact, condition, or event which

increases its guilt *or* enormity *or adds to its injurious consequences which is above and beyond the elements of the crime itself*" (CALJIC 8.88 [emphasis added]; 23 CT 6034) and that "*you are free to assign whatever moral or sympathetic value you deem appropriate.*" (*Ibid.*).

B. Argument

1. The California Scheme of Considering Victim Impact as a Circumstance of the Crime Fails to Preclude Jurors from Using Victim Impact Improperly, Provides Jurors No Coherent Basis for Evaluating Victim Impact and Leads to Capricious Results Violating The Eighth Amendment, Due Process and Common Sense. In *Booth v. Maryland* (1987) 482 U.S. 496, 504-505, the United States Supreme Court ruled that introducing evidence of the emotional trauma of the family of the victims of a crime violated the Eighth Amendment because this evidence might be "wholly unrelated to the blameworthiness of a particular defendant" and "could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime." (482 U.S. at 504-505.) Two years later in *South Carolina v. Gathers* (1989) 490 U.S. 805, the High Court held that it was an Eighth Amendment violation to read from a biblical tract which was on the person of the victim at the time of the crime because the contents of the tract "cannot be said to relate directly to the circumstances of the crime" because there was no evidence the defendant had read it and it was "extremely unlikely" he had done so. (490 U.S. at 811-812.) As Justice Kennard pointed out in her concurrence in *People v. Fierro* (1991) 1 Cal.4th 173, 256-266, both opinions rested on a narrow definition of "circumstances of the crime":

> [In *Booth],* [a] majority of the United States Supreme Court considered it self-evident that the words "circumstances of the crime" generally did not include evidence relating to the personal characteristics of a murder

> victim and the emotional impact of the crimes on the victim's family.
>
> .....
>
> [In *Gathers*], [a] majority of the high court thus held again that the term "circumstances of the crime" did not include personal characteristics of the victim that were unknown to the defendant at the time of the crime.

(1 Cal.4th at 260; Kennard, J., concurring.).

Just two years after its decision in *Gathers*, in *Payne v. Tennessee* (1991) 501 U.S. 808, the Court partially overruled *Booth* and *Gathers*, stating that evidence about the personal characteristics of the victim (even those unknown to the defendant at the time of the crime) and of the impact of the crimes on the family of the victim is admissible as evidence of "specific harm caused by the crime." (501 US. at 825.) As Justice Kennard has accurately observed, the Court in *Payne*:

> did not retract its earlier conclusions about what did and did not constitute "circumstances of the crime." Instead, the court rejected the more fundamental premises of its earlier decisions about what the Eighth Amendment permitted as penalty considerations in a capital case. The court concluded that the "harm caused by the crime" was a constitutionally valid sentencing consideration even when the harm resulted from circumstances unknown to the defendant at the time of the crime. The court concluded that victim impact evidence was "simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question," and therefore the Eighth Amendment did not bar its use.

(People v. Fierro, supra, 1 Cal.4th at 260-261; Kennard, J., concurring.) And as Justice Kennard further observed,

> Nothing in *Payne* .... suggests that the plain meaning of "circumstances of the crime," as used in a capital sentencing scheme, generally encompasses evidence of either the victim's personal characteristics or the emotional impact of the crimes on the victim's family. To the contrary, the United States Supreme Court studiously avoided taking issue with this aspect of the decisions it overruled, and its statement that *the defendant's* personal characteristics were *not* related to the circumstances of the crime

> clearly implies that the victim's personal characteristics were also unrelated. Rather than including victim impact as a "circumstance of the crime," the high court in *Payne* expanded from two to three the number of considerations permissible for capital sentencing under the Eighth Amendment. Previously a death sentence might be based only on the defendant's character and background and the circumstances of the crime, but after *Payne* it might be based also on the specific harm caused by the crime.

(Id. at 261.)

Because *Payne* involved testimony about the impact of the defendant's crimes on a three-year-old boy who was present when his mother and sister were murdered (and because the issue of victim impact has not yet returned to the high court), the question of whether evidence of the impact of a crime on family members of the victim who did not witness the crime is still not definitively resolved by the United States Supreme Court. This Court has repeatedly ruled, however, that victim impact evidence, both relating to the personal characteristics of the victim and the impact on the victim's family is admissible at the penalty phase, regardless of whether the defendant knew of these characteristics or impacts at the time of the crime. (See, e.g., *People v. Zamudio* (2008) 43 Cal.4th 327, 363-368; *People v. Kelly* 2007) 42 Cal.4th 763, 796-797; *Roldan, supra*, 35 Cal.4th 646, 730-731, 27 Cal.Rptr.3d 360, 110 P.3d 289; *People v. Panah* (2005) 35 Cal.4th 395, 494- 495, 25 Cal.Rptr.3d 672, 107 P.3d 790; *People v. Benavides* (2005) 35 Cal.4th 69, 107, 24 Cal.Rptr.3d 507, 105 P.3d 1099; *People v. Brown* (2004) 33 Cal.4th 382, 396-398; *and People v. Pollock* (2004) 32 Cal.4th 1152, 1181.)

Despite these rulings, appellant urges this Court to reconsider the body of law on this subject developed over the past seventeen years because the decided cases result in an incoherent system which is inconsistent with the language, purpose, and history of the 1978 death penalty statute, inconsistent with this

Court's decisions limiting aggravating and mitigating circumstances to the factors enumerated in that statute, and leaves the jury at sea without rudder or compass when it is asked to evaluate victim impact evidence. Such a system creates an unreasonable risk of arbitrary and capricious use of victim impact evidence and thereby violates the Eighth Amendment and Due Process.

The root of the problem can be traced to the Court's decision in *People v. Edwards* (1991) 54 Cal.3d. 787, 832-836 which held that victim impact evidence was admissible under Penal Code section 190.3, subd.(a) ("circumstances of the crime") in the wake of *Payne*. *Payne* did not mandate that victim impact evidence be admitted in the penalty phase; it only held that:

> *if the State chooses to permit the admission of victim impact evidence* and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.

(501 U.S. at 827 [emphasis added].) In other words, *Payne* left states free to choose to admit appropriate victim impact evidence, but they had to choose to do so.

In California, this Court has narrowly circumscribed judicial power to enlarge the scope of considerations before a penalty juror by recognizing that the 1978 death penalty statute itself had specifically limited the relevant considerations to the factors listed in Penal Code section 190.3.[31] (*People v.*

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[31] Those factors are: "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1. (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.(c) The presence or absence of any

Boyd (1985) 38 Cal.3d 762, 775.) As Justice Mosk pointed out in *Edwards*, because the 1978 death penalty law was passed years before anyone even considered attempting to admit evidence of victim impact, there is simply no chance that in reality the drafters or voters intended "to choose to permit the admission of victim impact evidence" (*Payne, supra,* 501 U.S. 827) as relevant to any of the factors listed. (*See People v. Edwards*, *supra*, 54 Cal.3d. at 853-855, Mosk, J., concurring and dissenting.) Moreover, as Justice Kennard pointed out in *Fierro* and as was discussed above, the Supreme Court's analysis in *Booth, Gathers* and *Payne* defined "circumstances of the crime" narrowly to include only the events which were part of the actual crime or involved consequences known to the defendant at the time of the crime and to not include any other victim impact evidence, and this definition of "circumstances of the crime" was left intact by *Payne*. Both Justice Mosk in *Edwards* and Justice Kennard in *Fierro* presented an array of impressive arguments from the language of factor (a), its history, its context and its purpose that all made clear that "circumstances of the crime" under section 190.3(a) was used exactly as the

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prior felony conviction.(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his [or her] conduct.(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his [or her] conduct or to conform his [or her] conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects [*sic*] of intoxication.(i) The age of the defendant at the time of the crime.(j) Whether or not the defendant was an accomplice to the offense and his [or her] participation in the commission of the offense was relatively minor. (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

Supreme Court used it in *Booth, Gathers*, and *Payne*.

This Court faced a formidable challenge in justifying the use of victim impact under the California death penalty scheme. *Boyd* made it clear that structure of the penalty trial was dictated by the 1978 death penalty statute and that there was no judicial power to modify that statutory scheme, enacted by the voters under Proposition 7. But the 1978 death penalty law embodied in Penal Code section 190.3 did not explicitly authorize the use of victim impact evidence and none of the factors authorized the jury to consider the "specific harm caused by the crime" – the basis on which *Payne* permitted victim impact evidence. Rather than acknowledge this dilemma, this Court asserted its conclusion : "we believe that the injury inflicted is generally a circumstance of the crime as that phrase is commonly understood." without support that would withstand objective analysis:

> (1) In asserting how "circumstances of the crime" was "commonly understood" the Court ignored the uniform usage of the Supreme Court and the language, history, context and purpose of the 1978 death penalty law and cited a definition of the single word "circumstance" contained in the Oxford English Dictionary (54 Cal.3d at 833), a publication promulgated by English scholars at Oxford University which has been criticized as relying on the written word of elite scholars as opposed to the way language is commonly understood or spoken by ordinary people.. See Roy Harris, "The History Men." *Times Literary Supplement* (September 3 1982) 935-936 (criticizing the 1982 edition; Creaser, Wanda. Review of Willinsky, John, *Empire of Words: The Reign of the Oxford English Dictionary. Rocky Mountain Review of Language and Literature* 50:1 (1996): 108-109. (Criticizing more recent editions).

(2) It analyzed prior decisions of this Court, all of which involved prosecutorial argument (not the introduction of victim impact evidence) and none of which had authorized the use of evidence of either the personal characteristics of the victim unknown to the defendant or the impact on family members who had not been at the crime scene[32], ignored the significance of the absence of such prior judicial authorization vis-a-vis the proper construction of section 190.3 and simply asserted that these cases supported the use of victim impact evidence because "[w]e need not divorce the injury from the acts." (54 Cal.3d at 835)

The question, however, was not whether one must "divorce the injury from the acts," but rather whether section 190.3's factor (a) was intended by its drafters (or the voters) to encompass victim impact evidence and whether this Court's prior decisions provided any support for finding that it had been.

