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S083594

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>TOMMY ADRIAN TRUJEQUE,<br><br>Defendant and Appellant. | (Los Angeles County Superior Court No. VA048531-01) |

# APPELLANT'S OPENING BRIEF

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

HONORABLE PATRICK COUWENBERG, JUDGE



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DEATH PENALTY

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| TOMMY ADRIAN TRUJEQUE, | ) | |
| Defendant and Appellant. | ) | |

**APPELLANT'S OPENING BRIEF**

## INTRODUCTION

In his 1999 trial in this case, appellant, Tommy Trujeque, was sentenced to death for the 1986 killing of Max Facundo, his cousin Charlene's abusive boyfriend, and convicted of second degree murder for his role in the January 1987 stabbing death of Raul Apodaca by a fellow gang member, Jesse Salazar. Salazar, the undisputed instigator of the assault on Apodaca, pled guilty to voluntary manslaughter and was sentenced to credit for time served in 1987. Appellant was also first charged with Apodaca's murder in 1987, but at that time, he was held to answer only for manslaughter, and the charges were dismissed. Similarly, appellant was arrested a few days after the Facundo stabbing in 1986, but the charges were dropped.

The state made no further effort to prosecute either case for over a decade, until 1998, when appellant, who had recently received a life sentence for armed robbery, contacted the Los Angeles County Sheriff's

Office and offered to confess to both the Facundo and Apodaca murders, as well as an additional armed robbery, in exchange for the death penalty.

## STATEMENT OF THE CASE

The current prosecution of appellant, in case number VA048531, was initiated on June 1, 1998 with the swearing of a three-count felony complaint for arrest warrant charging him with (1) the murder of Max Facundo on or about June 2, 1986 in violation of Penal Code section 187, subdivision (a)[1], (2) the murder of Raul Luis Apodaca on or about January 23, 1987 in violation of section 187, subdivision (a), and (3) second degree robbery of Ronni Mandujano and Spartan Burgers on or about January 21, 1998 in violation of section 211; counts one and two were alleged to be special circumstances within the meaning of section 190.2, subdivision (a)(3). (1 CT 1-8.)[2]

After agreeing to continue his arraignment on July 1 and 22, 1998, appellant's request to represent himself was granted in the Municipal Court on August 6, 1998. (1 CT 15-17.) Appellant's preliminary hearing was held on September 29, 1998. Appellant represented himself, stipulated to the cause of death as to both victims, and did not cross-examine any of the four witnesses who testified. (1 CT 17-36.) Appellant was held to answer on all three counts of the complaint. (1 CT 8, 37.)

An information charging counts identical to the complaint was filed

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

[2]The Clerk's Transcript is cited as "CT" and the Reporter's Transcript is cited as "RT."

on October 13, 1998.[3] (1 CT 39-44.) At his first appearance in superior court on the same day, the judge directed appellant to submit another petition to appear pro per if he wanted to continue representing himself. (1 RT 3.) On October 16, 1998, Judge Couwenberg granted appellant's request to continue appearing pro per and arraigned him on the information; appellant pled not guilty. (1 RT 11-12, 17.) The court granted appellant's request for funds and appointed an investigator. (1 RT 14-16.) On November 13, 1998, Andrew Stein was appointed standby counsel and appeared in court; trial was set for December 11, 1998. (1 RT 34-49;1 CT 68.)

On November 17, 1998, appellant was found to have materials from the jail law library in his cell, and the Sheriff's Department proceeded to revoke his pro per privileges in the jail. (1 CT 71-102.) On November 25, 1998, appellant signed a Substitution of Attorney, designating Mr. Stein as his attorney. (1 CT 70.) On December 3, 1998, appellant's motion to withdraw his substitution of counsel was denied, and the trial was continued, over appellant's objection, to February 25, 1999. (1 RT 51-63;1 CT 103.)

On January 22, 1999, the prosecution filed an amended information, on which appellant was ultimately tried, alleging the same three counts as before but adding a prior-murder special circumstance allegation. (1 RT 66; 1 CT 109-112.) Count one charged appellant with the murder of Max Facundo on or about June 21, 1986, in violation of section 187, subdivision (a). It also alleged appellant personally used a knife, within the meaning of

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[3]At the preliminary hearing on September 29, 1998, the complaint was amended to correct the date to June 21, 1986. (1 CT 16.)

section 12022, subdivision (b)(1). (1 CT 109.)

Count two charged appellant with the murder of Raul Luis Apodaca on or about January 23, 1987 in violation of section 187, subdivision (a), and alleged that he personally used a screwdriver within the meaning of section 12022, subdivision (b)(1). (1 CT 109-110.)

As to counts one and two, both the prior-murder and multiple-murder special circumstances were alleged under section 190.2, subdivisions (a)(2) and (a)(3), respectively. The prior murder alleged was a February 1971 second degree murder conviction in Los Angeles County. Counts one and two were also alleged to be serious felonies within the meaning of section 1192.7, subdivision (c)(23). (1 CT 109-110.)

Count three charged appellant with the second degree robbery of Ronni Mandujano and Spartan Burgers on or about January 28, 1998, in violation of section 211. It was also alleged that appellant personally used a handgun within the meaning of sections 12022.5, subdivision (a)(1), and 12022.53, subdivision (b). Count three was alleged to be a serious felony within the meaning of section 1192.7, subdivision (c). (1 CT 110.)

As to count three, it was alleged pursuant to section 1170.12, subdivisions (a) through (d), and section 667, subdivisions (b) through (i), that appellant had suffered convictions for serious or violent felonies, including five violations of section 211 (robbery), four attempted violations of section 211, two violations of section 245, subdivision (a) (assault), one violation of section 192 (manslaughter) and one violation of section 187 (murder).[4] It was also alleged as to count three that appellant had

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[4]As discussed in Argument I, *infra*, the manslaughter and murder convictions are in fact for the same offense: the former being appellant's juvenile adjudication for the killing of Allan Rothenberg and the latter

previously been convicted of serious felonies within the meaning of section 667, subdivision (a)(1), specifically (1) on December 13, 1989 in Los Angeles County, four counts of robbery in violation of section 211 and two counts of attempted robbery in violation of sections 664 and 211; and (2) on February 11, 1998 in San Diego County, robbery in violation of section 211. (1 CT 111.)

As to counts one, two and three, it was further alleged that appellant had suffered the following prior serious felony conviction(s) within the meaning of section 667, subdivision (a)(1): (1) on February 19, 1971 in Los Angeles County, second degree murder in violation of section 187;[5] (2) on January 7, 1977 in Los Angeles County, attempted robbery and assault in violation of sections 664, 211 and 245, subdivision (a); (3) on January 7, 1977 in Los Angeles County, assault in violation of section 245, subdivision (a); and (4) on February 22, 1979 in San Bernardino County, attempted robbery in violation of sections 664 and 211. (1 CT 112.)

Finally, it was alleged as to count three that, pursuant to section 667.5, subdivision (b), appellant had been convicted on December 13, 1989 of a violation of section 4573.6 (unauthorized possession of a controlled substance in prison), served a term as described in section 667.5 for that offense, and did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during a period of five years

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being an adult murder conviction for the same offense.

[5]An additional prior, a March 21, 1969 conviction for manslaughter in Los Angeles County, in violation of section 192, is crossed out. (1 CT 112.) As explained in note 4, *supra*, this was a juvenile adjudication for the same offense for which appellant was convicted of second degree murder on February 19, 1971, also alleged as a prior conviction in the amended information. (*Ibid.*)

subsequent to the conclusion of said term.

Appellant was arraigned on the amended information on January 22, 1999. (1 RT 66; 1 CT 115.)

Juror questionnaires were distributed on July 15 and 16, 1999, and jury selection began on August 2, 1999. (2 CT 327-330, 3 CT 585-586.) Stephanie Holtz was appointed as second counsel to represent appellant and made her first appearance August 2, 1999. (1 RT 119.) Jury selection was completed, and the jury sworn on August 11, 1999. (4 CT 946-947.)

On August 10, 1999, the court denied Defendant's Motion to Sever Count III from Counts I and II. (3 RT 737-747, 4 RT 752; 4 CT 944-945.) The Court also heard Defendant's Motion to Strike Prior Conviction – appellant's 1971 second degree murder conviction – and denied it. (4 RT 753-767, 769-801;4 CT 944-945.) Defendant's Motion to Dismiss Count II was heard on August 10 and 11, 1999 and was denied on August 12, 1999. (4 RT 807-838, 844-877, 893-938, 943-984; 4 CT 946-949.) A stay was granted to August 16, 1999 so that appellant could take a writ on the denial of his Motion to Dismiss Count II; the Court of Appeal denied the writ on August 16, 1999, and this Court denied the petition for review. (4 CT 948-949, 954-955, 959; 4 RT 984.)

Opening statements were given and testimony began on August 16, 1999. (4 CT 954-955.) The case was submitted to the jury on August 25, 1999. (4 CT 992-993.) On August 26, the jury requested a readback of the testimony of Richard Rivera and appellant's tape-recorded statement. (CT 996.) On August 30, 1999, the jury returned its verdict: on count one, appellant was found guilty of the first degree murder of Max Facundo, on count two, guilty of the second degree murder of Raul Apodaca and on count three, guilty of robbery. The jury also found that appellant had

personally used a knife, as to count one, a screwdriver, as to count two, and a handgun as to count three. The jury further found the multiple-murder special circumstance to be true. Appellant waived his right to jury trial, stipulated to the 1971 prior second degree murder that was alleged as a special circumstance and admitted the other priors alleged in the information. (5 CT 1000-1002.)

On September 2, 1999, the court found the prior-murder special circumstance to be true, and the penalty phase of the trial began. (5 CT 1009-1010) The penalty phase concluded on September 21, 1999. (5 CT 1083-1084.) During their deliberations, the jury asked to have appellant's testimony and the stipulation of his prior convictions read back to them. (5 CT 1085-1086.) On September 24, 1999, the jury returned a verdict of death. (5 CT 1291-1292.) And on November 9, 1999, the court denied appellant's automatic motion under section 190.4, subdivision (e), to modify the death sentence. The court sentenced appellant on all charges as follows: For count one, the first degree murder of Max Facundo, appellant was sentenced to death (5 CT 1312.) As to count three, appellant was given a "consecutive sentence of 25 years to life pursuant to 1170.12(a-d) and 667(b) through (i)." (5 CT 1321; 12 RT 3078.) As to counts one and two, the sentences were enhanced with one additional year, consecutive, for the use of a dangerous or deadly weapon. As to count three, appellant received an additional 10 years for using a handgun. (5 CT 1312-1313, 1327.) As to all counts, the sentences were enhanced with a further 35 years, consecutive, for the finding of seven (7) five-year priors within the meaning of penal code section 667, subdivision (a). ( 5 CT 1312-1314, 1327-1327A.) The abstract of judgment stated that, as to counts two and three, appellant was sentenced to 25 years to life. (5 CT 1327-1327A.)

## STATEMENT OF APPEALABILITY

This appeal is from a final judgment of death following a jury trial and is authorized by section 1239, subdivision (b).

## STATEMENT OF FACTS

### A. THE GUILT-INNOCENCE PHASE

#### 1. The Facundo Murder

Appellant's cousin, Charlene Trujeque, began dating Max Facundo in about 1984, when she was 20 years old. (5 RT 1015, 1017.) Facundo was a member of the Florencia gang in East Los Angeles. (5 RT 1046.) According to Charlene, Facundo regularly used drugs, mostly PCP, and wanted her to do drugs with him. (5 RT 1018, 1026.) Max beat Charlene at least once a month. (5 RT 1018-19.) Charlene did not talk to her parents, Elena and Charlie, about Max's abusive behavior, but they saw her frequently with her "face bruised up." (5 RT 1019, 1048.)

Charlene's parents were very upset by Facundo's treatment of Charlene. (5 RT 1048, 1254, 1256.) Facundo was jealous and controlling. He would not let Charlene go out or even talk on the phone with her parents. (6 RT 1326-27.) Sometimes, when they were worried about Charlene, Charlie and Elena would go to Charlene's house, where she lived with Max, and Max would refuse to let them see Charlene. (6 RT 1296.) When Charlene did come over, she had bruises on her arms and face and "constantly" had black eyes. (6 RT 1296.) Charlene was always making up stories about running into the door. Based on what she saw, Elena was afraid for her daughter's life. (6 RT 1297)

Charlene's parents begged her to leave Max, but Charlene would not. (6 RT 1298-99.) Elena and Charlie went to the police, but the police refused even to take a report; they said Charlene had to complain herself,

but Charlene was too afraid of Max. (6 RT 1300.)

Appellant had started writing to Charlene when she was 16-17 years old, while he was in prison. (5 RT 1016.) Appellant counseled Charlene to stay in school so she could have a better life. (5 RT 1016.) While Elena testified that she thought appellant's letters were not "cousinly," Charlene never thought appellant's letters were inappropriate. (5 RT 1055, 6 RT 1288-90, 1315.) The detective who interviewed Elena said she had not expressed concern about the letters until the week before trial, in a meeting with the prosecutor. (6 RT 1491.) Charlene met appellant for the first time when he visited her parents in May 1986, after being released from prison. (5 RT 1075, 1255, 1257; Peo. Ex. 6A, p.4.)[6]

Appellant noticed that Charlene was beat up: "she had a black eye and a big lip and bumps on her forehead." (Peo. Ex. 6A, pp. 3-4.) On a later visit, Charlene was wearing sunglasses, and "her lips [and] face is (*sic*) all swollen." She didn't want to say what happened but admitted her boyfriend had done it. (Peo. Ex. 6A, p. 4.)