Indeed, other than a skirmish over whether the Attorney General had conceded that remote consequences of the crime were not "circumstances of the

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[32] The cases it relied on were: *People v. Haskett* (1982) 30 Cal.3d 841, 863-864 (argument on impact on mother of victim who witnessed the crime permissible); *People v. Douglas* (1990) 50 Cal.3d 468, 536 (no victim impact evidence introduced; fleeting references to victim's family were minor part of argument about circumstances of the crime, did not violate *Booth* and were in any case harmless); *People v. Benson* (1990) 52 Cal.3d 754, 795-797 ("jury would not have understood the prosecutor's remarks" – about the impact of child molestation on the murder victims and other children like them – "as crossing the constitutional barrier marked by *Booth* and *Gathers* into such forbidden areas as the victims' personal characteristics, the emotional impact of the crime on their families, and the opinions of family members about the crimes and the criminal.") None of these cases involved a contention that victim impact evidence about the personal characteristics of the victim or the emotional impact on their families (or the opinions of families about the crimes and criminal) was admissible or authorized as circumstances of the crime.

crime" (*id.* at 835, fn.11), the majority opinion in *Edwards* did not respond to Justice Mosk's meticulous analysis which showed that the accepted meaning of "circumstances of the crime" is "'part' of the crime itself" (54 Cal.3d at 853) or his careful recounting of the history of the initiative measure h enacting the 1978 death penalty law, which showed that the voters could not have intended to mean anything other than "part of the crime itself" when they passed the initiative because victim impact evidence was not a part of death penalty proceedings at the time and was of questionable constitutionality. Nor did the majority opinion consider that the Supreme Court in *Booth, Gathers,* and *Payne* has consistently used the term "circumstances of the crime" in the narrow sense Justice Mosk urged. Then in *Fierro*, Justice Kennard's concurring opinion demonstrated that the narrower definition of "circumstances of the crime" used by the Supreme Court and Justice Mosk was the only one consistent with the structure of the statute because the broader definition used by the majority in *Edwards* would swallow all the other section 190.3 factors. The majority in *Fierro* did not address Justice Kennard's cogent arguments; it would have been hard-pressed to justify its construction of "circumstances of the crime" on any basis that paid appropriate deference to the legislative judgments of the people in enacting Proposition 7 or to language, structure, context, history, or purpose of that enactment.

The Court's failure to embrace Justice Mosk's and Justice Kennard's demonstration of the proper construction of factor (a) has resulted not only in a misconstruction of a state initiative measure, but also deprived petitioner of an important state-law procedural safeguard and liberty interest -- the right not to be sentenced to death except upon the basis of aggravating factors specified by the voters who enacted the 1978 death penalty law (as to *People v. Boyd*, *supra*, 38

Cal.3d at 772-775), thereby violating not only state law but the Fourteenth Amendment due process rights of California capital defendants, including appellant. (See, *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [noting that "state laws which guarantee a criminal defendant procedural rights at sentencing, even if not themselves constitutionally required, may give rise to a liberty interest protected against arbitrary deprivation by the Fourteenth Amendment's Due Process Clause"; and agreeing that Washington state statute created a liberty interest in having state supreme court make certain findings before affirming death sentence].)

Edwards and *Fierro* were decided some 17 years ago. Since then the Court has consistently and repeatedly upheld the use of victim impact evidence, both as to the character of the victim and the impact on families as part of the circumstances of the crime. Why should this Court reconsider a decision which has been followed this long? Because the failure of the Court in *Edwards* to face up to the inherent contradictions between "circumstances of the crime" and victim impact evidence has resulted in a penalty phase scheme which gives the jurors so little guidance on the purposes for which victim impact evidence can be used that it creates an unreasonable risk of capricious decision making by the jury in two ways: (1) it allows the jury to use victim impact evidence in ways that are clearly improper; (2) it fails to give the jury any meaningful guidance on how to properly consider victim impact. Each of these critical failings is discussed in turn below.

a. CALJIC 8.88 permits improper use of victim impact testimony. In *Payne*, Chief Justice Rhenquist's majority opinion acknowledged the potential problem that evidence about the victim's personal characteristics might have:

> the concern voiced in Booth 's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. *Booth*, *supra*, 482 U.S., at 506, n. 8.

(*Payne*, *supra*, 501 U.S. at 823.) The opinion answered that concern by suggesting that the purpose for which the jury could use the evidence would be restricted from such odious considerations:

> As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind-for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.

(*Ibid.*) But in California, the jury is not given any specific instructions on how to evaluate victim impact evidence or any instruction that the purpose of such evidence is limited to showing "each victim's 'uniqueness as an individual human being.'" Nor are they told they should refrain from making judgments that someone who kills a hardworking devoted parent is more deservingof the death penalty than someone who kills a reprobate. Indeed, CALJIC 8.88 when applied to victim impact evidence invites such judgments: it defines an aggravating factor as *any* fact, condition, or event which increases its guilt *or* enormity *or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC 8.88 [emphasis added]; 23 CT 6034) and that "*you are free to assign whatever moral value you deem appropriate.*" (*Ibid.*)

A juror who felt that the wealth or prominence of the victim (about which defendant had no idea) made defendant more deserving of the death penalty

would be free to make the very kind of odious choice that *Payne* indicated should not be made. Recognizing this concern, other states have adopted instructions which are designed to channel the jury's discretion toward appropriate use of victim impact evidence. (See, e.g., *Stephenson v. State* (Tenn. 2006) 195 S.W.2d 574, 604; *Turner v. State* (1997) 268 Ga. 213, 215-16 486 S.E.2d 839, 842-43; *State v. Muhammad*, 145 N.J. 23, 51-52 678 A.2d 164, 178 (1996); *Cargle v. State* (Okla.Crim.App.1995) 909 P.2d 806, 828-29, *cert. denied*, 519 U.S. 831 (1996). See also *Evans v. State* (1994), 333 Md. 660, 690-91, 637 A.2d 117, 132 *cert. denied*, 513 U.S. 833 (approving an instruction that told the jury that victim impact evidence "is not to be taken as an aggravating circumstance").)

Inexplicably, this Court has declined to promulgate any guidelines to assist the jury in understanding either the purpose for which victim impact may be used – to show the victim's uniqueness as an individual human being – or the considerations which are improper, such as the victim's comparative "social worth." See *People v. Valencia* (2008) 43 Cal.4th 268, 310 (ruling that there is no *sua sponte* duty to explain role of victim impact evidence); *People v. Zamudio* (2008) 43 Cal.4th 327, 368 (ruling that defense proposed instructions were misleading, without discussing why the request that the jury be informed that the purpose of victim impact evidence is to show the uniqueness of the victim was improper); *People v. Ochoa* (2001) 26 Cal. 4th 398, 455 (upholding trial court refusal to instruct describing the purpose of victim impact evidence.]) *But Cf. People v. Harris* (2005) 37. Cal.4th 310, 358-59 (upholding trial court's ruling granting prosecution request to instruct that the jury could consider the impact of the crime on the victim's family). The standard CALJIC instructions given in this case do not explain the limited purpose for which

victim impact evidence may properly be used and this Court's citation of prior cases in which it has ruled reveals no case which has explained how a jury is supposed to know that it would be improper to consider the killing of a "hardworking, devoted parent" as a more aggravating circumstance than the killing "of a reprobate."

The CALJIC instructions virtually invite jurors to consider these and other inappropriate factors such as the wealth, class, social status, or race of the victim as a "circumstance of the crime" which "increases its guilt *or* enormity *or adds to its injurious consequences which is above and beyond the elements of the crime itself*" and *assign whatever moral value you deem appropriate.*" (CALJIC 8.88 [emphasis added]; 23 CT 6034.) This systemic flaw in California's capital sentencing scheme, and its application in this particular case, resulted in the violation of Sonny's rights under the Eighth and Fourteenth Amendments to due process and a fair and reliable capital sentencing determination, as well as a violation of both Sonny's and the victims' rights to equal protection of the law. (See *Turner v. Georgia, supra,* 268 Ga. at 218 (Sears, J., concurring): "[U]nder our justice system, all victims are held in equal esteem, and accorded the same degree of reverence, no matter if they are rich or poor, loved or unloved, celebrated or anonymous. In other words, if we are to fulfill our obligation to ensure equal protection of the law, no victim can be valued over any other victim.")

b. CALJIC Instructions Fail to Channel the Jury Into the Proper Uses of Victim Impact Evidence. Beyond the danger of the CALJIC instructions failing to restrict the jury's improper use of victim impact evidence, the structure of the California penalty trial system is also defective in failing to affirmatively advise the jury as to how victim impact evidence might properly be

weighed.[33] Because of Boyd's recognition that Penal Code section 190.3 strictly limits the factors a penalty jury may consider, the Court in *Edwards,* in order to uphold the use of victim impact evidence, pigeon-holed such evidence as "circumstances of the crime" even though it is a strained and tenuous fit. Neither CALJIC 8.88, nor any other standard California sentencing instruction, ever tells the jury about the mental gymnastics necessary to fit injuries to the family and characteristics of the victim unknown to the defendant at the time of the crime into this odd space. Assuming the jury even knows that victim impact is part of the circumstances of the crime,[34] the jury is given no idea how to use that evidence as more or less aggravating.

The only substantive limitation CALJIC 8.88 puts on the use of victim evidence is the general definition of aggravating circumstances which states that an aggravating circumstance is anything which "increases its guilt *or* enormity *or* adds to its injurious consequences which is above and beyond the elements of the crime itself." As noted above, this general language does nothing to tell the juror that it is improper to consider the victim's social status. But just as importantly, it does not tell jurors how they can properly use victim impact evidence as evidence that the victim's life was unique. The instructions thus violate the core principle of the Supreme Court's capital jurisprudence, which is that the sentence of death must reflect an "individualized determination" of the

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[33] Principles for formulating appropriate instructional language to help reduce the danger of arbitrary and capricious use of victim impact evidence is set forth at the conclusion of the next section of this argument (Prejudice and Remedy).

[34] In the instant case, the instructions did not tell the jury that victim impact evidence was a circumstance of the crime. The prosecutor did argue, that however. See (XXXIII RT 4595:15-17,) .

defendant's "'personal responsibility and moral guilt' " and must be based upon factors that channel the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action. " (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Enmund v. Florida* (1982) 458 U.S. 782, 801; and *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.).)