Elena and Charlie told appellant how worried they were about what Max was doing to Charlene and conveyed their "sense of urgency and extreme fear" about the situation. (6 RT 1323.) Charlie said Charlene and Max "smoke Sherm [PCP] and they all – they both get shermed out and they end up arguing and he ends up kicking her ass." (Peo. Ex. 6A, p. 4.) Charlie said if it didn't stop, "eventually he's gonna kill her." (*Ibid.*) A week or so before the stabbing, Charlie had a conversation with appellant

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[6] People's Exhibit 6A is the redacted transcript of appellant's 1998 statement to police, which was played for the jury but not taken down by the court reporter. (RT 1422-1423.) The unredacted transcript was also included as an exhibit to a defense motion at 2 CT 512- 6 CT 553.

about hurting Max but, Elena insisted, her husband "only" asked appellant to beat up Facundo, maybe break his arm or leg to teach him a lesson - but not to hurt him badly. (6 RT 1308, 1312.)

On the evening of June 21, 1986, Charlene was at her parents' house; she again had a black eye. (5 RT 1022.) Appellant came over with another cousin, Raymond, and they sat on the porch talking for hours. (5 RT 1022, 1079, 1259.) Appellant and Raymond also spoke to Charlie outside for about five minutes. (5 RT 1259-1260, 6 RT 1306.) Appellant was drinking cognac. He questioned Charlene about how she got the black eye, but Charlene would not say. (5 RT 1022.) Charlene could tell appellant was mad about her black eye, and she asked him to promise not to hurt Facundo. (5 RT 1023-24.) Appellant said "promises weren't made to be broken, something like that." (5 RT 1023.) Later, Facundo came over, and Charlene introduced him to appellant and Raymond. (5 RT 1023.)

Facundo agreed to give appellant and Raymond a ride to appellant's cousin Pat's house. (5 RT 1023, 1082; Peo. Ex. 6A at p.6.) Max, Charlene, appellant, and Raymond piled into Facundo's Volkswagen and left about 10:30 p.m. (5 RT 1024-1025, 1029, 1078.) On the way to Pat's house, Max, Charlene and Raymond smoked a "sherm" - a cigarette soaked in PCP. (5 RT 1026-27.) By the time they arrived at Pat's house, Charlene was "extremely high" and could not remember much of what happened. (5 RT 1057.) Charlene and Raymond got out of the car and walked toward the driveway to Pat's apartment. (5 RT 1028.) Charlene heard noises behind her and turned to see appellant struggling with Facundo. (5 RT 1029.) She ran toward them, screaming at them to stop, "and all I know is that I hold Max and we fall together on the ground full of – I'm full of blood." (5 RT 1029.) She screamed for someone to call the police. (5 RT 1030.) She was

still "a lot" under the influence of PCP and was upset, screaming and hollering. (5 RT 1034.) The police handcuffed her hands and feet and put her in the backseat of a patrol car on her stomach. (5 RT 1034.) Charlene could remember nothing about getting to the police station. (5 RT 1035, 1059.) The next thing she remembered, she was in a cell; a detective told her Max was dead. (5 RT 1036, 1059.)

Facundo died of multiple stab wounds to the chest that would have caused him to bleed to death within approximately a minute. (5 RT 1166, 1176.)

Charlie and Elena received a phone call that evening from Pat and learned Facundo had been stabbed in front of Pat's house. (5 RT 1262-1263.) Appellant called later and asked for a ride. (5 RT 1266-67.) They picked appellant up and took him to El Sereno. (5 RT 1266-1267.) On the way, Charlie yelled at appellant for getting them involved. (5 RT 1268.)

Elena testified that appellant claimed to have no remorse and said killing Max was nothing to him. (5 RT 1268.) Elena admitted that she felt relieved Facundo was dead, because Charlene would not be beaten any more. (6 RT 1322.) She was worried, however, that Max's family would retaliate, because "everybody" was saying she and Charlie had paid to have Max killed. ". . . [S]omehow the word got out that – that we paid him because everybody knew that we hated Max. . ." (6 RT 1323.) Elena claimed that, although they knew appellant had killed Max, they did not go to the police because they were scared. (5 RT 1273.)

One of the officers investigating Facundo's death – Sergeant Beecher of the South Gate Police Department – testified that at about two or three in the morning following the stabbing, a man identifying himself as Tommy Trujeque called and said he was "the one that killed that dude" and

told him to let Raymond Guzman and Charlene Trujeque go. (6 RT 1390, 1395.) On June 26, 1986, appellant was arrested for the murder of Max Facundo but the charges were dropped on July 2, 1986 for lack of probable cause. (7 RT 1672; Peo. Ex. 6A, p.10.)

During the trial, defense counsel attempted to ask Elena whether another relative - appellant's cousin Vicki - had been killed by her boyfriend about a week before the Facundo stabbing. (6 RT 1324-25.) The prosecutor objected that Elena could not testify about the murder because she had not personally witnessed it, and the objection was sustained. (6 RT 1325.) Defense counsel explained later, at sidebar, that Vicki was stabbed 40 times by her boyfriend, and the defense was attempting to show that Elena told appellant that she was afraid Facundo would do the same thing to Charlene. (6 RT 1329-31.)

Before Elena or Charlie Trujeque testified, the prosecutor asked the court to appoint counsel for them, because their testimony could incriminate them. (5 RT 1094.) Elena Trujeque did not invoke the Fifth Amendment at the guilt-innocence phase, but after she testified, Charlie Trujeque did invoke his privilege against self-incrimination. (6 RT 1353.) Defense Counsel objected that the invocation of the Fifth Amendment was too broad and said he wanted to ask Mr. Trujeque questions that would not incriminate him, especially about Vicki's murder. (6 RT 1358-1359.) The trial court sustained Charlie Trujeque's blanket assertion of privilege and ruled Vicki's murder a collateral matter on which testimony would not be permitted. (*Ibid.*)

**2. The Apodaca Murder**

On January 23, 1987, appellant and six to eight people, including Jesse "Termite" Salazar, Raul Apodaca, Robert DeAlva, Frank [last name

unknown], Willie Contreras and Luis Villalobos, were partying – drinking and doing drugs – at an East Los Angeles upholstery shop owned by Richard "Conejo" Rivera. (5 RT 1114, 1115, 1147.) Rivera dealt drugs from the upholstery shop, and it served as a hangout for White Fence gang members. (5 RT 1110.)

DeAlva testified that he had gone to the upholstery shop to buy and use drugs - heroin and cocaine. (5 RT 1107-08.) He did not remember much about that night because he had injected heroin more than once and passed out on one of the tables in the shop. (5 RT 1126, 1151.) DeAlva did not remember appellant being at the upholstery shop that night and did not recognize him in the court room. (5 RT 1115-16, 1117.) Similarly, while DeAlva remembered the name Jesse Salazar, he couldn't describe him. (5 RT 1116.) DeAlva could remember only that there was a scuffle and Apodaca ended up on the ground. (5 RT 1115, 1122.) He remembered taking Apodaca to the hospital. (5 RT 1115.)

Dr. Eugene Carpenter, referring to an autopsy report prepared 13 years earlier by another pathologist, testified that Apodaca died of a stab wound to the chest, at the notch of the collarbone. (5 RT 1162-1164, 1178, 1179-1180, 1183, 1189.) He had five other wounds on his lower chest and abdomen; these were abrasions that did not break the skin. (5 RT 1225.) A single shallow puncture wound to the back of the neck appeared to have been inflicted by a different weapon, because its shape was different from the others. (5 RT 1180, 1186.)

DeAlva said he had been on drugs when he gave his statement to police in January 1987 and only vaguely remembered the statement. (5 RT 1118, 1155.) When the prosecutor suggested DeAlva was "afraid to snitch," DeAlva replied "[n]o, I'm here to tell the truth." (5 RT 1115-16.)

The prosecution called Detective Birl Adams to testify to DeAlva's 1987 statement, in which he said he awakened to see Jesse, Raul, and appellant fighting. Raul fell to the floor and appellant and Jesse fled. (6 RT 1372-1373.) DeAlva had also identified appellant's photo in 1987. (6 RT 1375-76.)

By the time of trial, Rivera was deceased, and the defense introduced his prior testimony, from appellant's 1987 preliminary hearing. Rivera had testified that Jesse and Frank got into a fist fight over a card game, Raul grabbed Jesse, and Luis took hold of Frank to break up the fight. (RT 1520-1521, 1534.) The others left, except for Robert, Jesse, Raul, and appellant. (6 RT 1522.) Rivera went to the bathroom for a few minutes, and when he came out, Apodaca was lying on his back and appellant and Salazar were gone. (6 RT 1527.) Rivera said he did not hear any fighting while he was in the bathroom. (6 RT 1527.) He denied using any drugs that night. (6 RT 1520.) Rivera and DeAlva tried to revive Apodaca, then took him to the hospital, about five or six in the morning. (6 RT 1528, 1531.) At the hospital, Rivera gave false information concerning the location of the stabbing; neither Rivera nor DeAlva left their name.[7] (6 RT 1536-37, 2 CT

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[7]DeAlva failed to appear at appellant's preliminary hearing in 1987, and prosecutors were unable to locate him. (2 CT 411.) Based on Rivera's testimony, the magistrate found probable cause only for manslaughter. (2 CT 421.) Although the prosecution nevertheless filed an information in superior court, it was dismissed when the prosecution again could not produce DeAlva. (2 CT 428.) Appellant moved before trial to dismiss the Apodaca murder count on the ground that the state had exceeded the permissible number of refilings under section 1387. (2 CT 333-482 CT 333-48.) The motion was denied. (4 RT 981-984.) Appellant sought a writ of prohibition from the Second District Court of Appeal. (1 CT Supp. V 64 - 3 CT Supp. V 871.) The petition was summarily denied, as was appellant's petition for review to this Court. (4 CT 953, 959.)

372-93.)

### 3. The Spartan Burgers Robbery

Over appellant's objection that joinder was improper, he was also tried and convicted for the January 21, 1998 armed robbery of a Spartan Burgers restaurant in Huntington Park. (3 RT 737-747, 6 RT 1398; 2 CT 496-511 [Defendant's Notice of Motion and Motion to Sever the Trial of Count III of the Amended Information from Counts I and II].) According to the cashier, Ronni Mandujano, the robber first ordered food then pulled a gun and demanded money. (6 RT 1400-01) The owner, seeing that Ms. Mandujano was nervous, gave the robber the money. (6 RT 1401.) When the owner went to the back of the store to retrieve more money, the robber took Ms. Mandujano along at gunpoint. (6 RT 1401.) The robber then directed them back to the front of the store and left. (6 RT 1402.) On April 29, 1998, Ms. Mandujano picked appellant's photo out of a six-man photo lineup. (6 RT 1403-04.) She also identified him in the courtroom. (6 RT 1399.)

### 4. Appellant's Confesssion

The Facundo and Apodaca cases remained dormant for over ten years, until February 1998, when Los Angeles County Deputy Sheriff Frank Durazo received a call from another officer concerning an inmate – appellant – who claimed to have information about two Los Angeles homicides. (6 RT 1420.) Appellant wanted to confess to the murders in order to get the death penalty. (6 RT 1477, 1493.)

Durazo and his partner, Jose Romero, drove to San Diego and interviewed appellant. (6 RT 1421.) After reminding the detectives to read him his rights, appellant gave a statement concerning both the Facundo and Apodaca homicides, as well as the Spartan Burgers robbery. (6 RT 1422,

1472; Peo. Ex. 6A, p. 3). Appellant's taped statement was played for the jury. (6 RT 1423.)

**a. Facundo**

In his statement to police, appellant said that when his uncle expressed fear that Facundo would kill Charlene and asked appellant to "take care of it," he understood that to mean that his uncle and aunt wanted Facundo dead. Appellant said that about two weeks after their initial conversation, his uncle reminded him about "taking care of this dude" because he was "still kicking [Charlene's] ass" "just about everyday." (Peo. Ex. 6A, p. 5) Appellant and his cousins Raymond and Phillip agreed to go home with Charlie. Appellant got a hunting knife "it was one of them knives that have teeth on it where it doesn't do anything when you stick it in but when you stick – when you pull it out that's when it tears everything up, the kind, the good kind." (*Ibid.*) They were visiting and talking at Uncle Charlie's house when Charlene came in and Uncle Charlie motioned that Facundo was there. (*Ibid.*)

Appellant thought Charlene "sensed that something was gonna happen" because she knew appellant did not like the way Facundo treated her. (Peo. Ex. 6A, p. 6.) On the way to Pat's house, Max and Charlene smoked a "sherm." Raymond "is already shermed out, he's already smoked one or two . . . Red Daddies." Appellant did not want to get high because "I won't be able to do what I want to do in the right way." (*Ibid.*) Appellant was told that "when you kill somebody the main thing is to get away with it . . . So . . . this is what my computer is telling me." (*Ibid.*)

Appellant said he was thinking to himself "there's no way I'm gonna fail in this mission, because, you know, you know, the dude is helpless man, and that's the time if you want to kill somebody get 'em when

they - when they're helpless not when they can defend themselves. . ." (Peo. Ex. 6A, p.7.) When they arrived at Pat's house, appellant got out the knife. Charlene and Raymond were walking ahead. Max's back was to appellant, who grabbed Max around the neck "and I just go for the target one time, and I stabbed him in the – in the heart, and, uh, I want to stab him again, I want to stab this mother fucker a 100 times" but as he pulled the knife out, Charlene was yelling "Tommy don't, Tommy stop . . ." (*Ibid.*)

Facundo fell on the curb. Appellant heard all this yelling "and my computer is telling me, man get the fuck out of here" so he ran away and buried the knife in some shrubs. (Peo. Ex. 6A, p. 8.) Appellant called his Uncle Charlie to pick him up. (*Ibid.*) When Charlie and Elena picked appellant up, Charlie said "you didn't have to kill him," but appellant responded that Facundo otherwise would have come after him later. (*Id.* at p. 9.) His Aunt Elena was "ecstatic" and thanked appellant profusely. (*Ibid.*)

According to appellant, some of the neighbors had heard Charlene yelling his name, so investigators "put two and two together" and appellant was arrested on June 26, 1987. (Peo. Ex. 6A, pp. 9-10.) The case was subsequently dismissed, however, for lack of evidence. (*Id.* at p.10) Appellant said that as payment for stabbing Facundo, his aunt and uncle sent him $200 in prison and gave him another $300, to purchase a gun, when he was released. (*Id.* at p. 18.)