Moreover, the rubric of aggravating circumstances is particularly problematic as a way of evaluating victim impact evidence. The U.S. Supreme Court in *Payne* and this Court in *Edwards* struggled mightily to explain the proper role of victim evidence. The fine distinctions as to what is the proper use of this evidence are difficult for even experienced counsel to comprehend. It appears that ultimately the rationale for allowing this kind of evidence is to help ensure that the victim's uniqueness and dignity as a human being are not excluded from the deliberations. How the dignity and uniqueness of a human life can be judged as more or less aggravating is hard to fathom; one human life is no more valuable than another. Perhaps for this reason, a number of states specifically instruct the juries not to consider victim impact evidence in determining whether the state has established aggravating circumstances. (See, e.g., *Stephenson v. State, supra* 195 S.W.2d at 604; *Turner v. State, supra,* 268 Ga.at 215-16 , 486 S.E.2d at 842-43; *State v. Muhammad*, 145 N.J. at 51-52, 678 A.2d at 178; *Cargle v. State*, supra, 909 P.2d at 828-29, *Evans v. State, supra,* 333 Md. at 690-91, 637 A.2d at 132.) Although these states have somewhat different penalty trial structures, they recognize that treating victim impact evidence as more or less aggravating is problematic.

For all of these reasons the combination of pigeon-holing victim impact evidence into the circumstances of the crime and giving instructions which fail to give the jury any guidance on how to properly consider victim impact evidence as more or less aggravating, together with the impermissible invitation to treat one life as more

valuable than another permits arbitrary and capricious use of such evidence and thereby violates the Eighth Amendment and Due Process.

2. Prejudice and Remedy Because California's practice of permitting the introduction of victim impact evidence without instructions to guide the sentencer's use of such evidence violates the Eighth Amendment and Due Process and interjects into the death penalty process adventitious and improper considerations, the error is a structural error which requires reversal of the penalty phase *per se*. Even if it were to be treated as a trial error, the resulting violations of the Eighth Amendment and Due Process are clearly constitutional violations which require that the prosecution prove that the error was harmless beyond a reasonable doubt. *(Chapman v. California* (1967) 386 U.S. 18, 24.)

Here, the state cannot meet this burden. Evidence was introduced that Dedrick Gobert was in several Hollywood movies and that Ignacio Hernandez received an acceptance to a school in Texas for mechanical engineering. There was nothing in the instructions which prevented the jury from using this information as more aggravating because of the social status of the victims rather than simply as evidence of their uniqueness as human beings. The possibility that this clearly impermissible use of the evidence colored the jury's decision cannot be rebutted beyond a reasonable doubt.

Moreover, generally, the scheme did not adequately channel the jury's discretion and left them without guidance on how to use the primary evidence introduced by the prosecution at the penalty trial.

The Court should vacate the penalty judgment and remand for a new penalty trial with specific instructions to the trial judge to not allow victim impact evidence into the trial until and unless it is authorized legislatively. In the alternative, the Court should remand the case to the trial court with instructions to be given the jury

setting out basic principles to channel their use of victim impact evidence. At a minimum those instructions should make clear:

1. That evidence about the victims' personal characteristics was introduced to give a brief glimpse of victim's life and to inform the jury of the uniqueness of the lives of these victims.

2. No human life is worth more than another.

3. The bedrock of a penalty determination is an evaluation of the moral culpability of the defendant

4. The culpability of the defendant for facts about which he was unaware at the time of the crime is less than for things he knew at the time of the crime.

VI.

THE PROSECUTOR'S ARGUMENT URGING THE JURY TO VOTE FOR DEATH TO ACCOMMODATE THE WISHES OF THE FAMILIES OF THE VICTIMS AND AVOID MORE NEGATIVE IMPACTS ON THOSE FAMILIES DENIED SONNY A RELIABLE PENALTY TRIAL AND VIOLATED THE EIGHTH AMENDMENT AND DUE PROCESS

A. The Record.

Appellant has previously set forth the factual record concerning the pre-penalty-trial dispute as to the permissible scope of victim impact evidence, the trial court's ruling on that issue, the victim impact testimony presented, and the jury instructions that may have related in any way to that evidence. (See Argument V , at pages 118-123.) In closing argument, the prosecutor, going beyond the limits of both the trial court's pretrial ruling and the evidence actually presented, urged the jury to vote for death in order to satisfy the wishes and protect the well being of the survivors of the two homicide victims. First, he argued that "If this decision is not the appropriate one in this case, it would bring further injury to the shattered lives of three families."

(XXXIII RT 4585.) Then he argued that "These people [victims' survivors] look to you for justice. They have waited patiently for 4 ½ years." (XXXIII RT 4595.) When the defense objected, the trial judge reminded the jury that "public feeling or public sentiment" is not to enter into the jury's determination, which is to be made on the basis of the aggravating and mitigating factors. (*Ibid.*) The judge did not say that the feelings or sentiment of the victims' survivors (as opposed to the general public) shouldn't be considered, or that the prosecutor's argument was improper.

The prosecutor, after suggesting that the jury should consider the allegedly negative impact of not executing Sonny on the victims' survivors as a reason for imposing a death sentence, also explicitly advised the jury that they were not to consider the impact of executing Sonny on Sonny's family. (XXXIII RT 4597.) Then, in arguing that no juror should use his or her "power to stop the State from executing Mr. Enraca," the prosecutor suggested that this would be "corrupt" and then added "Theirs, not our lives, we would be adding insult to. It's further insult that we'd be adding to theirs *and their families'*." (XXXIII RT 4606:20-22.) The defense objected ("improper argument") and the judge sustained the objection. (*Id.* at 4606:23-25.) But when the defense requested an admonition, the judge said only that "public sentiment and feeling" should not "come into" the jury's decision. (XXXIII RT 4606:27-4607:1.)

The prosecutor responded by explaining to the jury that he had no intent to suggest that public outrage should enter into the decision, and that his comments were limited to "this defendant, *and these victims.*" (XXXIII RT 4607:2-7 [Emphasis added].) The defense again objected The trial judge responded by announcing "Victim impact is a consideration for this jury." Defense counsel then argued against using the victims' survivors' wishes as a basis for a death sentence: "But not their desire." The trial judge again stated that "Victim impact is a

consideration for this jury" and expressly overruled the defense objection. (XXXIII RT 4607:7-16.) Set out more fully, this concluding colloquy between counsel and the court on the permissible scope of victim impact sentencing considerations was as follows:

> MR. RUIZ [prosecutor]: Ladies and gentlemen, you will hear, I'm sure, after I'm done, that all it takes is just one of you to stop this from happening. Each one of you has the power to stop the State from executing Mr. Enraca. That appeals to some people. Especially people who feel they don't exercise a lot of power in their own lives. But what do you know about power? Power corrupts. It has to be wielded responsibly, appropriately, and not out of some desire to wield it. Theirs, not our lives, we would be adding insult to. It's further insult that we'd be adding to theirs and their families'.
>
> MS. FEIGER [defense counsel]: I'm going to object. That is improper argument.
>
> THE COURT: Sustained.
>
> MS. FEIGER: I'd like to have the jury admonished.
>
> THE COURT: Once again, ladies and gentlemen, public sentiment and public feeling should not come into any decision you make in the penalty phase.
>
> MR. RUIZ: There wasn't anything about what I just said that I intended to mean that because of public outrage, you should light your torches and get the pitchfork, and "Let's go kill the monster." My comments are limited specifically to these facts, this defendant, and these victims.
>
> MS. FEIGER: Again, Your Honor, I'm going to object. What it implies.
>
> THE COURT: Victim impact is a consideration for this jury.
>
> MS. FEIGER: But not their desire.
>
> THE COURT: Victim impact is a consideration for this jury.
>
> MR. RUIZ: Thank you, Your Honor
>
> MS. FEIGER: That's overruled?
>
> THE COURT: Yes, ma'am.

(XXXIII RT 4606, line 13 - 4607, line 16.)

The net result was to convey to the jury that the prosecutor's position was correct and that the sentencing preferences of the victims' survivors and the impact of the sentencing choice on those survivors were proper victim impact factors to be weighed in the sentencing determination.

B. Argument.

Whatever one's view of the propriety of using victim impact evidence as a basis for selecting the death penalty, it has been clear since *Payne* that the opinions of family members concerning the proper punishment or arguments concerning the wishes of family members are inappropriate. Prior to *Payne,* in *Booth v. Maryland, supra,* 482 U.S. 496, the United States Supreme Court vacated a death sentence, holding that it violated the defendant's Eighth Amendment rights to consider victim impact statements in sentencing the defendant to death; *Booth* ruled that two aspects of the victim impact statements were improper: (1) statements about the impact of the crime on the victims' families (482 U.S. at 502-507) and (2) characterizations of the defendant by the victims' families and expressions of their desires for a particular penalty. (482 U.S. at 508.) As this Court stated in *People v. Smith,* in *Payne*:

> The high court overruled *Booth* in part, but it left intact its holding that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Payne v. Tennessee, supra,* 501 U.S. at p. 830, fn. 2.

(*People v. Smith* (2003) 30 Cal.4th 581, 622.). Thus, it is well settled that "victim impact evidence does not include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victims' family members or friends, and such testimony is not permitted." (*People v. Pollock* (2004) 32 Cal. 4th 1153, 1180, citing *People v. Smith, supra,* 30 Cal.4th at 622.)

Consistent with the scheme set up by *Booth* and *Payne* and adopted by this

Court in *Smith* and *Pollock*, the trial judge ruled prior to the penalty trial that "[p]ossible sentence has nothing to do with the impact. .... [n]o one is going to ask what is appropriate." (XXVIII RT 4082:28 to 4083:4.) Also consistent with *Payne* and the trial judge's ruling, the two victim impact witnesses did not testify about their wishes concerning penalty; the record was silent on that point. But the prosecutor's closing arguments and the trial judge's ruling on defense objections to these improper arguments ignored these very strictures and left the jury with the impression that it was proper to give weight to what the survivors wanted and to protecting the survivors from further insult or injury (or at least to what the prosecutor contended the survivors wanted and would protect them from further injury and insult).

The prosecutor's argument was improper for three reasons. (1) It urged aggravation based on the effect not giving the death penalty would have on the families of the victims and the families' sentencing preferences; (2) it argued purported facts not in evidence; and (3) it invited the jury to diminish its responsibility for its sentencing determination in violation of *Caldwell*. Each of these three reasons and the errors of the court in dealing with the prosecutor's argument are discussed in turn below.