**b. Apodaca**

Concerning the Apodaca homicide, appellant told Durazo that "the 187 in Montebello" happened in an upholstery shop owned by appellant's "homeboy" "Conejo." (Peo. Ex. 6A, p.19.) Conejo's first name was Ricky but appellant could not remember his last name. The upholstery shop was

where they partied and got high. (*Ibid.*) Conejo and Jesse Termite dealt drugs from the upholstery shop, and there were always prostitutes there. The night of the murder there were four or five of them at the upholstery shop drinking and playing poker and snorting coke and the prostitutes were doing what they did every night. (*Ibid.*)

Raul and Jesse Termite, who was Conejo's money man, didn't get along. (Peo. Ex. 6A, p.19.) The group decided to go to the Quiet Cannon bar and were there for three or four hours. (*Id.* at p. 20.) At the Quiet Cannon, Jesse kept mentioning to appellant that he "hated this mother fucker . . . He wants to kill this mother fucker." (*Ibid.*) Appellant was just listening, not paying attention until they got back to the upholstery shop and Jesse said he was "gonna stab this mother fucker man" and told appellant "I just want you to have my back" and "back my play" if Raul got the best of him. (*Ibid.*) Appellant still did not think Jesse would do anything. (*Ibid.*) Some people left, so that Conjeo, Jesse Termite, Raul, and appellant were the only ones left. Jesse Termite and Conejo started fist-fighting. (*Id.* at pp. 20-21.)

Appellant figured they were drunk. (Peo. Ex. 6A, p. 21.) He broke up the fight, then went to the restroom to snort some coke. When he came out, Jesse and Raul were fighting. (*Ibid.*) Raul was getting the best of Jesse. Appellant went to break it up and Raul pushed him and hit him in the face. (*Ibid.*) Appellant said "the red light goes on and the alarm goes off," and he walked to the table where Conejo's tools were and grabbed a screwdriver. Jesse Termite was on top of Raul stabbing him, so appellant went over, bent down and stabbed Raul two to three times on the left side of his body. (*Ibid.*)

Appellant didn't know what kind of weapon Jesse had, but he had

something in his hand that he was stabbing Raul with in the chest, his arms, and other places. Conejo was "all hysterical." He pulled Jesse Termite off Raul, and Jesse ran to the door, telling appellant "let's go, let's go." (Peo. Ex. 6A, p.21.) Appellant left with the weapon in his hand. (*Id.* at pp. 21-22.) He and Jesse threw their weapons on the roof of a car port and spent the night at Jesse's house. (*Id.* at p. 22.) Appellant believed Conejo told police that he and Jesse did it and "from then on they were after me for the 187." Appellant "gave Jesse up," and he was arrested after appellant. (*Ibid.*)

**c. Spartan Burgers Robbery**

Appellant also confessed to the Spartan Burgers robbery. He said he was with his cousin Teddy, Charlie's and Helen's son, and Teddy needed money. (Peo. Ex. 6A, p. 30.) Appellant proposed "let's just hit this burger thing right here." (*Ibid.*) He went into the store and ordered a pizza or something. When the girl tallied the price up, appellant reached into his pocket, took out a gun and told her to give him all the money. Appellant thought he got "close to $400." He gave Teddy $150 and kept the rest. (*Ibid.*) Appellant next saw Teddy when he went to Super Bowl Sunday in San Diego "and got caught doing another robbery with his fat ass." (*Ibid.*)

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At the end of the interview, appellant told Durazo that if he got the death penalty, as he wanted, he would also tell the police everything he knew about the murder of George Arthur.[8] (6 RT 1468-1469; 6 CT 552.) Durazo explained that hundreds of people claimed to have information

[8]Durazo had asked appellant "[s]ince we're on a roll," if there was anything else appellant would like to confess to? (3 CT 551.)

about the Arthur case – a killing of a Los Angeles sheriff's deputy that was still unsolved at the time of appellant's confession. (6 RT 1468-1469.) It turned out, however, to be a marital dispute. (6 RT 1469.)

**5. The Garcetti Letter**

In a further effort to secure the death penalty, appellant wrote a letter to Los Angeles District Attorney Gil Garcetti on September 19, 1998 while awaiting trial. (Peo. Ex. 8B for identification.) In the letter, appellant taunted Garcetti - "if 'you' don't have enough balls to & guts to give me what I deserve, by sending my ass to the 'gas chamber,' then my only other recourse is to kill someone else - once I return to prison - in order to finally receive the 'ultimate punishment' that even the man upstairs knows I deserve!" In this letter, Appellant also adverted to two additional special circumstances, claiming that he killed Facundo "for hire" and that he killed Apodaca, "while I was robbing him." (*Ibid.*) The prosecutor acknowledged that these claims were false and that appellant was just "bragging" and asserting the existence of additional special circumstances (robbery and financial gain) in an effort to enhance his chances of getting a death sentence. (7 RT 1681-1687, 1701-1702.)

In the letter, appellant also disclaimed the existence of mitigating circumstances. He denied being drunk or under the influence of any drug; he also denied suffering from "any mental disorder" or being mentally retarded. (Peo. Ex. 8B for identification.) To the contrary, he insisted, he "knew exactly" what he was doing and still felt that "both of those cowards deserved what they got." For good measure, appellant wrote "As a matter of fact, if I had the opportunity to do it over, I would cut off their heads and send 'em both to their family (sic).'" "So," appellant wrote, "you needn't 'cry for me, Argentina,' because I'm more than ready, willing & able to

face the music and accept responsibility for my actions . . . ." Appellant vowed he would not be changing his mind like "some idiots on death row have recently did," because he was "proud of taking out" the "two (2) cowards." Finally, appellant told the District Attorney he could do as he pleased "with this li'l 'incriminating note.'" (*Ibid.*)

Over repeated defense objections that the letter was far more prejudicial than probative, the prosecution was allowed to introduce a redacted version of the letter, which included the false assertions of special circumstances, the remark about severing the victims' heads, and the claim to be proud of "taking out" the "two (2) cowards." (6 RT 1441-47, 1453-62; 4 CT 972-84; Peo. Ex. 8.) The version admitted at the guilt-innocence phase of the case redacted only appellant's threat to kill someone in prison if he did not get the death penalty; his claim that he had committed other, still unsolved, homicides in prison; and his assertion that he did not regret his actions. (6 RT 1443-1444.) At the penalty phase, another version of the letter was admitted into evidence, which redacted only the claim about unsolved homicides. (9 RT 2267-2268, 2283; Ex. 8A.)

**6. Appellant's Testimony**

Appellant insisted on testifying, against the advice of counsel. (7 RT 1577, 1585.) Appellant had not slept the night before, nor had he taken his medication, which consisted at the time of haldol, cogentin, and valium.[9] (7

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[9]Haldol, a brand name of haloperidol, is an antipsychotic drug, also used to treat severe behavioral problems and hyperactivity in children. (<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682180.html> ; <http://en.wikipedia.org/wiki/Haloperidol> [as of March 15, 2012].) Cogentin, a brand name of benzatropine, is an anticholinergic drug used to reduce the side effects of antipsychotic medication. (<http://en.wikipedia.org/wiki/Benzatropine> [as of March 15, 2012].)

RT 1584-1585.) As in his statement to Durazo and his letter to Garcetti, appellant took responsibility for both murders. (7 RT 1591, 1600, 1605, 1622, 1625-1626, 1628.) Over defense objection that it was unduly prejudicial and remote, appellant was impeached with his 1971 conviction for second degree murder, committed in 1969, when appellant had just turned 16 (6 RT 1505-1515, 1578-1581), as well as his other prior convictions (6 RT 1705-1706). Appellant testified that he killed Facundo "because he deserved it" (7 RT 1595), again claimed the Apodaca murder had been a robbery (7 RT 1661), and denied being mentally ill (7 RT 1601-1602), or high at the time of the offenses (7 RT 1591, 1621, 1628). Appellant refused to answer questions about why he wanted to be sentenced to death, saying he did not want to discuss it. (7 RT 1600-1601, 1689.)

**7. Jury Instructions**

Based on the defense theory that appellant had acted in mistaken or imperfect defense of Charlene Trujeque when he stabbed Facundo, and also that appellant had interceded to protect Apodaca from Salazar, defense counsel requested instructions on mistake of fact, necessity, homicide in defense of another, and actual but unreasonable belief in necessity to defend – CALJIC Nos. 4.35, 4.43, 5.13, 5.14, 5.15, 5.16, 5.17, 5.32. (5 RT 1555-1565; 5 CT 1208-1215.) These were refused. (6 RT 1556-1557, 1561-1565, 1713.) As to count two, the Apodaca murder, the jury was instructed on voluntary manslaughter with provocation at the request of the defense. (7 RT 1765-1769; 5 CT 1150A-1156.)

Appellant was convicted of the first degree murder of Max Facundo,

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Valium, or diazepam, is used to relieve anxiety, muscle spasms, and seizures. (<http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000556/> [as of March 15, 2012].)

the second degree murder of Raul Apodaca, and the second degree robbery of Ronni Mandujano and Spartan Burgers restaurant. (7 RT 1855-56.)

Following the jury's verdict appellant waived his right to a jury determination of his prior convictions, (7 RT 1861, 1868), and admitted the following convictions: (1) a 1989 Montery County conviction for possession of cocaine in a correctional facility in violation of section 4573.6 (7 RT 1863-1864); (2) a 1975 Los Angeles County conviction for joyriding (7 RT 1864); (3) 1988 Los Angeles convictions for three counts of robbery and two counts attempted robbery in violation of sections 211 and 664 (7 RT 1864-1865); (4) a 1998 San Diego conviction for robbery with a firearm (7 RT 1865); (5) a 1979 San Bernardino County conviction for attempted murder with a knife (7 RT 1866); (6) a 1976 Los Angeles conviction for assault with a deadly weapon in violation of section 245, subdivision (a) (7 RT 1866); and (7) a 1976 Los Angeles conviction for for attempted robbery (7 RT 1866-1867). Appellant also waived his right to a jury on the prior murder conviction, and the trial court found the prior-murder special circumstance to be "true." (7 RT 1868, 8 RT 1874.)

## B. PENALTY PHASE

### 1. Aggravating Evidence

In its case in aggravation, the prosecution presented evidence of appellant's prior convictions and uncharged criminal acts.

#### a. The Prior Murder

The prosecution introduced appellant's confession to the February 7, 1969 killing of Allen Rothenberg, a few weeks after appellant turned 16 years old. (9 RT 2167-2171.) At about 1:30 pm, appellant called Nate's Liquor Store and ordered a case of Colt 45 beer to be delivered to the apartment where he lived with his mother. (9 RT 2168.) Appellant's friend

Bert G. and a girl were there at the time. (9 RT 2168.) Appellant had armed himself with a knife because he planned to rob the delivery man. (9 RT 2169.) When Rothenberg arrived, appellant put a knife to his neck and threw him to the floor, announcing "this is a stickup." (9 RT 2169.) Appellant stabbed Rothenberg multiple times then dragged the body downstairs where Bert G. helped him throw the body over the fence in the backyard. (9 RT 2169-70.) Former LAPD officer Ruben Sanchez, who responded to the call when Rothenberg's body was found, lived near Nate's Liquor Store and knew the victim; he testified that Allen Rothenberg used to drag one foot and was "mentally slow." (9 RT 2221, 2225.) Appellant was arrested early the next morning and confessed to the killing. (9 RT 2233-2236.)

Sanchez identified 22 photos of the Rothenberg crime scene, which were introduced into evidence. (9 RT 2226-2232.)

The trial court took judicial notice of appellant's juvenile court file, which consists of three sealed volumes in the Clerk's Transcript. (4 RT 753; 1& 2 CT Supp. IV, CT Supp. IVA.) These are discussed in the sealed portions of Appellant's brief.