1. Prosecutor's Argument And The Trial Judge's Rulings Improperly Allowed The Jury To Consider The Wishes Of The Victims' Survivors. A significant part of the prosecutor's argument for death was that a sentence other than death "would bring further injury to the shattered lives of three families" (XXXIII RT 4585) and would frustrate the families – " not just the moms. They had whole families. .... These people look to you for justice. They have waited patiently for 4 ½ years." (XXXIII RT 4595:1-4.) When the defense objected, rather than make it clear that the neither the effect of the sentence choice on the victims' survivors, nor the

desires of these family members, were relevant considerations for the jury, the trial judge told the jury only that "public feeling or public sentiment" was not to enter into the jury's determination, which was to be made on the basis of the aggravating and mitigating factors. (XXXIII RT 4595:7-11.) The prosecutor then explained to the jury that "[v]ictim impact is considered a factor in aggravation under Factor (a), the circumstances of the offense. That's the law.") (*Id.* at 4595:15-17.) But rather than sticking to the impact of the crimes, the prosecutor continued to push his theme that not giving the death penalty would be "further insult that we'd be adding to theirs *and their families' [lives]*." (XXXIII RT 4606:20-22.[emphasis added]) Although the trial judge sustained the defense objection. (*Id.* at 4606:23-25.), the judge's response to the defense's request for an admonition fell far short of advising the jury that the wishes of the survivors or the impact of a non-death sentence would have on them were not permissible aggravating circumstances, instead telling them only that "public sentiment and feeling" should not "come into" the jury's decision. (XXXIII RT 4606:27-4607:1.)

The prosecutor then disavowed any attempt to urge the jury to weigh "public sentiment" in their deliberations, but did urge the jurors to consider only "this defendant, these victims." Though the prosecutor's use of the "these victims" clearly referred back to his immediately preceding argument that jurors should avoid "further insult that we'd be adding to theirs and their families," and the defense objected to this clearly improper argument as using the victims' survivors' "desires" as a basis for a death sentence, the trial judge overruled the defense objection, telling the jury that those desires were "Victim impact [which] is a consideration for this jury". (XXXIII RT 4607:7-16.)

Thus, the *denouement* of this interchange was a clear error by the trial judge: overruling a well-taken defense objection to the prosecutor's inviting the jury to

base their penalty decision on the desires of the surviving family members and the impact on them of the sentencing choice, considerations clearly beyond the scope of either factor (a) or victim impact as defined by the Supreme Court in *Booth* and *Payne*. As the Supreme Court of Tennessee has said:

> Victim impact evidence and argument, however, must be relevant to the specific harm to the victim's family. It must be limited to "information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's family.

(State v. Middlebrooks (Tenn.1999) 995 S.W.2d 550, 558; *State v. Nesbit (*Tenn. 1998) , 978 S.W.2d 872, 891 (footnote omitted); *State v. Burns* (Tenn.1998) 979 S.W. 2d 276, 282.)

The trial judge's error in overruling defense counsel's objection and permitting argument concerning the wishes of the families and the impact of a sentence other than death on them put the court's seal of approval on an extensive campaign by the prosecutor to influence the jury to choose the death sentence by urging them to weigh the impact *of their sentence* as opposed to the impact *of the crime* on the victims' survivors. Moreover that same campaign included urging jurors to comply with the wishes of the victims' families. This is prosecutorial misconduct. (*State v. Middlebrooks, supra,* 995 S.W.2d at 558 (Argument that "his family asks you to impose the death penalty" is "prosecutorial misconduct – the prosecutor's statement clearly is an improper characterization of the family's view as to the appropriate sentence"); see also *Wimberly v. State* (Ala. Crim. App. 1999) 759 So.2d 568, 573 (Family member wrote victim impact statement to sentencing judge urging the death penalty; court noted "Had the prosecutor made these same comments in argument, we would find them to be a textbook example of

prosecutorial misconduct.")

What makes the misconduct so much more serious an error is that the trial judge not only failed to cure it after repeated requests for an admonition by defense counsel (the trial judge told the jury that they should not be swayed by "public feeling or public sentiment," but never told them that they must avoid considering the impact of the penalty verdict on the families), but also actually ruled in a way that approved the concept that "desires" of the family were "victim impact ... a consideration for this jury." This error is particularly serious because, as discussed above in Argument V (see pp. 132 -137), *the instructions given to the jury never explained for what purpose victim impact should enter a juror's deliberations and never explained the difference between the permissible use of victim impact evidence to show the victim's uniqueness and the harm caused by the crime and the clearly impermissible consideration of the victims' families' sentencing preferences and/or the impact of a life sentence on them.* With some very explicit instructions, perhaps the effect of the prosecutor's misconduct and the court's errors could have been overcome. But with only the vague, general instructions that the jury should consider "the circumstances of the crime of which defendant was convicted" (CALJIC 8.85; 23 CT 6028) and that "an aggravating factor is *any* fact, condition, or event which increases its guilt *or* enormity *or adds to its injurious consequences which is above and beyond the elements of the crime itself*" (CALJIC 8.88 [emphasis added]; 23 CT 6034) and that "*you are free to assign whatever moral value you deem appropriate*" (*Ibid.*), the jury was left without any guidelines or tools with which to separate permissible victim impact from the totally improper suggestions of the prosecutor which had been legitimized by the court.

2. Aggravation on basis of matters not in evidence. The prosecutor's argument was also misconduct (and the trial judge's failure to cure the prejudice

with appropriate admonitions was error) because the prosecutor's argument was based on matters not in evidence – the two victim impact witnesses never testified concerning their wishes for penalty, nor did they testify about the impact a sentence of life without parole or a sentence of death would have on them. (*People v. Bolton* (1979) 23 Cal.3d 208, 212-213.) Specifically, they did not testify that a sentence of life without parole would "bring further injury to the[ir] shattered lives" They did not testify that they were "waiting patiently for 4½ years" or that they were looking to the jury for "justice" or that a verdict of life without parole would be less than justice or an "insult" to them. Had they attempted to testify to any such matters, the defense would have objected and the trial judge, who had already ruled prior to trial that no such testimony was permissible, would have been obligated to sustain the objections and admonish the jury not to consider any such evidence. (See *People v. Pollock, supra; People v. Smith, supra*; *State v. Middlebrooks, supra,* 995 S.W.2d at 558.) Surely the prosecutor cannot be allowed to make an argument assuming as fact evidence that would have been inadmissible at trial. (See *Wimberly v. State, supra*, 759 So.2d at 573 ("Had the prosecutor made these same comments in argument [including, inter alia, the surviving family member's exhortation that the jury return a death sentence] we would find them to be a textbook example of prosecutorial misconduct.")

Moreover, the use of the argument is particularly unfair because the defense was barred from introducing evidence of what the impact of a death sentence would be on Sonny's family. (See XXXIII RT 4083: 8-10.) Indeed, soon after the prosecutor had argued that the jury should consider the impact of the sentence on the victims' families, the prosecutor very explicitly told the jury that the impact of an execution on defendant's family is not something the jury should consider. (XXXIII RT 4597.) This advice was incorrect and misleading: the jury may consider the

impact of an execution on a defendant's family insofar as the sense of pain or loss the defendant's family would feel may reflect positive qualities of the defendant. Their suffering, as such, may not matter, but the fact of their suffering is relevant as a basis for inferences about the defendant. (See *People v. Ochoa*, 19 Cal.4th 353, 456 (1998) [Sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but family members may offer testimony about the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character].) Thus, the Court's ruling barring the defense from introducing such evidence was error which exacerbates the errors in allowing the prosecutor to argue without evidence in the record as to what the victims' families wanted.

Moreover, allowing the prosecution to make arguments from matters not in evidence rewards prosecutorial misconduct at the same time it punishes the defense for adhering to the letter and the spirit of the trial judge's ruling barring evidence about the impact of one penalty or the other on the family of either the defendant or the victims.

Further, by arguing on the basis of alleged facts not in evidence, the prosecutor became "'his own witness - offering unsworn testimony not subject to cross-examination [and] . . . effectively circumvent[ed] the rules of evidence'" (*People v. Hill* (1998) 17 Cal.4th 800, 827-828, quoting *People v. Bolton* (1979) 23 Cal.3d 208, 213), thereby undermining appellant's rights to confrontation, to due process, and to a fair and reliable sentencing determination, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Crawford v. Washington* (2004) 541 U.S. 36, 69 (testimonial statements cannot be used against a defendant at a criminal trial absent an opportunity for cross-examination); *Zant v. Stephens* (1983) 462 U.S. 862, 879 (Eighth and Fourteenth Amendments require reliable, individualized capital

sentencing determination.)

3. *Caldwell* Error. Finally, the prosecutor's argument invited the jurors to do what the survivors allegedly wanted and needed, rather than taking responsibility for deciding for themselves, on basis of statutory guidelines, what sentence was appropriate and thereby violated *Caldwell v. Mississippi* (1985) 472 U.S. 320. As the Court in *Caldwell* stated,

> A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion .... Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

(472 U.S. at 333.) Although *Caldwell* involved prosecutorial argument suggesting that appellate review would cure any errors in defendant's sentence and the present case involves argument that the jury should defer to the wishes of thefamilies of the victims, the principle is the same: the prosecutor may not argue in a way that shifts responsibility for making the moral decision as to life or death away from the jury. The prosecutor's argument here did so and thereby violated the Eighth Amendment as authoritatively interpreted by the United States Supreme Court in *Caldwell.*

4. The Misconduct and Court Error Were Prejudicial and Certainly Not Harmless Beyond a Reasonable Doubt Assuming that this Court does not agree that California victim impact law creates structural error requiring reversal *per se* (Argument V, p. 137), the prosecutor's argument and the court error condoning it were constitutional error violating Sonny's rights under the Eighth and Fourteenth Amendments. Reversal is required unless the state can demonstrate the error was

harmless beyond a reasonable doubt.. *(Chapman v. California* (1967) 386 U.S. 18, 24.)[35]

Here. there is no way the state can meet the burden of showing the errors were harmless beyond a reasonable doubt. In the first place, victim impact witnesses were the only witnesses called by the prosecution at the penalty phase. So the error here went to the very heart of the prosecution case. Second, it is clear that the jury was repeatedly urged to render their verdict on constitutionally impermissible grounds (the impact of the verdict on the victims' families, the wishes of the victims' families) in a procedurally unconstitutional manner (based on evidence not in the record) and in a manner which unconstitutionally diminished the jury's individual and collective responsibility for their verdict. The magnitude of these errors is so great that there is no way the state could demonstrate harmlessness. After hearing the very sad testimony of the survivors, it would have been tempting and natural for the jury to accept the prosecutor's invitation to give these grieving mothers what, according to the prosecutor, they hoped for and would protect them from further injury. The impact of that prejudice could never be harmless beyond a reasonable doubt.

But even if this Court were to consider re-weighing the evidence at the

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They also clearly constitute state law error which, because it occurred at the penalty phase of a capital trial, requires reversal if "there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred" (*People v. Brown* (1988) 46 Cal.3d 432, 448 [emphasis added]) – a test essentially equivalent to the *Chapman* standard (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 (equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard).

penalty phase, it is impossible to conclude that the errors were harmless beyond a reasonable doubt. As noted above, the only penalty phase evidence introduced was victim impact evidence. Beyond that, the only aggravating circumstances introduced were the circumstances of the crimes for which appellant had been convicted. These crimes were substantial – two young men were dead and a young woman was paralyzed – but other circumstances were less aggravating: the crimes all occurred in the heat of a one-minute to two-minute confrontation initiated by the highly provocative behavior of one of the victims; there was no advance planning or brutality. Morever, Sonny had no prior criminal record of any kind. Weighed against this was a mitigating case so substantial that the trial judge in sentencing agreed with defense counsel that it was "the most benign [death case] in Riverside":

> I thought about that myself in assessing it, assessing when the jury even went out in the penalty phase. thought about maybe it was to my knowledge as well.

(XXXIII RT 4700:24 to 4701:4.)

The trial judge's assessment that this was the case of the most "benign" capital defendant the judge had seen in Riverside seems well supported. The defense penalty case presented evidence that Sonny had been abused and abandoned by his parents, and that this abuse and abandonment led him to join a gang ("ABC") as a substitute for the family he lacked, and further presented substantial evidence of Sonny's very positive qualities of responsibility, kindness, and hard work. Each of these aspects of the mitigating evidence is discussed below.%%%

Sonny's was the story of the unwanted son of a teenage mother who, he was told, had been raped and that every time she saw him, she was reminded of the rape. (XXXII RT 4592.) Sonny was left with his aunt and uncle to be raised in idyllic circumstances in the Philippines for his first eight years (XXXII RT 4492, 4495; see generally Statement of Facts pp. 43-45, *supra*) , but was then ripped from that idyllic

home to live as the unwanted child of an unstable mother and her abusive husband, through a cycle of continued emotional and physical abuse as he moved from military bases in Guam and then Japan and finally to the United States where the family unit disintegrated, with his mother abandoning him to his violently and physically abusive stepfather. (See Statement of Facts, pp. 45-48, *supra.)* Before his mother left the family, when Sonny was twelve, he came back to the Philippines for a visit. He asked his uncle Ray if he could remain there in his boyhood home, but Ray told him to go back with his family which Sonny did. (XXXII RT 4543.*)*

Unable to take the abuse after his return to the United States, especially after his mother abandoned him, Sonny left his abusive home by age 14, began working to support himself, eventually dropped out of school to work full time and lived with a succession of friends' families including the Accurso and Lopez family. (See Statement of Facts, pp. 48-49, *supra.*) The mothers in these households testified to what a respectful, helpful, religious and trustworthy young man Sonny was, always helping out in any way he could. (See Statement of Facts, pp. 49-50, *supra*) Terisita Accurso testified that Sonny was like a son to her and that he was the only one of her son? Ralph's friends she trusted, particularly with her infant grandson. Sonny was compassionate and grateful to her for taking him in. (XXXI RT 4449) She told of the kind way Sonny helped with Alzheimer patients whom she cared for and of the supportive way he befriended one of her patients. (XXXI RT 4445-4446) Gloria Lopez testified that Sonny would always be welcome in her home. He has always been like a father and brother to her children. Always there to help them. He was very grateful to be in her home. (XXXI RT 4436.) This Court reads many more penalty records than counsel, but this case is unique in counsel's experience in that there is so much positive evidence of Sonny's kind, humane and industrious young life.

Moreover, defense expert Jean Nidorf explained Sonny's behavior both with these families and the members of ABC as follows: Sonny would do anything for his friends (XXX RT 4316.) She explained that this not only explained his very positive behavior with the families he stayed with, but also his membership in ABC. Sonny was emotionally involved in being a part of the gang and believing that they were all trustworthy and a family and loyal.(XXX RT 4342.) Dr. Nidorf testified that Sonny had a great deal of nurturance as a young child and that was very important to him in his development. Once he was uprooted and moved into a new family where he really did not belong, he felt quite abandoned and alone and experienced persistent rejection and confusion. He felt weak and powerless as if he could not determine his own destiny and nothing was in his control.(XXX RT 4331-4332.) ABC became a place that he could belong, but Dr. Nidorf concluded that the ABC gang was not a predatory gang. The gang members were going to school, working and living with their families. They were not a cluster of boys living on their own and acting up all the time. (XXX RT 4226.) Sonny was not attracted to the gang lifestyle to acquire power or break the law, but rather to have a family he could rely on. (XXX RT 4226.) She also testified that Sonny had genuine remorse for his actions, but sincerely believed that he was acting in self-defense. (XXX RT 4345-4346, 4252.)

Thus, the defense mitigation case was substantial: Sonny was the victim of circumstances out of his control, including repeated abandonments by his mother and abuse by his stepfather. His feelings of abandonment and need for the kind of closeness he had experienced until he was eight drove him to seek the family he had lost by attaching himself to other families and eventually to ABC. And it was this very need for attachment that led him to the crimes he committed. The crimes, however, were the single instance of criminal behavior in a life that was otherwise characterized by hard work, compassion, gratitude, and the kindness he showed

others. Given the limited aggravating evidence and the considerable mitigating evidence, it seems impossible to find beyond a reasonable doubt that without the prejudicial campaign of the prosecutor to have the jury decide on penalty in order to fulfill the wishes and promote the well being of the victims' families (a campaign unsupported by any evidence in the record), that a reasonable jury would have still voted for death. Accordingly, appellant's death sentence must be set aside.

VII.

THE PROSECUTOR'S ARGUMENT THAT LACK OF REMORSE WAS AN AFFIRMATIVE REASON FOR CHOOSING DEATH, REINFORCED BY THE TRIAL JUDGE'S ERRONEOUS OVERRULING OF A TIMELY DEFENSE OBJECTION, WAS MISCONDUCT THAT VIOLATED *BOYD* AND DEPRIVED SONNY OF DUE PROCESS UNDER THE 14TH AMENDMENT

A. The Record

Although it is long-settled California law that remorse is a mitigating factor under Penal Code Section 190.3, and that it is misconduct for a prosecutor to argue that lack of remorse is aggravating (see *People v. Kennan* (198 8) 46 Cal.3d 478, 510), the prosecutor here argued extensively that defendant's lack of remorse was an affirmative reason for the jury to choose death. In the prosecutor's closing argument in the penalty phase, he offered three reasons why "death is warranted in this case" (XXXII RT 4587:12):

(1) the circumstances of the crime which, according to the prosecutor, was a "street execution" without any good reason (XXXII RT 4587:12 to 4592:3);

(2) victim impact evidence (XXXII RT:4592:17 to 4597:16); and

(3) lack of remorse (XXXII RT 4597:24 to 4604:17).

Two things are clear from the structure of the prosecutor's argument. First, lack of remorse was specifically included as one of the three aggravating factors

which the prosecutor argued justified the death penalty. Starting on page 4587, he begins his discussion of the reasons "why death is warranted in this case." As noted above, he starts with the circumstances of the crime and discusses them for just under five pages (to p. 4592, line 3). Then he moves to "another factor which you can consider is what the attorneys call 'victim impact.'" (XXXII RT 4592:17-18) After discussing victim impact, he sums up his argument as of that point: "That's two things that, I submit, compel the more severe penalty in this case." (XXXII RT 4597:17-18.)

The prosecutor then argues that absence of remorse is "a third reason why death is the only appropriate verdict in this case." (XXXII RT 4597:24-25.) Upon concluding his discussion of absence of remorse (XXXII RT 4597:24 - 4604:16), the prosecutor sums up again: "That's the case for the most severe punishment of the two available to you." (XXXII RT 4604: 16-17.) If there were any doubt that the prosecutor was asking the jury to consider the absence of remorse as aggravating, it is erased when it is considered that immediately after arguing that lack of remorse was a reason to execute Sonny and summing up his case for death, he then asks "is there anything that the defense has presented to you which says that you shouldn't do that [vote for death]?" (XXXII RT 4604:18-19) and then goes on to discuss and disparage the defense mitigation case. (XXXII RT 4604-4606.)

The second thing that is clear from examining the structure of the argument is that lack of remorse (7 pages) got 40% more air time than either the circumstances of the crime (5 pages) or victim impact (5 pages) in the prosecutor's summary of the reasons why Sonny should get death. It was not an isolated or incidental reason for giving the death penalty; it was a critical part of the prosecutor's argument.

As the prosecutor's analysis of Sonny's lack of remorse reached its crescendo, he made clear that "lack of remorse is the third thing [reason for executing Sonny]"

(XXXII RT 4602:18-19), but the defense attorney objected, seeking to clarify that "It's not the law. It's not an aggravated [sic] lack of remorse." (*Id.* at lines 25-26.) Inexplicably, even though the trial judge apparently agreed that lack of remorse was "not" an aggravating circumstance (*Id.* at line 27), the judge overruled the defense objection (*Id.* at line 24) and missed the opportunity to cure the prosecutor's error in suggesting to the jury that lack of remorse was an aggravating factor. The objection having been overruled, the prosecutor continued his argument that lack of remorse was a reason to impose death.[36] (XXXII RT 4603:3 - 4604:16.)

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[36] The colloquy surrounding the defense objection was as follows:

> Mr. RUIZ [the prosecutor]: . . . You see, there's no remorse. And lack of remorse is the third thing. And --
>
> MS. FEIGER [defense counsel]: I think -- I think I'm going to object.
>
> THE COURT: I don't know what the third thing is, so --
>
> MR. RUIZ: No. It's -- lack of remorse is the third thing.
>
> THE COURT: Overruled.
>
> MS. FEIGER: It's not the law. It's not an aggravated [sic] lack of remorse.
>
> THE COURT: It is not, and they're not numbered. They're one through -- (a) through (k).
>
> MS. FEIGER: Right.
>
> THE COURT: Thank you.
>
> MR. RUIZ: He showed no remorse. . . .

(XXXII RT 4602:18 - 4603:3.)

B. It is well settled that remorse is a mitigating factor and that lack of remorse cannot be used as factor in aggravation.