**b. Other Offenses**

The prosecution first presented evidence about the San Diego robbery which led to appellant's arrest and subsequent confession to the Apodaca and Facundo murders. On Super Bowl Sunday 1998, appellant robbed TLC Liquors in Imperial Beach. (9 RT 1901-1903.) Nissim Jenah, who was working at the store at the time, testified that appellant came into the store about four in the afternoon and ordered several large bottles of Hennessey cognac and cartons of cigarettes. (9 RT 1904.) Instead of paying, appellant pulled out a gun and demanded money. (9 RT 1905-

1906.) After Jenah gave him the money, appellant pointed the gun at the back of Jenah's head and told him to lay down on the floor. (9 RT 1908-09.) After appellant put the gun away, however, Jenna chased after him and flagged down a police car. (9 RT 1910-1911.) About 20 minutes after Jenah gave his report, the police told him they had someone in a police car, who they hoped was the robber. (9 RT 1912.)

Appellant was apprehended about 3/4 mile away, outside the Old Plank Inn in Imperial Beach. (9 RT 1931.) The owner of the Inn observed appellant leaving his gun and leather coat under a nearby tree and called the police. (9 RT 1923-24.) Police responding to the call saw appellant and arrested him. (9 RT 1932.) Jenah was brought to the scene and identified appellant. (9 RT 1913.)

The portion of appellant's statement in which he confessed to the TLC Liquor Store robbery was also played for the jury and the transcript introduced into evidence. (8 RT 1936-1937, 9 RT 2238; Peo. Ex. 10.) In his statement, appellant said he was mad at himself because he "knew when I got out of the joint I knew what was gonna happen if I ever went back to prison – . . . on a felony conviction, I knew thee (sic - there) was no day light." He preferred "to come out blastin' and die on the streets than in CMC [California Men's Colony] 90 years old. And if – and – and – and I promised myself if I – if I'm not packing then I'm just gonna come out of the car real quick and reach for something like I am, you know, so they could blast me, you know." Appellant didn't carry out his plan to provoke his own shooting death, because he didn't think he had any evidence on him. (Peo. Ex. 10, pp. 38-39.)

The prosecution introduced the former testimony of Rondelle Self, now deceased, who had been assaulted by three other inmates, including

appellant, in the Los Angeles County jail in 1976. (8 RT 1945-1946, 1948.) The men demanded money and, when Self refused, one of the men beat Self on the head with a belt wrapped around his hand while appellant and another man pushed and kicked him. (8 RT 1947-1948.) Self required 14 stitches on his head and face. (8 RT 1949.) He received a reduced sentence of probation in exchange for his testimony. (8 RT 1958.)

Rudy Ortiz testified that, in 1976, appellant and a codefendant, tried to steal a car at knife point from Ortiz and his friend Tony Montano. (8 RT 1977-1978.) When Mr. Ortiz attempted to flee, appellant stabbed him in the ensuing struggle; Ortiz was cut on the chest, leg and wrist and required stitches on his leg. (8 RT 1980.) The Baldwin Park police officer, Kenneth Boyd, who arrested appellant testified he had seen appellant and another man running through an apartment complex and gave chase. He tackled appellant and, after a struggle, cuffed him. Another officer found a steak knife in appellant's back pocket. (8 RT 1982, 1984-1986, 1987, 1989.)

Between February 14 and 16, 1987, appellant robbed or attempted to rob three liquor stores in the same neighborhood, two of them twice in the three-day period. (8 RT 1993-2013.)

A corrections officer testified that in 1978, while working at the California Institute for Men in Chino, he saw appellant attack another inmate, Ruben Gaxiola, who afterwards was bleeding heavily from his ribcage. (8 RT 2096, 2101, 2103) Gaxiola testified he had about seven to eight wounds, the worst was one to his left side that punctured a lung; he was in the hospital for a week. (8 RT 2119-2120.)

Frank O'Hare testified that in Folsom prison in 1978 appellant had stabbed him in a dispute after failing to deliver on a promised trade of canteen goods. (9 RT 2180, 2183-2184.) On cross-examination, O'Hare

acknowledged that he is schizophrenic and that he hoped to get special housing in exchange for his testimony against appellant. (9 RT 2189-90.) O'Hare had been in Folsom after being convicted of robbery and an escape in which he stole a bailiff's gun during trial and tried to kill him. (9 RT 2192.)

As noted above, over renewed defense objection, the trial judge admitted another version of appellant's letter to Mr. Garcetti with fewer redactions, including appellant's statement that he did not "regret my actions in any way, shape or form" and his threat to kill someone in custody if he did not get the death penalty in his current trial. (9 RT 2267-2268; Ex. 8A.)

**2. Case in Mitigation**

Defense counsel attempted to dissuade the jury from allowing appellant to commit "suicide by jury." (11 RT 3009.) The defense presented evidence that appellant became a ward of the state at the age of nine and was essentially raised in institutions, never receiving the nurturing necessary for normal emotional development. In addition, appellant's father, a violently abusive drug addict who was in and out of prison, was a poor role model.

**a. Limitations on the Mitigation Case**

The mitigation case was limited by the trial court's rulings. First, when defense counsel attempted to call appellant's uncle Charlie Trujeque to testify about appellant's father and his paternal family background, the prosecutor objected that Charlie Trujeque might incriminate himself. (10 RT 2567, 2582-2583.) Through counsel, Mr. Trujeque then formally invoked the Fifth Amendment and refused to answer any questions. (10 RT 2567-2571.) The court sustained his blanket assertion of privilege. (10 RT

2586.) The defense proposed to instead call Elena Trujeque to testify as a family historian, but she was also allowed to assert her privilege against self-incrimination – even though she had already testified at the guilt-innocence phase–on the ground that she could be subject to perjury charges for her earlier testimony. (10 RT 2588, 2595, 2597, 2659, 2661-2665.) Trial counsel therefore presented little evidence about appellant's father and none about his father's family background.

Second, the trial court excluded as hearsay the contents of juvenile probation reports prepared when appellant was first taken into state custody, because the defense could not produce the authors, who were now deceased or could not be located. ( 9 RT 2424, 2431-2437.) The defense did produce two of appellant's juvenile probation officers who handled his case from the time he was 11 to 14, but – at the prosecutor's urging – the court also excluded portions of the probation reports prepared by these officers that referenced the earlier reports or discussed appellant's childhood diagnosis of brain damage, on the ground that they were hearsay and not based on the firsthand knowledge of the records' authors. (11 RT 2805-2808, 2810-2812, 2814, 2817-2821.) The court also excluded the portions of appellant's school records that recorded appellant's childhood medical history on the same grounds. (11 RT 2868-2870, 2874.) Defense counsel objected repeatedly that such records were admissible under various exceptions to the hearsay rule or under the Due Process Clause to the federal Constitution, citing *Green v. Georgia* (1979) 442 U.S. 95. (8 RT 2149-2152; 9 RT 2434; 10 RT 2725-2728, 11 RT 2864-2874.) Because appellant's juvenile file is sealed in the record, the contents of the excluded reports are discussed in Argument XIII, *infra*, which is filed under seal.

### b. Mitigating Evidence

The defense presented testimony from appellant's half-sister and several maternal aunts and uncles concerning his childhood and his mother's family history.

Appellant was the illegitimate child of Manuel Adrian Trujeque and Mildred ("Tillie") Dominguez. Mildred's mother died when she was 12, and Mildred and her four siblings, who ranged in age from eight to 14, were taken away from their father, who had a drinking problem. (9 RT 2374-2376.) The children were placed first at juvenile hall then at boarding homes. (9 RT 2376-2377.)

When Mildred met appellant's father, Adrian, at a bar, she had previously been married to a man named Dominguez, who was the father of appellant's half-sister, Rosemary. (9 RT 2380-2381.) Adrian Trujeque was violently abusive to appellant's mother, including beating her while she was pregnant. (9 RT 2295-97, 2339-40, 2384, 10 RT 2671, 2678, 2684.) Mildred's brother, Marcelo, saw her with a bruised mouth and bloody nose. Mildred was terrified of Adrian, sometimes to the point of hysteria. (10 RT 2678-2679.) Marcelo and Mildred's brother-in-law, Tony Garcia, attempted to intervene to protect Mildred and Rosemary. (9 RT 2384) Mildred took refuge from Adrian at their houses, once staying with Marcelo for more than a month. (10 RT 2678, 2684.) Mildred's sisters took Rosemary to stay with them, to get her away from Adrian; on at least one occasion, they overheard Adrian beating Mildred as they left. (9 RT 2297, 2371, 10 RT 2671-2672.) Other times, Rosemary would play a record in her room, over and over, in an effort to drown out her mother's screams. (9 RT 2340.)

A narcotics addict, Adrian Trujeque was in and out of prison as

appellant was growing up.[10] (11 RT 2835, 2846, 2856.)

Both before and after appellant was born, Mildred was romantically involved with Sol Slotnick, a former co-worker. (9 RT 2380, 2389-2390, 2402-2403.) Before appellant was born, Mildred had a baby, Rebecca, with Mr. Slotnick. (10 RT 2382-2383, 2690.) Rebecca died of pneumonia at the age of six months. (9 RT 2383, 2690-2691.) Mr. Slotknick lived with Mildred off and on for many years. (9 RT 2402.) They never married, however, because Mr. Slotknick was already married and had a family on the east coast. (9 RT 2310, 2382, 2402.) Rosemary had fond memories of Slotnick and considered him her father. (9 RT 2300.) She testified, however, that none of her happy memories of family outings with her mother and Slotnick included appellant. (9 RT 2309.) One of appellant's cousins saw Slotnick pull appellant, hit him in the head, and throw him in the car. (9 RT 2394-2395.) Mr. Slotnick died in 1967. (9 RT 2300.)

Rosemary testified that their mother was cold, selfish, and secretive. (9 RT 2300, 2332.) She did not show affection easily and did not talk about her feelings. (*Ibid.*) Rosemary was, at the time of trial, in therapy to resolve issues from her childhood. (9 RT 2307-2308.) Appellant, however, was completely devoted to his mother. (9 RT 2329-2330.) He was devastated when Mildred had a stroke and was hospitalized. (9 RT 2326, 2328.)

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[10]Among the information defense counsel sought to elicit from Charlie Trujeque was that his brother Adrian had died of a drug overdose in 1968. (10 RT 2572.) Because Mr. Trujeque's assertion of his privilege against self-incrimination was sustained, this was not brought out before the jury. (10 RT 2586.) The defense introduced Manuel Trujeque's death certificate into evidence, but the prosecution would not concede the cause of death. (10 RT 2745, 11 RT 3036; Def. Ex. N.)

When appellant was two or three, Rosemary hit him in the head with a shoe. (9 RT 2304, 2347.) That night, he developed a fever and had a seizure. (9 RT 2304, 2348.) As a result, appellant was on the anti-seizure medication Dilantin, which also served as a sedative, throughout most of his childhood. (9 RT 2428, 10 RT 2497, 2501, 2846.) His mother did not give him the medication consistently when he lived with her, however, and appellant was noted to be extremely impulsive and hyperactive. (9 RT 2427-2428, 2439, 2443.)

Appellant was placed at The Sycamores, a residential children's home on June 1, 1962.[11] (9 RT 2438-2439.) Mildred told Rosemary that "Tommy is not going to be with us anymore" and that appellant wasn't behaving and therefore had to be in a home. (9 RT 2312, 2316, 2354.) Rosemary could remember accompanying her mother to visit appellant at The Sycamores only once, because her mother did not want Rosemary in "that environment." (9 RT 2360.) Mildred did not tell other family members why Tommy was no longer living at home. (9 RT 2387; 10 RT 2673, 2685.) In fact, his Uncle Marcelo did not know appellant was no longer living with Mildred. (9 RT 2386-2387.) Marcelo would have been willing to take appellant in. (9 RT 2387.)

After appellant had been at The Sycamores for more than a year and a half, his mother requested that he remain there because she was working

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[11]The trial court excluded the contents of the early juvenile probation reports which explained the circumstances in which appellant became a ward of the state and the assessments of appellant's medical and psychological condition that were considered in finding an appropriate placement for him. As these reports are in the sealed part of the record, they are described in more detail in Argument XIII, *infra*, which is filed under seal.

full time and could not supervise him. (11 RT 2836.) A year later, when appellant had been suspended repeatedly from public school because of behavior problems, his mother and Mr. Slotnick volunteered to pay for tutoring if The Sycamores would keep appellant there rather than sending him home. (11 RT 2840-2841.) Appellant finally returned home in September 1965. (10 RT 2559.)

Appellant did not get along with Mr. Slotnick, who was now living with appellant's mother, however, and despite doing well initially, he was soon in trouble again. (10 RT 2457-2458, 11 RT 2845-2846.)

Kurt Kocourek, the probation officer who began supervising appellant near the end of 1965, characterized appellant as a friendly, likeable kid with lots of problems – he was vey hyperactive and had poor impulse control. (10 RT 2420, 2439, 2443, 2453.)

By September 1966, a supplemental petition had been filed in juvenile court alleging that appellant had run away and was incorrigible at home; he had been suspended from four different schools. (11 RT 2849.) In October 1966, Kocourek secured a placement for appellant at Tarzana Hospital, a psychiatric hospital with a children's wing. (10 RT 2422.) Kocourek decided to recommend a psychiatric hospital after reviewing the entire probation file, observing appellant at home with his mother, and seeing that appellant was having trouble in school because of his hyperactivity. (10 RT 2427.) Kocourek recommended the placement because (1) it a was closed setting and appellant could not run away and (2) appellant could get psychological and psychiatric counseling. (10 RT 2427-2428.) It was "a matter of record" that appellant had organic brain damage. (9 RT 2428.) Reports from the psychiatric unit at juvenile hall stated appellant had a brain lesion or organic brain damage, dating back to the age

of 3½. (9 RT 2428-2429.) EEG examinations when appellant was young showed a serious brain lesion, though later reports indicated less severe damage, and Kocourek concluded appellant had other problems. (10 RT 2460-2461.) Today, appellant would probably be diagnosed with attention deficit disorder. (10 RT 2453.)

After less than a month, appellant was removed from Tarzana Hospital for "serious and persistent misbehavior," including sneaking over to the girls' dorms at night. (9 RT 2440, 10 RT 2464, 11 RT 2849.) Regarding the allegations that appellant may have been having sexual liaisons with the female students, appellant's mother reported that shortly before his placement at Tarzana, appellant's father had procured a prostitute to "seduce" appellant. (9 RT 2447, 11 RT 2849-2850.) Appellant's mother was very upset and asked to bar appellant's father from further visits. (11 RT 2850)

Following his expulsion from Tarzana, Kocourek had difficulty finding another placement for appellant, because his impulsive-acting out was well known. (9 RT 2442, 2444.) Kocourek did not consider appellant to be truly delinquent and was therefore trying everything he could to keep him out of the California Youth Authority. (9 RT 2442-2443; 10 RT 2453.) Appellant was placed for a while in Unit O, an intensive therapy program in juvenile hall, but he came back late from a home pass, and the program refused to take him back. (9 RT 2445.)

Appellant was thereafter essentially at home again. (9 RT 2466.) In the beginning, appellant did well but then reverted to his old pattern of not cooperating and not being able to attend public school which meant he could not remain at home. (9 RT 2466.) Appellant disappeared from home for long periods of time and continued to have difficulty getting along with

Slotnick. (9 RT 2467.) The home situation deteriorated to such a degree that appellant's mother "threw her hands up" and said she could not have appellant in her house anymore. (9 RT 2468.) In June 1967 Kocourek persuaded Lakeside Lodge in Elsinore to take appellant. (10 RT 2465.) Approximately four months later, he was removed from that program and charged with assault with a deadly weapon for throwing a rock at a motorcyclist – Kocourek thought this was a typical impulsive act by appellant. (9 RT 2444; 10 RT 2469.) Appellant was thereafter placed in a Los Angeles County Probation Department camp for juveniles – a military-type program that was the last stop before commitment to the Youth Authority. (10 RT 2469-2470.)

Dr. Marshall Cherkas who evaluated appellant for the juvenile court in November 1966, after his expulsion from Tarzana Hospital, testified that he found appellant emotionally unstable, with a history of borderline organic brain damage and treatment for psychomotor epilepsy. (10 RT 2495.) Dr. Cherkas said appellant struggled with parental rejection. Even if appellant's mother was not a bad mother, he explained, a child will certainly experience his mother saying she can't deal with him as rejection. (10 RT 2525.) Dr. Cherkas said that nurturing can sometimes compensate for organic brain damage, but appellant's parents did not provide nurturing. (10 RT 2510.) Instead, during the most critical years for his emotional development – ages nine to twelve – appellant was living in an institution. (10 RT 2512, 2514.) He was prescribed anti-psychotic medication to sedate him and control his impulsiveness. (10 RT 2501-2503.)

Dr. Cherkas thought that being hit on the head by his sister could have caused appellant's brain damage, particularly given the subsequent seizures, but it was also possible this was coincidence. (10 RT 2500.)

Cherkas acknowledged that the EEG exams, on which the doctors had relied first to diagnose appellant's brain damage and then to find that it had improved several years later, are not an effective way to identify brain damage compared to modern brain imaging techniques. (10 RT 2515-2516.) Cherkas had examined appellant before trial only for competency. (10 RT 2517.) He did not administer any other tests. (10 RT 2510.) Today, Cherkas thought, appellant would be diagnosed with attention deficit disorder (ADD), an anxiety disorder, and some antisocial characteristics. (10 RT 2506.) Cherkas thought appellant might have been diagnosed as an adult with intermittent explosive disorder. (RT 2506.) He would be treated with better drugs today also - Ritalin and anti-epileptic drugs like Gabapentin and Depakote that also reduce impulsiveness. (10 RT 2511.)

UCLA Professor James Diego Vigil, an expert on gangs, testified that someone in appellant's position, from a dysfunctional family and with a father who had been in a gang was particularly vulnerable to gang involvement. (10 RT 2599, 2632, 2635, 2640-2642.)

Appellant's juvenile parole-officer, John Kersey, testified that he first met appellant in 1971. (10 RT 2697.) He characterized appellant as highly institutionalized; he learned the ropes and ultimately felt more comfortable in prison than on the outside. Kersey continued to correspond with appellant when he went to adult prison in 1972. He described how appellant had earned an AA degree while in Soledad. Kersey had known hundreds or thousands of young men in trouble, and appellant stood out for his potential. (10 RT 2706.) Despite his promise, however, appellant did stupid things to go back to prison - such as robbing the same store in his own neighborhood more than once. (10 RT 2712.) Kersey considered

appellant a friend, even though he did not condone his behavior. (10 RT 2710.)

When appellant was released from prison a few years earlier, Kersey picked appellant up at Tehachapi, and appellant and his wife stayed with Kersey for a couple of days while Kersey helped him by taking him to the DMV, the Social Security Administration, and other errands. (10 RT 2705.) Kersey had not known about the Apodaca or Facundo murders but did not think it necessarily would have changed his treatment of appellant. (10 RT 2710.) Margaret Trujeque, appellant's ex wife, testified that she and appellant had planned to make a life together when he was released in 1997. (10 RT 2713, 2717.) Appellant got a job and was living with his mother, helping her out. (10 RT 2722) Then, Mildred had a stroke in November 1997. She was in the hospital, and appellant was very emotionally distraught. (10 RT 2717-2718.) At the time of the trial, Mildred was extremely ill and confined to a wheelchair, having recently suffered two strokes, a heart attack and bypass surgery. (10 RT 2681-2682.)

Finally, appellant's daughter Diana, 22 at the time of trial, testified. (10 RT 2757.) Diana had almost never seen her father in person, though he wrote to her constantly and spoke to her on the phone whenever he could as Diana was growing up. (10 RT 2758-2759.) Appellant's letters were a source of strength to Diana. Her mother, appellant's first wife, was a heroin addict, and Diana and her siblings were frequently removed from their mother's care. (10 RT 2760-61.) Diana was abused by her mother's boyfriends and appellant got Diana's maternal grandmother to assume guardianship of her. (10 RT 2762.) Despite appellant's efforts, Diana rebelled, ran away from home and began using drugs herself. (10 RT 2766-69.) For a time, appellant arranged for Diana to live with Charlie and Elena

Trujeque, but she ran away from them as well. (10 RT 2772.) Diana finally went to prison and eventually found religion and got sober. (10 RT 2773-74.) At the time of trial, Diana was still sober and caring for her daughter - appellant's granddaughter. (10 RT 2774.)

**3. Closing Argument**

In his penalty phase closing, the prosecutor argued, "the most important thing that sets a theme to this closing argument is the defendant's letter" [to Gil Garcetti]:

> And you haven't had the opportunity to read this portion because it was blocked out before because it wouldn't have been right to give it to you in guilt phase. But he says in his letter that he writes to the district attorney, 'in any case, sir, if you don't have enough balls and guts to give me what I deserve by sending my ass to the gas chamber, then my only other recourse is to kill someone else once I return to prison in order to finally receive the ultimate punishment even the man upstairs knows I deserve."

(11 RT 2957.) He then urged the jurors to sentence appellant to death, because "by doing so, you know, in your mind as jurors that you've done everything you can so that that last sentence doesn't happen." (*Ibid.*)

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The jury returned a death verdict, and appellant was sentenced to death. This appeal follows.

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**ARGUMENT I PAGES 38 THROUGH 56**

**FILED UNDER SEAL**

## II.

## THE TRIAL COURT ERRONEOUSLY APPLIED PENAL CODE SECTION 1387.1 RETROACTIVELY TO PERMIT THE STATE TO REFILE THE PREVIOUSLY BARRED APODACA MURDER CHARGE IN VIOLATION OF THE EX POST FACTO CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS

Appellant's conviction for the second degree murder of Raul Apodaca must be vacated because the state exceeded the permissible number of times for refiling a previously dismissed charge, improperly reviving the previously barred Apodaca murder charge by retroactively applying section 1387.1 in violation of the ex post facto clauses of the state and federal Constitutions. (U.S. Const., art. 1, § 10, 8th & 14th Amends.; Cal. Const., art 1, § 9.) The multiple-murder special circumstance, based upon the invalid second degree murder conviction, must also be vacated. (U.S. Const., 8th & 14th Amends.)

### A. Introduction

The state was improperly allowed to prosecute appellant for the murder of Raul Apodaca, even though there had been at least two prior dismissals of the charges against appellant, barring further refiling under section 1387.[12] The state, conceding that there had been two prior

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[12]Section 1387 provides:

> (a) An order terminating an action pursuant to this chapter, or Section 859b, 861, 871, or 995, is a bar to any other prosecution for the same offense if it is a felony or it is a misdemeanor charged together with a felony and the action has been previously terminated pursuant to this chapter, or Section 859b, 861, 871, or 995, or if it is a misdemeanor not charged together with a felony, except in those felony cases,

dismissals so that a third refiling was barred by section 1387, relied on section 1387.1, which was enacted in September 1987 and created an exception allowing the prosecution a third refiling of felony charges if the felony was a violent felony as defined in section 667.5 and if the charges had been dismissed due to "excusable neglect" by the prosecution.[13]

The defense argued below, first, that retroactive application of section 1387.1 violated the ex post facto clause; second, that even if section 1387.1 could be applied retroactively, there had been *three* prior dismissals in this case, so that the current charges were also barred under section

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> or those cases where a misdemeanor is charged with a felony, where subsequent to the dismissal of the felony or misdemeanor the judge or magistrate finds that substantial new evidence has been discovered by the prosecution which would not have been known through the exercise of due diligence at or prior to the time of termination of the action or that the termination of the action was the result of the direct intimidation of a material witness, as shown by a preponderance of the evidence.
> . . . .

[13]Section 1387.1, enacted in 1987, provides:

> (a) Where an offense is a violent felony, as defined in Section 667.5 and the prosecution has had two prior dismissals, as defined in Section 1387, the people shall be permitted one additional opportunity to refile charges where either of the prior dismissals under Section 1387 were due solely to excusable neglect. In no case shall the additional refiling of charges provided under this section be permitted where the conduct of the prosecution amounted to bad faith.
>
> (b) As used in this section, "excusable neglect" includes, but is not limited to, error on the part of the court, prosecution, law enforcement agency, or witnesses.

1387.1; and third, that even if there were only two prior dismissals, neither was due to excusable neglect.

**B. Procedural History**

Appellant was first charged on February 5, 1987, by felony complaint under the case number A795989 (2 CT 349-352), with the murder of Raul Apodaca in violation of section 187, subdivision (a), with a special circumstance alleged under section 190.2, subdivision (a)(2), for a 1971 second degree murder conviction.[14] Jesse Salazar was charged in the same complaint with both the murder of Raul Apodaca and, in count two, with the September 1985 murder of another man, Ronald Eugene Diaz. (2 CT 349-352.) The warrant was recalled and the case dismissed as to appellant on March 13, 1987. (2 CT 349.)

On March 25, 1987, the state re-filed the first degree murder charge against appellant under case number A798706, again alleging the prior-murder special circumstance. (2 CT 353-54.) The preliminary hearing was held April 8 and 9, 1987. (2 CT 358-424.) The prosecution sought a continuance because the purported eyewitness to the stabbing had failed to appear. There was a dispute whether the witness had been properly served: a subpoena had been left with the witness' mother, but he had failed to pick it up as he had purportedly promised to do. (2 CT 364, 368.) The magistrate declined to find good cause for a continuance based on the witness failing to appear but allowed the prosecution to proceed while they continued to look for the witness. (2 CT 368, 370-71.)

The prosecution then called Richard Rivera who owned the East Los

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[14]This was for the murder of Allen Rothenberg - a conviction that is separately challenged in Argument I, *supra*.

Angeles upholstery shop where Apodaca had been stabbed. (2 CT 373.) Rivera testified that on the night of January 22, 1987, a group of friends – Jesse Salazar, appellant, Luis Villalobos, Raul Apodaca, Frank [last name unknown], Willie Contreras, Al Hernandez, and Robert DeAlva – returned to the upholstery shop at 2 a.m. after drinking at the Quiet Cannon bar. Several of the men began playing poker. (2 CT 373-74.) A fistfight broke out between Salazar and Frank during the game. (2 CT 376.) Apodaca and Villalobos broke up the fight. (2 CT 375-76.) After that, everyone left the upholstery shop except Rivera, Salazar, appellant, Apodaca, and Robert deAlva. (2 CT 377.) Rivera went into the restroom. (2 CT 379.) When he came out a couple of minutes later, Apodaca was lying on the floor and appellant and Salazar were gone. (2 CT 379, 381.) Rivera looked outside and saw appellant and Salazar walking rapidly down the street. (2 CT 382.)