As this Court held almost 20 years ago in *People v Kennan:*

> Aggravating factors under the 1978 death penalty law are limited to those expressly set forth in the statute. (*People v. Boyd* (1985) 38 Cal.3d 762, 773.) Lack of remorse is not included in the statutory list. (See § 190.3, factors (a)-(k).) The prosecutor may suggest that evidence of remorselessness, or an absence of evidence of remorse, weighs against the finding of remorse as a *mitigating* factor. (*Ghent, supra*, 43 Cal.3d at p. 771; see also *People v. Odle* (1988) 45 Cal.3d 386, 422 *People v. Ruiz* (1988) 44 Cal.3d 589, 622 [244 Cal.Rptr. 200, 749 P.2d 854].) On the other hand, he should not argue that the absence of remorse is a factor *in aggravation*. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 788-790; *People* v. *Davenport* (1985) 41 Cal.3d 247, 288-290 [plur. opn.].)

(46 Cal.3d at 510.) The Court has always maintained that critical distinction and continues to do so. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 356 ("[a] prosecutor may properly comment on a defendant's lack of remorse, as relevant to the question of whether remorse is present as a mitigating circumstance, so long as the prosecutor does not suggest that lack of remorse is an aggravating factor. .... when a prosecutor does argue absence of remorse as an aggravating factor, it is misconduct."[citations omitted]).)

Although the Court has rarely found a case in which the prosecutor crossed the line, this present case is clearly one. As the summary of the record above establishes, the prosecutor specifically and repeatedly argued that Sonny's alleged lack of remorse was "the third reason why death is the only appropriate verdict in this case," the trial judge overruled the defense objection to lack of remorse as aggravation, and the prosecutor explicitly pivoted from aggravating factors to mitigating factors *after* arguing extensively that Sonny lacked any remorse. In these

circumstances, the prosecutor committed misconduct when he argued that lack of remorse was aggravating, and the trial judge erred by overruling the defense objection to this misconduct. The prosecutor continued to argue lack of remorse as an aggravating factor after the defense objection was overruled.

Although there was evidence supporting a finding that Sonny was remorseful, there is a good chance that the prosecutor succeeded in persuading the jury that Sonny had shown no remorse. A defense mental health expert, Dr. Nidorf, testified that Sonny had shown remorse relying on her interactions with him and upon a police videotape of Sonny, which not only showed Sonny admitting the shootings to Officer Spidle, but also talking by phone with his girlfriend and a fellow gang member (Roger Boring), and appearing to accept responsibility for his acts and express regret for having been a disappointment to Roger's mother. In his closing argument the prosecutor urged the jury to find that Sonny was in fact remorseless, relying in this argument, *inter alia,* on (1) a statement made to friends on the evening of the shooting in response to questions as to why he shot the victims ("Fuck em, maybe they deserved it"), (2) Sonny's initially lying to the officers, denying that he had done the shootings, (3) Sonny's then telling officer Spidle that he did the shootings but it was in self-defense, (4) Sonny's leading the officers on a wild goose chase looking for the gun he knew to be elsewhere, and (5) Sonny's failure to express self-reproach or compassion during the videotaped re-enactment. (XXXII RT 4597:24 to 4604:16.)

While angry remarks made shortly after the shooting and failures to cooperate with police and/or the assertion of a claim of self-defense are not necessarily inconsistent with remorse for what he had done, one or more jurors could have agreed with the prosecutor that Sonny lacked remorse, and, if they did, proceeded to accept the prosecutor's invitation to rely upon that lack of remorse as

the basis for imposing a death sentence.

The likelihood that the jury aggravated sentence upon the basis of non-statutory aggravation (the alleged lack of remorse) deprived appellant of an important state-law generated procedural safeguard and liberty interest -- the right not to be sentenced to death except upon the basis of statutory aggravating factors specified by the voters (*People v. Boyd*, supra, 38 Cal.3d at 772-775) and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. 343; *Fetterly v. Paskett, supra* 997 F.2d at1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); *Campbell v. Blodgett, supra,* 997 F.2d at 522 (noting that "state laws which guarantee a criminal defendant procedural rights at sentencing, even if not themselves constitutionally required, may give rise to a liberty interest protected against arbitrary deprivation by the Fourteenth Amendment's Due Process Clause"; and agreeing that Washington state statute created a liberty interest in having state supreme court make certain findings before affirming death sentence).

C. The Prosecutor's Misconduct, Compounded by Court Error, was Prejudicial.

The prosecutor's argument and the court error condoning it were constitutional error violating Sonny's rights under the Eighth and Fourteenth Amendments. Reversal is required unless the state can demonstrate the error was harmless beyond a reasonable doubt.(*Chapman v. California* (1967) 386 U.S. 18, 24.) They were also state law error which, since they occurred at the penalty phase of a capital trial, are subject to essentially the same prejudice test. (See *People v. Brown* (1988) 46 Cal.3d 432, 448 (establishing reasonable-possibility test for

appraising impact of state law error occurring at a penalty phase trial), and *People v. Ashmus* (1991) 54 Cal.3d 932, 965 (equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard).) In the circumstances, of this case, the state cannot meet the burden of proving the error harmless beyond a reasonable doubt. The prosecutor's misconduct was highly prejudicial particularly because the trial judge missed the opportunity to cure the error when the defense objected. To be sure, this Court has long recognized that " ' "[r]emorse is universally deemed a factor relevant to penalty. The jury, applying its common sense and life experience, is likely to consider that issue in the exercise of its broad constitutional sentencing discretion no matter what it is told." ' "*(People v. Bonilla, supra,* 41 Cal.4th 313, 356 quoting *People v. Combs* (2004) 34 Cal.4th 821, 866 .) But here, the jury was explicitly told by the prosecutor that lack of remorse was aggravating. And the trial judge reinforced that impression by denying the defense objection. Had the trial judge sustained the objection and properly admonished the jury, the prejudice might have been cured. But by overruling the defense objection the trial judge exacerbated the problem.

In the context of a case where, as discussed above, the trial judge agreed that Sonny's case was "the most benign [death case] in Riverside" (XXXIII RT 4700:24 to 4701:4) and in which a very substantial mitigating case was presented (See Argument VI , pp. 149-153, *supra*), it is impossible to conclude that the repeated suggestion that lack of remorse was an aggravating factor did not have any impact on the jury's decision.

Moreover, the combination of this misconduct and court error with the misconduct by the prosecutor in improperly arguing that the jury should vote for death in order to avoid adverse impact on the living family members (and court's error in failing to correct that error) is cumulative in its impact and can certainly not

be found harmless beyond a reasonable doubt.

VIII.

THE TRIAL COURT VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY REFUSING TO GIVE A LINGERING DOUBT INSTRUCTION REQUESTED BY THE DEFENSE, PARTICULARLY AFTER ONE OF THE JURORS WAS REPLACED AND THE PENALTY JURY WAS INSTRUCTED TO ACCEPT THE GUILTY VERDICTS AS HAVING BEEN PROVEN BEYOND A REASONABLE DOUBT

A. The Record.

At the penalty trial, the defense requested that the court instruct the jury as follows concerning lingering doubt:

> Each individual juror may consider as a mitigating factor residual or lingering doubt as to whether the defendant acted with premeditation and deliberation. Lingering or residual doubt is defined as the state of mind between a reasonable doubt and beyond all possible doubt. Thus if any individual juror has a lingering or residual doubt about whether the defendant acted with premeditation and deliberation, he or she must consider this as mitigating and assign to it the weight you deem appropriate.

(23 CT 6041).

Because a juror who sat on the guilt jury refused to pay attention to the defense penalty case and was removed from the jury (XXX RT 4277), the trial judge gave CALJIC 17.51.1:

> A juror has been replaced by an alternate juror. The alternate juror was present during the presentation of all of the evidence, arguments of counsel, and reading of instructions, during the guilt phase of the trial. However, the alternate juror did not participate in the jury deliberation which resulted in the verdict and findings returned by you to this point. For the purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt, those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial. Your function now is to determine, along with the other jurors, in the light of the prior verdict or verdicts, and findings and the evidence and the law, what penalty should be

> imposed. Each of you must participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial.

(23 CT 6032; emphasis added.)

At the jury instruction settlement conference, the trial judge reacted to the proposed lingering doubt instruction by stating that "I don't understand it." (XXXII RT 4571:9.) Defense counsel responded by noting that the instruction was taken from *People v. Nicholaus* (1991) 54 Cal.3d 551, 586 in which the jury was "instructed that they 'may consider as a mitigating factor residual or lingering doubt as to whether the defendant intentionally killed the victim or acted with premeditation and deliberation.'" (See XXXII RT 4571:10-11.) The trial judge stated that his problem with the instruction was that "[t]his is not well constructed." (XXXII RT 4572:5-6.) When defense counsel asked "what would the court recommend to make it appropriate in its construction," the trial judge responded by asking to hear from the prosecutor. (See *Id.*, lines 7-9.) The prosecutor did not address how to improve the instruction, but argued that later case law stated that the defense was allowed to argue lingering doubt, but was not entitled to a jury instruction on that. (*Id.* at lines 11-20.) The trial judge then stated that he would not give the instruction because:

> this one is horrific. It doesn't make sense as it's put here.... Doesn't make reference to the phase of the trial ... to the idea of reasonable doubt applied to the guilt versus the penalty."

(*Id.* at lines 21-26.)

Later defense counsel asked the trial judge again if it could make some suggestions about how to better word the lingering doubt instruction, but the judge refused. (XXXII RT 4574:16 to 4575:9.) The judge never articulated why he thought the proposed instruction didn't "make sense."