The coroner testified that the cause of death was a stab wound to the chest. (2 CT 402.) Apodaca had four other superficial, non-penetrating wounds to his chest, round to oval in shape all of which were "most likely" made by the same instrument as the stab wound. (2 CT 401, 403.) There was another, much smaller puncture wound at the back of the neck 1/8 of an inch deep, which was "most likely" made by a different instrument but conceivably could have been made by the same instrument that inflicted the other wounds. (2 CT 401-02.) The preliminary hearing recessed at 2 p.m., over defense objection. (2 CT 409.) When the hearing resumed the next morning, the prosecution announced it had been unable to locate DeAlva and rested. (2 CT 411.)

Based on the evidence presented at the preliminary hearing, Magistrate Lamb held appellant to answer only for the lesser offense of manslaughter. (2 CT 421.)

On April 24, 1987, the People nevertheless filed an information in superior court pursuant to section 739, once again charging appellant with first degree murder of Apodaca, but this time omitting the special circumstance allegation.[15] (2 CT 425-26.) On June 23, 1987, the Superior Court granted appellant's motion to dismiss under section 1382 when the prosecution stated it was unable to proceed because it still could not locate its witness.[16] (2 CT 428.)

The prosecution subsequently reached a plea agreement with appellant's co-defendant, Jesse Salazar, who had been held to answer for murder based on his admission to an associate that he had stabbed someone in a fight at Ricky's upholstery shop, and the person had died. (2 CT Supp.Two 237-238, 268.) Salazar was allowed to plead guilty to voluntary manslaughter – the same offense for which appellant had previously been held to answer – and received a sentence of credit for time served and five years' probation. (2 CT Supp.Two 342-348, 350.)

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[15]Section 739 provides:

> When a defendant has been examined and committed, as provided in Section 872, it shall be the duty of the district attorney of the county in which the offense is triable to file in the superior court of that county within 15 days after the commitment, an information against the defendant which may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed. The information shall be in the name of the people of the State of California and subscribed by the district attorney.

[16]Section 1382 provides in pertinent part that a case must be dismissed if the defendant is not brought to trial within 60 days after an information is filed.

In September 1987, after the charges against appellant had been dismissed in superior court, the legislature enacted section 1387.1, which allows the prosecution to refile after three (rather than two) prior dismissals if the defendant is charged with a violent felony as defined by section 667.5 and one of the prior dismissals was due to excusable neglect.

The Apodaca case was apparently dormant until 1998 when appellant was arrested on unrelated charges and offered to confess to the Apodaca homicide if the police would ensure he got the death penalty, because – appellant told the officers – he preferred to be executed than die an old man in state prison. (6 RT 1420, 1492-1493.) The state then charged appellant again with the first degree murder of Apodaca, alleging the special circumstances of multiple murder and prior murder. (1 CT 1-3.)

Appellant's counsel filed a motion to dismiss count two of the information, the Apodaca murder charge, asserting that the prosecution had exceeded the allowed number of refilings under both sections 1387 and 1387.1. (2 CT 333-348 [Defendant's Motion to Dismiss Count II of the Amended Information and Special Circumstance Allegations Arising Therefrom].) In their response, the prosecution conceded there had been two dismissals of the Apodaca case in 1987. (4 CT 923-940 [People's Opposition to Motion to Dismiss Count II].) Whether appellant could be prosecuted for that charge therefore turned on whether (1) section 1387.1 could be applied retroactively; (2) if it could, whether there had actually been three rather than two dismissals so that the prosecution would be barred even under section 1387.1; or (3) if there had been only two dismissals, whether either was due to excusable neglect as required by section 1387.1.

Before ruling on the motion, the trial court held a hearing at which

the prosecution put on its evidence to show that the prior dismissals were due to excusable neglect. At that hearing, Robert Schraeder, a former investigator for the district attorney's office "Hardcore Gang Unit" testified as did Assistant District Attorney Sandy Harris and Los Angeles Police Department homicide investigator Birl Adams. Schraeder had no independent recollection of the Apodaca case or what work he had done for it. (4 RT 816.) Harris and Adams explained that they had been unable to personally serve the one eyewitness to the homicide, Robert DeAlva. (4 RT 853, 863.) Because DeAlva had not been properly served, the prosecution was unable to obtain a bench warrant. (4 RT 865.) These same problems were why the prosecution agreed to allow Salazar to plead guilty to voluntary manslaughter and receive a sentence of credit for time served and probation. (4 RT 848-849.)

At the conclusion of the hearing, the trial court found there was excusable neglect within the meaning of section 1387.1. (4 RT 913.) After further arguments of counsel, the trial court also ruled that the case had been properly refiled under section 1387.1 because there had been only two prior dismissals rather than three. (4 RT 981-982.) The court accepted the prosecutor's argument that the magistrate's order declining to hold appellant to answer for murder was not a dismissal or termination of the action for purposes of section 1387 because appellant had been held to answer for the lesser included offense of manslaughter.[17] (4 RT 981-982.)

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[17]In its written opposition, the state argued the magistrate had not made factual findings but had merely "formed the legal conclusion that the evidence was insufficient to show probable cause" for the murder charge and "[t]hus the reduction to the lesser included offense of voluntary manslaughter did not preclude the District Attorney pursuant to Penal Code section 739 from filing the charge of murder." (4 CT 924-925.) This

The court agreed that its ruling included an implicit finding that section 1387.1 applied retroactively and did not violate the ex post facto clause. (4 RT 984.)

Appellant sought a writ of prohibition from the Second District Court of Appeal. (1CT Supp. V 64 - 3 CT Supp. V 871.) The petition was summarily denied, as was appellant's petition for review to this Court.[18] (4 CT 953, 959.)

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In this case, the prosecution did not dispute that the Apodaca case had been dismissed twice: first, when case number A795989 was dismissed at the prosecution's request in March 1987; and second, when the superior court judge dismissed case number A798706 in June 1987, under section 1382. (4 CT 923, 926.) The prosecution conceded that "[t]he current action case number VA048531 is the third filing" but maintained it was "permitted pursuant to Penal Code section 1387.1." (4 CT 923.)

The sole areas of disagreement were whether section 1387.1 could be applied retroactively to appellant's case, and, if it could, whether the magistrate's order holding appellant to answer for the lesser charge of manslaughter when the prosecution refiled under case A798706 was "an order terminating the action" pursuant to section 871, making the

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misses the point entirely, as appellant never disputed that the prosecution could have properly refiled the murder charges under section 739, *if* the case had not previously been dismissed – as the prosecution conceded it had – before being refiled in case number A798706.

[18]Summary denial of a writ petition does not constitute law of the case and therefore does not preclude review of the same issues on direct appeal. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 899; accord *People v. Jones* (2011) 51 Cal.4th 346, 370, fn. 4.)

subsequent dismissal in superior court the third rather than the second dismissal and thus barring refiling even under section 1387.1.

### C. The Retroactive Application of Section 1387.1 to Appellant Violates the Ex Post Facto Clauses of the State and Federal Constitutions

The prosecution did not dispute that, under the two-dismissal rule of section 1387, the June 1987 dismissal would have been "a bar to any other prosecution for the same offense."[19] (4 RT 964.) The prosecution relied expressly on section 1387.1, and its exception allowing violent felony charges to be refiled a third time when one of the two prior dismissals was due to excusable neglect. (4 CT 927-934.) The defense argued vigorously that applying section 1387.1 retroactively violated the ex post facto clauses of the California and United States Constitutions. (4 RT 925-927, 934.)

#### 1. Section 1387.1 Was Not Intended to Apply Retroactively

Under California law, "[a] new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise."

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[19]In arguing that the statute's purpose of preventing harassment of defendants was not offended by the prosecution in this case, the prosecutor noted that "the current information was filed based upon newly discovered information, namely the confession of the defendant. After approximately eleven years and only after the newly discovered evidence was the case refiled." (4 CT 926-927.) The trial court similarly commented in passing that the that newest filing is "arguably because of newly discovered evidence," (4 RT 944), but the prosecution never asserted that the re-filing was therefore permissible under section 1387, and the court made no finding, as required by the statute, that "substantial new evidence has been discovered by the prosecution which would not have been known through the exercise of due diligence at or prior to the time of termination of the action." (Pen. Code., § 1387, subd. (a)(1).)

(*People v. Hayes* (1989) 49 Cal.3d 1260, 1274, quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206-1209; Pen. Code, § 3.) If a statute is ambiguous on the question of retroactivity, it must be construed as "'unambiguously prospective.'" (*Alch v. Superior Court* ( 2004) 122 Cal.App.4th 339, 400, citing *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 and quoting *INS v. St. Cyr* (2001) 533 U.S. 289, 320, fn. 45.) This is consistent with the principle that a statue should be construed, when possible, to "render it valid ... or free from doubt as to its constitutionality...." (*People v. Lowery* (2011) 52 Cal.4th 419, 427, citing *Myers v. Philip Morris Companies, Inc., supra*, 28 Cal.4th at p. 846, and *In re Smith* (2008) 42 Cal.4th 1251, 1269 [our "common practice" is to employ this statutory construction device, "'when reasonable, to avoid difficult constitutional questions'"].)

Although the prosecution asserted below that "[r]etroactive application of Penal Code section 1387.1 clearly appears from the statute and the Senate Bill itself" (4 CT 927), section 1387.1 does not in fact contain an express retroactivity clause, nor is there a "clear and compelling" implication that the Legislature intended it to apply retroactively. The legislative history is silent, and there are no reported decisions addressing the issue of retroactivity. (See 3 CT 621-4 CT 922 [Legislative Intent Service for California Penal Code Section 1387.1])

Section 1387.1 was enacted in response to an Alameda County murder case, *People v. Mackey* (1985) 176 Cal.App.3d 177, in which the appellate court ordered the defendant discharged on the ground that his prosecution was barred by section 1387, the charges having been dismissed twice due to errors by the prosecution. (4 CT 936–937 [excerpt of Report of California Senate Committee on the Judiciary regarding SB 709 1987-1988

Regular Session].) The new provision was intended to allow the state one additional opportunity to refile charges that were dismissed due to the prosecution's "excusable neglect," provided there was no bad faith.

### 2. Applying Section 1387.1 Retroactively Violated the Ex Post Facto Clause

Even if the legislature intends to apply a statute retroactively, it may not do so if such application would violate the ex post facto clause of the United States or California Constitutions:

> Article I, section 10, clause 1 of the federal Constitution states: "No state shall ··· pass any bill of attainder, *ex post facto law,* or law impairing the obligation of contracts, or grant any title of nobility." (Italics added.) Similarly, article I, section 9, of the California Constitution provides: "A bill of attainder, *ex post facto law,* or law impairing the obligation of contracts may not be passed." (Italics added.)

(*People v. Grant* (1999) 20 Cal.4th 150, 158.) The California ex post facto clause is interpreted "no differently than its federal counterpart." ( *Ibid.*)

Both provisions "prohibit[ ] any legislative act that criminalizes conduct innocent when done, makes a crime greater than when done, increases or changes the punishment, or alters the rules of evidence to permit conviction on lesser or different evidence than when the crime was committed." (*People v. Brown* (2004) 33 Cal.4th 382, 391, citing *Carmell v. Texas* (2000) 529 U.S. 513, 522-525.)

Both parties correctly analogized section 1387.1 to a statute of limitations. (4 RT 925-926; 4 CT 930-934.) The prosecutor argued that "an alteration extending a limitation period does not violate either the State or Federal ex post facto clauses" because it does not alter the definition of the crime or abolish a defense within the meaning of ex post facto clause analysis. (4 CT 930-934.)

In *Stogner v. California* (2003) 539 U.S. 607 (*Stogner*), however, the United States Supreme Court disagreed and held squarely that a law which revives a previously-barred prosecution violates the ex post facto clause. Quoting Justice Chase's seminal opinion in *Calder v. Bull* (1798) 3 Dall. 386, [1L.Ed. 648], the Court found that reviving a barred prosecution falls into the category of prohibited ex post facto law "that aggravates a crime, or makes it greater than it was, when committed." (*Stogner, supra*, 539 U.S. at p. 612, quoting *Calder v. Bull, supra*, 3 Dall. at pp. 390-391, [1L.Ed. 648].) These categories of impermissible ex post facto laws arose from the abuses of the British parliament, which had "inflicted punishments, where the party was not, by law, liable to any punishment." (*Stogner, supra,* 539 U.S. at p. 612, quoting *Calder v. Bull, supra*, 3 Dall. at p. 389, [1L.Ed. 648] [italics omitted].) Reviving a previously time-barred offense, the Court reasoned, "enabled punishment where it was not otherwise available 'in the ordinary course of law,'" much like repealing an amnesty. (*Stogner, supra*, 539 U.S. at p. 614, quoting 2 Wooddeson, A Systematical View of the Laws of England (1792) p. 638 ; *id.* at p. 619.)

As the parties recognized, section 1387 operates precisely like a statute of limitations. It expressly creates "a bar to any other prosecution for the same offense." (Pen. Code, § 1387.) The bar arises not from the passage of time but from the prosecution's prior attempts to prosecute the offense. Under section 1387, the prosecution was allowed two attempts to prosecute appellant. When the state chose to initiate a second prosecution without securing the witness it knew was necessary, and the case was dismissed a second time, the state was barred from attempting "any other prosecution for the same offense" – that is, the twice-dismissed murder charge. (Pen. Code, § 1387.) Significantly, as discussed further below, the

state was *not* barred from prosecuting appellant for manslaughter – the offense for which the magistrate held him to answer, and to which the prosecution accepted a plea from appellant's co-defendant.

Thus, by operation of section 1387, appellant was not by law liable for the twice-dismissed murder charges, and the new exception created by section 1387.1 to allow prosecutors a third bite at the apple was not properly applied retroactively to appellant.

### D. Even If Section 1387.1 Could Properly Be Applied Retroactively, Prosecution of the Apodaca Murder Charge Was Barred Because it Had Been Dismissed Three Times

As noted above, the parties agreed the case had been dismissed at least two times. The defense, however, maintained that the case had actually been dismissed *three* times. The dispute centered on whether the magistrate's order holding appellant to answer only for manslaughter constituted a termination of the action within the meaning of sections 1387 and 1387.1 so that the superior court's ultimate dismissal of the case under section 1382 was a third dismissal, barring appellant's prosecution even under section 1387.1.

As noted above, section 1387 provides in pertinent part: "An order terminating an action pursuant to this chapter, or Section 859b, 861, 871, or 995,[20] is a bar to any other prosecution for the same offense if it is a felony.

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[20]Section 859b provides that a complaint shall be dismissed if the preliminary examination is not held within specified time limits.

Section 861 provides that the complaint will be dismissed if the preliminary examination is not conducted in a single session or postponed for good cause.

Section 871 provides that "[i]f, after hearing the proofs, it appears either that no public offense has been committed or that there is not

. . and the action has been previously terminated pursuant to this chapter, or Section 859b, 861, 871, or 995." (Pen. Code, § 1387, subd. (a).)

This Court has observed that "section 1387 'has been amended nine times since its adoption in 1872, and the resulting 108-word, 13-comma, no period subdivision is hardly pellucid....'" (*People v. Traylor* (2009) 46 Cal.4th 1205, 1212, quoting *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1018.) The case law applying section 1387 has not necessarily clarified the statutory language.

### 1. Holding Appellant to Answer for a Lesser Offense was an Order Terminating an Action under Section 1387

A magistrate's refusal to hold a defendant to answer for a charged offense, including holding the defendant to answer for a lesser offense, or holding the defendant to answer for some but not all of the charged offenses, is considered a dismissal pursuant to section 871, even if there is no formal order of dismissal entered. (*In re Williams* (1985) 164 Cal.App.3d 979, 983 ["Despite the all-or-nothing wording of (section 871), it obviously applies where the magistrate finds insufficient evidence of and dismisses one count, but sufficient evidence of others"]; accord *Bodner v. Superior Court* (1996) 42 Cal.App.4th 1801, 1804, 1806 (*Bodner*) [magistrate held defendant to answer for lesser related offense]; *People v. Superior Court (Martinez)* (1993) 19 Cal.App.4th 738, 744 (*Martinez*);

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sufficient cause to believe the defendant guilty of a public offense, the magistrate shall order the complaint dismissed and the defendant to be discharged. . ."

Section 995 provides for the dismissal of an information when the defendant has not been legally committed by a magistrate or when the defendant has been committed without reasonable or probable cause.

*Brazell v. Superior Court* (1986) 187 Cal.App.3d 795, 800 (*Brazell*).) Whether such an order "terminates the action" within the meaning of section 1387, depends on whether the charge has already been dismissed once before.

In *Ramos v. Superior Court* (1982) 32 Cal.3d 26, 36 (*Ramos*), this Court held that section 1387 barred prosecution of a special circumstance allegation that had been twice dismissed by a magistrate[21] before the dismissed charge was realleged in superior court under section 739. Section 739 permits the district attorney to file an information charging the defendant "with either the offense or offenses named in the order of commitment *or any offense or offenses shown by the evidence taken before the magistrate to have been committed.*" (Pen. Code, § 739 [italics added].) Thus, the prosecutor may include in the information a charge that was dismissed by the magistrate, if "– at least in the district attorney's view - [the charge] was supported by the evidence presented at the preliminary hearing." (*Ramos, supra,* 32 Cal.3d at p. 34.)

In *Ramos*, following a preliminary hearing on a complaint charging Ramos and two co-defendants with murder and the special circumstance of financial gain, the magistrate found the evidence insufficient as to Ramos and dismissed all charges against him. (*Ramos, supra,* 32 Cal.3d at p. 29.)

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[21] *Ramos* addressed the 1980 amendments to section 1387 which "establish[ed] clearly that a magistrate, as well as a judge, may 'make a dismissal that serves as an effective bar to further prosecution.'" (*Ramos, supra,* 32 Cal.3d at p. 30.) Before those amendments, a magistrate's authority to dismiss a case had been called into doubt by *People v. Peters* (1978) 21 Cal.3d 749, 753, which had held a magistrate was not a court within the meaning of section 1385 and other provisions authorizing dismissal of charges by a "court." The 1980 amendments clarified that magistrates were judges and therefore empowered to dismiss cases.

The prosecution filed a new complaint a few days later, realleging the previously dismissed charges against Ramos. (*Ibid.*) A second preliminary hearing was held in front of a different judge who held Ramos to answer on the murder charge but dismissed the special circumstance allegation. (*Ibid.*) The prosecution filed an information in superior court under section 739, again charging Ramos with murder and the financial gain special circumstance. (*Ibid.*) Ramos moved to dismiss the special circumstance allegation on grounds of insufficient evidence under section 995 and/or to bar prosecution of the special circumstance under section 1387 on the ground it had been twice dismissed. (*Ibid.*)

The trial judge held that neither section 995 nor section 1387 applied to a special circumstance allegation. (*Ramos, supra,* 32 Cal.3d at pp. 29-30.) This Court disagreed, and held that the magistrate's dismissal of a special circumstance under section 871 was an "order terminating an action" under section 1387. (*Id.* at 34.) The special circumstance allegation had thus been twice dismissed within the meaning of section 1387, and filing an information realleging the dismissed special circumstance under section 739 was an impermissible "other prosecution" for the same offense. (*Id.* at 36.)

This Court added that its ruling did not leave the prosecution "without means to challenge a second order of a magistrate dismissing all or a portion of a complaint," because the prosecution could have sought review of the magistrate's ruling under section 871.5 rather than simply refiling the dismissed charges under section 739.[22] (*Ramos, supra,* 32

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[22]Section 871.5 provides that when an action is dismissed by a magistrate and may not be refiled under section 739 in the superior court, the district attorney may move in superior court within 15 days to compel

Cal.3d at p. 36.)

Analogizing to *Ramos*, the Court of Appeal in *Bodner* held that holding a defendant to answer for a lesser offense constituted a termination of the action for purposes of section 1387. (*Bodner, supra,* 42 Cal.App.4th at pp. 1804, 1806.) In the first action against the defendant, the magistrate declined to hold the defendant to answer on a felony complaint charging two counts of attempted murder, finding insufficient evidence of an intent to kill. (*Id.* at p. 1803.) The magistrate held the defendant to answer instead on one count of a lesser offense - assault with a deadly weapon.[23] (*Ibid.*) Pursuant to section 739, the district attorney filed an information again alleging attempted murder. The superior court dismissed those charges on the defendant's motion under section 995, without objection from the prosecution. The district attorney subsequently initiated a second prosecution, under a new case number, again alleging two counts of attempted murder. Following the second preliminary hearing, the magistrate again held the defendant to answer only for two lesser charges of assault with a deadly weapon. When the prosecution filed another information pursuant to section 739, the defendant moved to dismiss under section 1387, contending the second magistrate's order was a second termination that barred further prosecution. (*Id.* at p. 1803.)

The prosecution in *Bodner* argued that, because the magistrate "did not dismiss the action entirely but held defendant to answer for lesser related charges," the order did not constitute an order "terminating an action

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the magistrate to reinstate the complaint. (Pen. Code, § 871.5, subd.(a).)

[23]The opinion does not indicate whether the assault charges were alleged separately in the complaint.

pursuant to Section 871," and filing an information under section 739 including the dismissed charges was merely a continuation of the same action and not an "other prosecution" within the meaning of section 1387. (*Bodner*, *supra*, 42 Cal.App.4th at p. 1804.)

The Court of Appeal noted correctly that precisely the same argument had been rejected by this Court in *Ramos*. (*Bodner*, *supra*, 42 Cal.App.4th at p. 1804.) Adhering to *Ramos*, the court held that the second order by a magistrate holding the defendant to answer on lesser charges was indeed a second termination within the meaning of section 1387, "bar[ring] the People from simply refiling the dismissed charges under section 739." (*Id.* at pp. 1804-1805, quoting *Ramos, supra*, 32 Cal.3d at pp. 36-37.)

Similarly, in *Brazell, supra,* the Court of Appeal held that a magistrate's refusal to hold a defendant to answer on murder charges which had previously been dismissed under section 995 constituted a second termination of the action and barred the prosecution from filing another information in superior court under section 739, charging her with murder; the prosecution could pursue only the remaining charges on which the defendant had been held to answer. (*Brazell, supra,* 187 Cal.App.3d at p. 800.)

Finally, in *Martinez, supra*, three defendants were charged with murder and conspiracy to commit insurance fraud. (*Martinez*, *supra,* 19 Cal.App.4th at p.742.) Following a preliminary hearing, the magistrate held one defendant to answer on all charges, but held Martinez and another defendant to answer only on the insurance fraud charges. (*Ibid.*) The prosecution then filed an information charging the defendants with murder. (*Ibid.*) In the meantime, the prosecution obtained an indictment alleging

the same offenses. (*Id.* at p. 743.) The judge dismissed the information and arraigned the defendants on the indictment. (*Ibid.*)

Martinez argued his case had been dismissed twice – the first time by the magistrate failing to hold him to answer on the murder charge in the complaint and second when the prosecution dismissed the information in superior court – and thus the indictment was an impermissible third filing. (*Martinez, supra,* 19 Cal.App.4th at p.743.)

The Court of Appeal held that "a magistrate's (first) dismissal under section 871 is not by itself a termination of the action when followed by the filing of an information under section 739."[24] (*Martinez, supra,* 19 Cal.App.4th at p. 746.) In these circumstances, "the action remains alive" unless and until the superior court dismisses the information. (*Id.* at p. 745.) The court reasoned that its interpretation was consistent with *Ramos*, which had "limit[ed] its holding to the circumstance of a *second* magistrate's dismissal order," and specifically declined to express a view on the circumstance in which a first dismissal by a magistrate was followed by a filing of dismissed charges under section 739 and a dismissal under section 995 of the refiled charges. (*Id.* at p. 746 [original italics].)

The court rejected Martinez' argument that the prosecution should have been required to proceed under section 871.5 rather than section 739, emphasizing that it was already established that section 871.5 did not

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[24]Arguably, *Martinez*' entire discussion is dicta in that the case could have been resolved with the narrower holding that section 1387 does not apply at all to an order that simply dismissed an information in favor of a superseding indictment. (*Martinez, supra*, 19 Cal.App.4th at pp. 748-749.) But even if *Martinez*' reasoning is applied, the magistrate's refusal to hold appellant to answer for murder constituted a second dismissal in the procedural posture of this case, as explained above.

prohibit the prosecution from refiling charges under section 739 following a *first* dismissal by a magistrate. (*Martinez, supra,* 19 Cal.App.4th at p. 749, citing *People v. Encerti* (1982) 130 Cal.App.3d 791, 797-798 and *Ramos, supra*, 32 Cal.3d at p. 35.)[25] The Court of Appeal therefore concluded:

> The procedure in section 871.5 was not even available to the People, much less mandatory. The 1982 urgency amendment to section 871.5 makes clear that its remedy is intended for situations in which the People cannot use section 739, for example, (1) the magistrate dismisses all the charges (see *People v. Luna* (1983) 140 Cal.App.3d 788, 793, fn. 3); (2) the dismissed and nondismissed counts are not transactionally related (*People v. Slaughter* [1984] 35 Cal.3d [629], 633); or (3) the magistrate's dismissal is the second dismissal. (*Ramos v. Superior Court, supra*, 32 Cal.3d at pp. 35-36.)

(*Martinez, supra,* 19 Cal.App.4th at p. 750.)