B. The Refusal of the Trial Judge to Give a Lingering Doubt Instruction Deprived Sonny of His Right to Present the Lingering Doubt Defense in violation of the Sixth and Fourteenth Amendments

This Court has repeatedly ruled that although a defendant may argue that lingering doubt over whether he committed a capital offense is a mitigating circumstance which the jury should consider in deciding between life and death sentences, there is no general right to an instruction informing the jury that they may do so. (See, e.g., *People v. DePriest* (2007) 42 Cal.4th 1, 60 (no duty to instruct on lingering doubt); *People v. Bonilla* (2007) 41 Cal.4th 313; *People v. Gray* (2005) 37 Cal.4th 168, 231 (no *sua sponte* duty to instruct on lingering doubt when two alternates were substituted at the beginning of the penalty trial); *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1272. *But see People v. Harrison* (2005) 35 Cal.4th 208, 259-260 (approving lingering doubt instruction); *People v. Snow* (2003) 30 Cal.4th 43, 125 (approving similar lingering doubt instruction); *People v. Cain* (1995) 10 Cal.4th 1, 65-66 (upholding similar lingering doubt instruction).) Nonetheless, in light of its recent decision in *People v. Gay* (2008) 42 Cal.4th 1195, this Court should reconsider its approach to lingering doubt instructions and conclude that this California state-law-created right to a lingering doubt defense gives rise to a Sixth-Amendment right to fully present that defense by having the trial judge inform the jury of the existence of that defense and explain its relevance to their deliberations. And this is particularly true in the instant case where the substitution of an alternate juror resulted in the jurors being told that "[f]or the purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt, those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial." (23 CT 6032.) Absent some counterbalancing instruction from the trial court, the alternate juror, along with the

other jurors, would likely have understood this language to mean that the guilt phase findings of deliberate premeditated murder were to be taken as unquestionable fact.

As the Court put it in *Gay*, California is one of those jurisdictions which "have recognized the legitimacy of a lingering-doubt defense in the penalty phase of a capital trial." (*People v. Gay*, 42 Cal.4th at 1221.) The Court went further, noting that lingering doubt may often be the best defense: "As other courts have noted, 'residual doubt is perhaps the most effective strategy to employ at sentencing.'" (42 Cal.4th at 1227 [citations omitted].)

Given this clarification of the California right to a lingering doubt defense, the Court must also recognize that this right is protected by the Sixth and Fourteenth Amendments. (*Holmes v. South Carolina* (2006) 547 U.S. 319 ; *Crane v. Kentucky* (1986) 476 U.S. 683, *Chambers v. Mississippi* (1973) 410 U.S. 284.) Having established the state-law existence of a lingering doubt defense, a state must ensure that its relevance is conveyed to the trier of fact. (*Tyson v. Trigg* (7th Cir.1995) 50 F.3d 436, 448 [the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense"]; *U.S. v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202 ["[p]ermitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal"].)

The Court itself, just half a year prior to Sonny's penalty trial, had used language suggesting the lack of relevance of doubt as to guilt under any of the Penal Code section 190.3 factors:

> At the penalty phase a defendant must be permitted to offer any relevant potentially mitigating evidence, i.e., evidence relevant to the circumstances of the offense or the defendant's character and record. (Citations.) Evidence intended to create a reasonable doubt as to the defendant's guilt is not relevant

to the circumstances of the offense or the defendant's character and record." (*In re Gay* (1998) 19 Cal.4th 771, 814; discussed in *People v. Gay* (2008) 42 Cal.4th 1195, 1228-29 (Werdegar, J., concurring)

Thus, based on *People v. Gay*'s recognition of the right to a lingering doubt defense and clarification of the penalty phase relevance of evidence raising doubts as to guilt, this Court should reconsider its prior precedents and require that appropriate instructions inform the jury that they may consider lingering doubt because otherwise the right to make such a defense "would be empty" (*Tyson v. Trigg, supra.* 50 F.3d at 448) and "of little value." (*U.S. v. Escobar de Bright, supra,* 742 F.2d at 1201-1202.) It violates the Sixth and Fourteenth Amendment right to present a defense to render its exercise empty and valueless. Rather, this Court should implement the right to present a lingering doubt defense by requiring instructions which let the jury know that the right exists as the trial courts did in *Harrison, Snow,* and *Cain.* Indeed, the pattern of affirmances of trial judges who either give a lingering doubt instruction or refuse to give it, without any explanation of what should guide the trial judge in deciding whether or not to give the instruction leaves the defendant to a random lottery as to whether the jury receives instructions about a defense which this Court in *Gay* has noted is "perhaps the most effective strategy to employ at sentencing." (42 Cal.4th at 1227.) Such randomness violates the Eighth Amendment. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Thus, appellant suggests that the best remedy would be to overrule prior decisions and require a uniform lingering doubt instruction such as the one approved by this Court in *Harrison* and *Snow.*

The Court need not overrule its prior precedents to find error in the present case, however. The only case counsel has found in which this Court has faced the

issue of whether lingering doubt instructions are appropriate in a case such as the present *case,* in which a juror has been replaced, is *People v. Gray*, supra, 37 Cal.4th at 231. While *Gray* held that there was no *sua sponte* duty to give a lingering doubt instruction in that case, there is no indication in *Gray* that CALJIC 17.51.1 was given. The specific request for a lingering doubt instruction in the instant case, along with another instruction telling the jury that "the alternate juror must accept as having been proved beyond a reasonable doubt, those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial" renders this case distinguishable from *Gray* and would allow the Court to hold that the trial judge here erred without requiring it to overrule *Gray* or any of its prior precedents. Indeed, the portion of the *Harrison* instruction which told the jury that "You may not relitigate or reconsider matters which were resolved in the guilt phase, but you may consider such residual or lingering doubt, if it exists in your mind, as a circumstance in mitigation" *(Harrison, supra,* 35 Cal.4th at 259) would have been an ideal way to harmonize the language of CALJIC 17.51.1 and that of the lingering doubt instruction.

Whether the Court takes the broad approach that lingering doubt instructions are generally appropriate or restricts its ruling to the specific facts of this case, the trial judge's refusal to give lingering doubt instructions in the present case was error. Nor was that error excused by the trial judge's dissatisfaction with the instruction proposed by the defense. The language to which the trial judge objected was the same as that given in *Harrison* and *Snow: "*A lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt." (35 Cal.4th at 259-260; 30 Cal.4th at 125.) The trial judge never explained why he thought this legally correct language was problematic. Moreover, defense counsel twice requested suggestions for modifications to address any concerns the

trial judge had. The trial judge's refusal to suggest modifications or explain what kind of modifications might help compounded the trial judge's error in rendering what may be the most effective penalty phase defense "empty" and "of little value." The trial judge had a responsibility to give legally correct instructions on lingering doubt regardless of whether the defense requested instructions had flaws. (*People v. Hall* (1980) 28 Cal.3d 143, 159 [court has a duty to tailor or correct proffered instructions]; *People v. Cole* (1988) 202 Cal.App.3d 1439, 1446 [same]; *People v. Forte* (1988) 204 Cal.App.3d 1317, 1323 [where proposed instruction alerts court to defense theory, court has *sua sponte* duty to give a correctly phrased instruction].)

C. The Error in Refusing to Give A Lingering Doubt Instruction Was Prejudicial.

The trial judge's error in refusing to give the lingering doubt instruction violated the Sixth, Eighth and Fourteenth Amendments and therefore the burden is on the state to prove that the error was harmless beyond a reasonable doubt.[37] *(Chapman v. California, supra.)* In the instant case, the prosecution cannot meet that burden. The defense request was for an instruction on lingering doubt regarding the issue of premeditation and deliberation. There was certainly substantial evidence to

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The prejudice standard is essentially the same if the refusal to give the requested instruction is appraised only as an error of state law. A state law error occurring at the penalty phase of a capital trial, requires reversal if "there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred" (*People v. Brown* (1988) 46 Cal.3d 432, 448 [emphasis added]) – a test essentially equivalent to the *Chapman* standard (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 (equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard).

support lingering doubt as to whether Sonny acted with premeditation and deliberation. There was no evidence that Sonny knew Dedrick Gobert before Gobert confronted Sonny's friends in front of the pizza parlor. According to witnesses, Gobert was shot within in a minute or two of that confrontation. (See XVII RT 2847 [testimony of Arnold Belamide]; XXIII RT 3442 [testimony of Herman Flores].) Thus, any "deliberation" occurred within less than that one-to-two-minute period. So this is not a case where there was evidence of planning or preparation. This was at most a spur of the moment decision which the prosecutor argued was like deliberately going through a yellow light. (XXVII RT 3943-3944.) The shortness of time by itself could lead to a lingering doubt about whether Sonny premeditated and deliberated.

But there was also substantial evidence of provocation: highly inflammatory behavior by Gobert, including belligerent behavior and words including a statement that "I am not afraid to die" (XVII RT 3084-85), gang threats and taunts by Gobert (Argument II, *supra*, pp 83-84), and gestures suggesting that Gobert had a gun. (See Argument II, *supra*, p.85.) And there was evidence that Sonny was under the influence of methamphetamine, which during the confrontation may have caused Sonny to react impulsively, angrily, and/or with paranoia to Gobert's confrontational and provocative behavior in a way that was inconsistent with, or at least would support lingering doubt concerning, premeditation and deliberation. (See Statement of Facts, pp. 33-36, 39 and Argument II, p. 86.)

For all of these reasons, there was substantial reason to have a residual doubt about whether Sonny premeditated or deliberated on the shootings and the trial judge's failure to instruct on lingering doubt cannot be said to be harmless beyond a reasonable doubt. The death penalty verdict must therefore be set aside.

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, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6.)[38] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would

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[38]In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first-degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended

when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, 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. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances[39] purporting to narrow the category of first-degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree

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[39]This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down 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 U.S. Constitution and prevailing international law.[40]

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[40]In a *habeas* petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital

(See Section E. of this Argument.)

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[41] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[42] or having had a "hatred of

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sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

[41]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[42]*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

religion,"[43] or threatened witnesses after his arrest,[44] or disposed of the victim's body in a manner that precluded its recovery.[45] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

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. (*Tuilaepa*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and

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[43]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[44]*People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[45]*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and

prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 2007 WL 135687

[hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id., at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id., at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the supreme court stated that the governing rule

since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra*, Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. *In the Wake of Apprendi, Ring, Blakely, and Cunningham, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.*

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[46] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (XXXII RT 4651:21-24.),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating

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[46]This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[47] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[48]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an

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[47]In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

[48]This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[49] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (Id., pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra*, p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 14.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the

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[49]*Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

> concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* at p. 13.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first-degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[50] indicates, the maximum penalty for *any* first-degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that

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[50]Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first-degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first-degree murder in Arizona, a California conviction of first-degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first-degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances.

(Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be made unanimously and beyond a reasonable doubt violates the United States Constitution.

b. *Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.*

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943; accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *State v. Ring,* 65 P.3d 915 (Az. 2003); *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).[51]) No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[52] As the high court stated in *Ring*, *supra*,

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[51]See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[52]In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri,*] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60

122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. *Factual Determinations*

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the

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L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. *Imposition of Life or Death*

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14

Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case."

(*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will

otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[53] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the

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[53]A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.*"

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first-degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards

commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 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*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

6. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no*

> *reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 34 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.). This Court recently faced a record in which a juror's notes indicates that he aggravated the sentence based on factors which could only be considered mitigating; although the Court found the evidence inadmissible to impeach the jury verdict, the notes do underline the risk of confusion. See *People v. Cruz* (2008) 44 Cal.4th 636, 681-82.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth

Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. Indeed, the prosecutor's closing arugment invited the jury to consider it aggravating that, in the prosecutor's view, Sonny did not show remorse. (See Argument VII pp. 153 to 159, *supra.*) This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive 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. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[54] as in *Snow*,[55] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[56]

In a capital sentencing context, however, there is no burden of proof except

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[54]"As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[55]"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

[56]In light of the supreme court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[57] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom:*

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[57]Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot, supra*, 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European

Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[58] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[58]See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

X. CUMULATIVE ERROR

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair. (*Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 963; *People v. Hill, supra,* 17 Cal.4th at 844 ["a series of trial errors, though independently harmless, may in come circumstances rise by accretion to the level of reversible and prejudicial error]; *People v. Herring* (2d Dist.1993) 20 Cal.App. 4th 1066, 1074; *People v. Pitts* (5th Dist.1990) 223 Cal.App.3d 606, 273 Cal.Rptr.757, 815.) In such cases, "a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial against the evidence against the defendant. (*United States v. Frederick* (9th Cir.1996) 78 F.3d 1370, 1381.

Here, appellant Sonny Enraca, has identified numerous errors that occurred during the guilt and penalty phases of he trial. Each of these errors individually, and all the more clearly when considered cumulatively, deprived Sonny of due process, of a fair trial, of the right to confront him, and of a fair and reliable guilt and penalty determination in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Further each error, by itself, is sufficiently prejudicial to warrant reversal of appellant's conviction and his death sentence. Even if this Court were to find any of these errors not prejudicial in itself, reversal would still be required because of the substantial prejudice flowing from the cumulative impact of these errors.

CONCLUSION

For all of the foregoing reasons, the verdicts of guilty of first-degree murder of Gobert and of Hernandez, the special circumstances findings, and the death penalty verdict must be vacated and the case remanded for a new trial.

Respectfully submitted,

/S/

Paul J. Spiegelman

Attorney for Appellant Sonny Enraca

SUPPLEMENT FOR CONVENIENCE OF COURT

U.S. Department of State, *Notice for Law Enforcement Officials on Detention of Foreign Nationals* (April 20, 1993)

Available on Internet at:
http://www.cesarfierro.info/state93.pdf

United States Department of State

Washington, D.C. 20520

April 20, 1993

NOTICE FOR LAW ENFORCEMENT OFFICIALS
ON
DETENTION OF FOREIGN NATIONALS

The U.S. Department of State wishes to remind all law enforcement personnel that, whenever they arrest or otherwise detain a foreign national in the United States, there may be a legal obligation to notify diplomatic or consular representatives of that person's government in this country. Compliance with the notification requirement is essential to ensure that similar notice is given to U.S. diplomatic and consular officers when U.S. citizens are arrested or detained abroad.

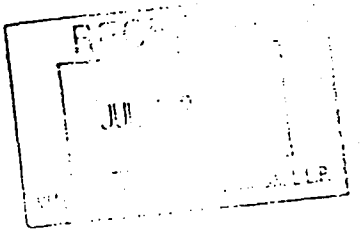
Whenever a foreign national is taken into custody, the arresting or other officer-in-charge should consult the list at Annex A to determine whether notification is mandatory. If the detainee is a national of one of the countries listed, there is a bilateral agreement in force with that country requiring notice in all cases. The nearest consulate or embassy should be notified without delay and the detainee so informed.

If the detainee is a national of any other foreign country, the Vienna Convention on Consular Relations and/or customary international law require that she/he must be informed without delay of the right to have his/her government notified. If notification is requested, it must be given without delay to the nearest consulate or embassy.

Law enforcement agencies should keep a written record of all notifications to foreign diplomatic or consular representatives. If notification is optional and is not requested by the detainee, that fact should be recorded in the detainee's file, and no notice should be given.

Subject to local laws and regulations regarding access to detained persons, foreign consular officers have the right to visit their nationals, to converse and correspond with them, and to arrange for their legal representation.

A current list of telephone numbers, and FAX numbers where available, for all foreign consulates and embassies is at Annex B. Please note that there are addenda for countries formerly part of the USSR and Yugoslavia.



Inquiries concerning the foregoing may be addressed to the Assistant Legal Adviser for Consular Affairs, U.S. Department of State, Washington, D.C. 20520; Telephone (202) 647-4415; FAX (202) 736-7559. Telephone inquiries after normal business hours may be directed to the Command Center of the Bureau of Diplomatic Security at (202) 663-0812.

The Department of State appreciates the continued cooperation of federal, state and local law enforcement agencies in meeting these United States obligations under international law.

Annex A

COUNTRIES FOR WHICH CONSULAR NOTIFICATION IS MANDATORY

Albania[1]	Malta
Antigua	Mauritius
Armenia	Moldova
Azerbaijan	Mongolia
Bahamas	Nigeria
Barbados	Philippines
Belarus	Poland
Belize	Romania
Brunei	Russian Federation
Bulgaria	St. Kitts/Nevis
China (Peoples' Republic)[2]	St. Lucia
Costa Rica	St.Vincent/Grenadines
Cyprus	Seychelles
Czech Republic	Sierra Leone
Dominica	Singapore
Fiji	Slovak Republic
The Gambia	South Korea
Georgia	Tajikistan
Ghana	Tanzania
Grenada	Tonga
Guyana	Trinidad/Tobago
Hungary	Turkmenistan
Jamaica	Tuvalu
Kazakhstan	Ukraine
Kiribati	United Kingdom[4]
Kuwait	U.S.S.R.[3]
Kyrgyzstan	Uzbekistan
Malaysia	Zambia

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[1]Arrangements with these countries provide that U.S. authorities shall notify responsible representatives within 72 hours of the arrest or detention of one of their nationals.

[2]When Taiwan nationals (who carry "Republic of China" passports) are detained, they should be informed without delay of their right to have the nearest office of the Taipei Economic and Cultural Representative Office, the unofficial entity representing Taiwan's interests in the United States, notified.

[3]All U.S.S.R. successor states are covered by this agreement. They are: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

[4]British dependencies are also covered by this agreement. They are: Anguilla, British Virgin Islands, Hong Kong, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

PAKISTAN Washington, D.C. (202) 939-6200; FAX (202) 387-0484
New York, NY (212) 879-5800
PANAMA Washington, D.C. (202) 483-1407
Miami, FL (305) 371-7031
Atlanta, GA (404) 525-2772
New Orleans, LA (504) 525-3458
New York, NY (212) 840-2450
Houston, TX (713) 493-5997
PAPUA NEW GUINEA Washington, D.C. (202) 659-0856;
FAX (202) 466-2412
PARAGUAY Washington, D.C. (202) 483-6960-62; FAX (202) 234-4508
Miami, FL (305) 477-4002
New Orleans, LA (504) 522-7424
New York, NY (212) 432-0733
PERU Washington, D.C. (202) 833-9860-69; FAX (202) 659-3660
Los Angeles, CA (213) 651-0296-7; FAX (213) 651-1264
San Francisco, CA (415) 362-7136
Miami, FL (305) 374-1407
Chicago, IL (312) 853-6173
Patterson, NJ (201) 278-2221
New York, NY (212) 644-2850-54
San Juan, PR (809) 763-0679
Houston, TX (713) 781-5000
PHILIPPINES Washington, D.C. (202) 467-9300; FAX (202) 328-7614
Los Angeles, CA (213) 387-5321
San Francisco, CA (415) 433-6666/69
Agana, Guam 646-4620/4630
Honolulu, HI (808) 595-6316
Chicago, IL (312) 332-6458
New York, NY (212) 764-1330
Houston, TX (713) 621-8618
Seattle, WA (206) 441-1640
Trust Territories, Saipan, San Jose, Commonwealth of the
Northern Marianas Island (670) 234-6089
POLISH PEOPLE'S REPUBLIC Washington, D.C.
(202) 234-3800-02; FAX (202) 328-6271
Chicago, IL (312) 337-8166
New York, NY (212) 889-8360
PORTUGAL Washington, D.C. (202) 328-8610; FAX (202) 462-3726
Los Angeles, CA (213) 277-1491
San Francisco, CA (415) 346-3400
Boston, MA (617) 536-8740
Newark, NJ (201) 622-7300
New York, NY (212) 246-4580; FAX (212) 459-0190
Providence, RI (401) 272-2003/9456
QATAR Washington, D.C. (202) 338-0111; FAX (202) 337-2989
ROMANIA, SOCIALIST REPUBLIC OF Washington, D.C. (202) 232-4747;
FAX (202) 232-4748
RUSSIAN FEDERATION Washington, D.C. (202) 628-7511 or 628-8548;
FAX (202) 347-5028
RWANDA, REPUBLIC OF Washington, D.C. (202) 232-2882;
FAX (202) 232-4544
SAINT KITTS AND NEVIS Washington, D.C. (202) 833-3550;
FAX (202) 833-3553

CERTIFICATE PURSUANT TO CA. RULE OF COURT 8.630

I hereby certify that, according to my computer's word processing program, this brief, exclusive of tables, is 64,569, well within the 102,000-word limit specified in California Rule of Court 8.630.

/S/

Paul J. Spiegelman
ATTORNEY FOR APPELLANT

DECLARATION OF SERVICE BY MAIL

Re: *People v. Enraca*, Supreme Court No. S 080947

I, Paul J. Spiegelman, declare that I am over 18 years of age and am not a party to this action. My business address is P.O. Box 22575, San Diego, CA 92192-2575. I served a copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following by placing same in an envelope addressed respectively as follows:

Mr. Sonny Enraca
P.O. Box P-48601
San Quentin, CA 94974

JERRY BROWN, Attorney General
300 South Spring Street, Suite 500
Los Angeles, CA 90013

STEVEN PARNES, Staff Attorney
California Appellate Project
101 Second Street
San Francisco, CA 94105

Each said envelope was then, on September 4, 2008, sealed and deposited in the United States mail at San Diego, California, with postage fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego, California this 4th day of September, 2008.

/S/
PAUL J. SPIEGELMAN, DECLARANT