Commentators have harmonized the case law as follows: First, when the prosecution chooses, following a magistrate's dismissal of an action "to start over with a new action by filing a second complaint," then the magistrate's dismissal constitutes a termination of the first action. (5 Witkin, Cal. Crim. Law (3d ed. 2000) Criminal Trial § 423, p. 600, citing *Ramos, supra,* 32 Cal.3d at p. 35, *Martinez, supra,* 19 Cal.App.4th at p. 744.) Second, when the prosecution chooses instead "to proceed in the

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[25] "*Ramos* described section 871.5 primarily as a remedy available to the People after a second dismissal by a magistrate, the condition under which *Ramos* held the People could not use section 739." (*Martinez, supra,* 19 Cal.App.4th at p. 749.) Section 871.5 was also amended to make this explicit, providing that the prosecution could seek reinstatement "[w]hen an action is dismissed by a magistrate pursuant to Section 859b, 861, 871, 1008, 1381, 1381.5, 1385, 1387, or 1389, or a portion thereof is dismissed pursuant to those same sections *which may not be charged by information under the provisions of Section 739....*" (*Id.* at p. 750 [original italics], quoting section 871.5.)

same case by filing an information" under section 739, realleging the dismissed charges, "the magistrate's dismissal does not constitute a prior termination of the action." (*Id.* at pp. 600-601, citing *Martinez, supra*, 19 Cal.App.4th at p. 745 [magistrate dismissed one of two counts, prosecution filed information charging both counts; subsequent dismissal under section1385 was only first termination].) Rather, the subsequent dismissal of that first case in superior court would constitute only a single dismissal, and the prosecution would be permitted to file one more complaint. Third, "[w]here the action has been terminated in a *previous prosecution*," the magistrate's subsequent "refusal to hold the defendant to answer on earlier dismissed charges," constitutes a second termination of the action within the meaning of section 1387, "even though the magistrate holds the defendant to answer on other charges and the prosecution attempts to reinstate the complaint under P.C. 739." (*Id.* at p. 601 [original italics], citing *Ramos, supra*, 32 Cal.3d at p. 35, *Martinez, supra*, 19 Cal.App.4th at p. 744.)

Appellant's case falls precisely into the third scenario. The prosecution dismissed the first action on its own initiative, before the preliminary hearing. The state properly conceded below that this was one dismissal. Consequently, under *Ramos* and *Martinez, supra,* the magistrate's decision in the second action, holding appellant to answer for a lesser offense, constituted a second dismissal and the refiling of murder charges under section 739 was "another prosecution" under *Ramos.*

The district attorney argued below, however, and the trial judge agreed, that the instant case could be distinguished because appellant was held to answer for a lesser included offense as opposed to a lesser related offense, so that there was no dismissal under section 871 and therefore no

remedy under section 871.5. (4 RT 960-965, 975-978, 981.) The district attorney also complained that there had been no actual ruling "on the merits" concerning the sufficiency of the evidence because the magistrate had ruled when the prosecution was missing its critical witness. (4 RT 944.)

Both of these purported reasons for denying the defense motion are utterly without support in the law.

First, section 1387 is not limited to rulings "on the merits" – the statute includes terminations of actions on a variety of grounds, including voluntary dismissals by the prosecution. Indeed, one of the central purposes of the statute is to prevent "the evasion of speedy trial rights through the repeated dismissal and refiling of the same charges." (*People v. Traylor, supra,* 46 Cal.4th at p. 1213, quoting *Burris v. Superior Court, supra,* 34 Cal.4th at p. 1018.) Such dismissals have nothing to do with a "judicial determination[] on the merits." (4 RT 944.)

Second, pursuant to section 739, the prosecution may reallege charges dismissed by a magistrate so long as the magistrate has held the defendant to answer for any transactionally related offense. (*People v. Slaughter, supra,* 35 Cal.3d at pp. 640-641 ["The choice between these alternatives [sections 871.5 and 739] depends upon whether the magistrate found probable cause to hold the defendant on a transactionally related offense."]) It is thus a distinction without a difference whether the magistrate held the defendant to answer for a lesser included offense or a lesser related offense, as both would be transactionally related to the greater offense originally charged. In both instances the factor that determines whether further prosecution is barred is whether the charges at issue had already been dismissed twice at the point that the prosecution sought to

reallege them under section 739.

Even if the magistrate's order holding appellant to answer for a lesser offense was not reviewable under section 871.5,[26] it does not follow that the prosecution was entitled to another bite at the apple under section 739.[27]

In insisting that it was entitled to a "remedy" under either section 739 or section 871.5 for the magistrate's order holding appellant to answer for the lesser offense of manslaughter, the prosecution ignored entirely its

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[26]In *People v. Williams* (2005) 35 Cal.4th 817, 828, this Court held that a magistrate's order reducing a "wobbler" felony to a misdemeanor under section 17, subdivision (b)(5), was not reviewable under section 871.5 because such an order was not included in the statute's list of orders subject to review. The Court distinguished *People v. Superior Court (Feinstein)* (1994) 29 Cal.App.4th 323, in which the Court of Appeal held that a magistrate's order reducing a "straight" – i.e. non-wobbler – felony to a misdemeanor *was* a dismissal under section 871 and hence reviewable under section 871.5. (*People v. Williams, supra,* 35 Cal.4th at p. 828.) The Court has not, however, overruled or disapproved cases such as *Bodner* that have treated an order holding a defendant to answer for a lesser felony to be a dismissal of the greater felony under section 871 and a termination of the action under section 1387. To do so would eviscerate the central purpose of section 1387, as reaffirmed in this Court's recent decision in *People v. Traylor*, *supra,* because it would allow the prosecution unlimited refilings of greater felony charges where a magistrate held the defendant to answer on a lesser charge. (See *People v. Traylor, supra,* 46 Cal.4th at 1218 ["a prime objective of the statute is to limit prosecutorial forum shopping on evidence that prior magistrates *have already found insufficient*"] [original italics].) The bar would operate only if the greater charge were dismissed altogether.

[27]While *Ramos* points to section 871.5 as an alternate means to review a magistrate's decision to hold a defendant to answer for less than he was charged with, it did not hold that a magistrate's order terminates the action *only* if it is an order reviewable under section 871.5. (*Ramos, supra,* 32 Cal.3d at p. 36.)

third option: Having twice failed to marshal the evidence to support a murder charge, the prosecution could have proceeded on an information alleging the manslaughter charge on which the magistrate held appellant to answer.[28] That was, after all, the charge to which the prosecution accepted a guilty plea by appellant's more culpable co-defendant.

The primary purpose of section 1387, subdivision (a), is to protect defendants from the persistent refiling of charges the evidence does not support, in hopes of finding a sympathetic magistrate who will hold the defendant to answer on the greater charges. (*People v. Traylor, supra*, 46 Cal.4th at p. 1209.) In *Traylor*, this Court held that refiling a lesser charge, after the magistrate has dismissed the greater charge (felony vehicular manslaughter with gross negligence vs. misdemeanor vehicular manslaughter based on ordinary negligence), was not precluded by section 1387's single dismissal rule for misdemeanors, because the pursuit of lesser charges was consistent with the statute's purpose to discourage overcharging. (*Id.* at p. 1215.)

The remedy contemplated in *Traylor* was readily available to the prosecution, but it chose not to pursue it, resulting in the *third* termination of the action when the murder charge was dismissed in superior court, following the prosecution's refiling under section 739. That dismissal precluded a fourth filing, which was not authorized even if section 1387.1 applied retroactively to appellant.

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[28]As this Court has emphasized, the state's right to appeal is statutory and narrowly construed, and "[c]ourts must respect the limits on review imposed by the Legislature 'although the People may thereby suffer a wrong without a remedy.'" (*People v. Williams*, *supra*, 35 Cal.4th at p. 823, citing *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 499.)

### 2. The State Did not Prove Excusable Neglect

Even if this Court finds section 1387.1 applicable to this case, and finds there were only two dismissals prior to the present charges, it still must find that the trial court erred in finding excusable neglect that allowed a third refiling of the Apodaca murder charge.

Section 1387.1 provides that excusable neglect "includes, but is not limited to, error on the part of the court, prosecution, law enforcement agency, or witnesses." (Pen. Code, § 1387.1, subd. (b).) The term "excusable neglect" in section 1387.1 has the same meaning as in civil cases: "Simply expressed, '[e]xcusable neglect is neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances.'" (*People v. Mason* (2006) 140 Cal.App.4th 1190, 1196, quoting *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 741 (*Miller*); accord *People v. Massey* (2000) 79 Cal.App.4th 204, 211.) It is the prosecution's burden to prove that at least one of the prior dismissals was due to excusable neglect. (*Miller, supra,* 101 Cal.App.4th at p. 747.) If the errors amount to "inexcusable neglect" – that is, if they are not objectively reasonable, then a third refiling will not be permitted. (*People v. Woods* (1993) 12 Cal.App.4th 1139, 1149.) Similarly, if the dismissal is not due to neglect but to the deliberate tactical decisions of the prosecution, a third refiling will not be permitted.

In this case, the prosecution's evidence of excusable neglect related primarily to its inability to produce DeAlva at appellant's April 1987 preliminary hearing. Specifically, the prosecution argued that the excusable neglect consisted of its failure to properly serve DeAlva, and/or the magistrate's refusal to grant a continuance so the prosecution could attempt

to locate him.[29] (4 RT 904.) While otherwise refusing to elaborate on his reasoning, the trial judge cited the magistrate's denial of a continuance as grounds for finding excusable neglect. (4 RT 912-913.)

This was wrong on at least two scores. First, the prosecution argued, and the trial judge agreed (erroneously), that the magistrate's order holding appellant to answer for the lesser offense of manslaughter did not constitute a dismissal, or "termination of the action," within the meaning of section 1387. (4 RT 907.) Thus, the magistrate's denial of the continuance is not relevant to the issue of excusable neglect because–on the prosecution's own theory– there was no dismissal to excuse.

Second, the notion that a one- or two-day continuance would have allowed the prosecution to secure DeAlva's attendance (4 RT 912-913), is contradicted by the prosecution's own evidence that it still had not located or served DeAlva two months after the April preliminary hearing, when the superior court dismissed the case against appellant under section 1382, or even six months later, when the prosecution accepted a plea from

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[29]While Deputy District Attorney Markus attempted to argue that the discussion of serving DeAlva related to the first case number, which was dismissed in March 1987 (4 RT 905), defense counsel correctly pointed out that the record contradicts this assertion: the transcript of the preliminary hearing very clearly refers to the unsuccessful attempts to serve DeAlva with a subpoena for the April 1987 preliminary hearing. (4 RT 905-906; 2 CT 363-368.) The prosecution offered no evidence whatsoever to support a finding of excusable neglect with respect to the first dismissal in March 1987. (4 RT 893.) There is a brief reference, by defense counsel, in the preliminary hearing transcript to the prior dismissal being due to a failure of witnesses to appear (2 CT 364), but the prosecution did not present any evidence about the circumstances of the first dismissal – its timing, the reasons, or the prosecution's previous efforts to secure the attendance of witnesses.

appellant's co-defendant, Salazar, explaining in its disposition report that "Witness DeAlva disappeared after the investigation and therefore was never available as a witness." (Court's Ex. 5 [Disposition Report re Salazar Plea by then-Deputy District Attorney Harris (Dec. 29, 1987)].)

Courts have found excusable neglect where witnesses have failed to appear due to miscommunications between the prosecution and the witness. (See *People v. Mason, supra*, 140 Cal.App.4th at pp. 1196-1197 [previously cooperative prosecution witness left town to work on a film without notifying the prosecution, apparently not understanding that the trial was imminent; case had been delayed repeatedly by defense continuances]; *People v. Massey, supra*, 79 Cal.App.4th at pp. 211-212 [finding excusable neglect, either in first dismissal where state's witnesses failed to appear despite extensive efforts to secure their attendance or in second dismissal where miscommunication between investigator and prosecutor resulted in a dismissal when the witnesses were actually available].) Excusable neglect has also been found where the prosecution made "reasonable" efforts to locate and secure the attendance of a "recalcitrant witness" who failed to appear even after being subpoenaed. (*Miller, supra,* 101 Cal.App.4th at pp. 741.)[30]

While the failure to secure DeAlva's presence for the preliminary hearing *may* have constituted excusable neglect under these cases, that does not matter if, as the prosecution maintained, the magistrate 's holding order was not a dismissal. The evidence about the prosecution's unsuccessful

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[30]Alternatively, the court found that the prosecutor's "failure to file a technically correct affidavit in support of her motion to continue" independently constituted excusable neglect and justified a third filing. (*Miller, supra,* 101 Cal.App.4th at p. 742.)

attempts to secure DeAlva's attendance at the preliminary hearing is relevant only insofar as it relates to the final superior court dismissal of the case in June 1987. Deputy District Attorney Markus argued that it was excusable neglect for the prosecution to refile against appellant before it subpoenaed witnesses at Salazar's preliminary hearing in June 1987. (4 RT 874) By this time, however, the decision to persist in overcharging appellant could no longer be regarded as *excusable* neglect.

After the magistrate held appellant to answer only for the lesser offense of manslaughter, the state was doubly on notice that it would not be able to prove murder beyond a reasonable doubt without DeAlva's testimony. The original prosecutor acknowledged at the preliminary hearing before Magistrate Lamb that whether the prosecution could establish the elements of the offense without DeAlva "will be very, very close."[31] (2 CT 365.) The magistrate's ruling, holding appellant to answer only for the lesser offense of manslaughter, was therefore not a surprise. Nevertheless, even though it had still not located DeAlva, the prosecution made a tactical decision to refile the murder charges against appellant, rather than pursuing the manslaughter charge for which he had been held to answer. Six months later, the prosecution accepted Salazar's plea to precisely that offense.

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[31]Deputy District Attorney Harris similarly conceded in her disposition memorandum regarding the dismissal of appellant's case in June 1987 that, without DeAlva, the prosecution "cannot establish the crime beyond a reasonable doubt." (Court Ex. 5)

## E. Conclusion

Appellant's second degree murder conviction must be vacated because the state was improperly allowed to revive a previously-barred murder charge by retroactive application of section 1387.1, in violation of the ex post facto clauses of the state and federal Constitutions. (U.S. Const., art. 1, § 10, 8th & 14th Amends.; Cal. Const., art 1, § 9.) The multiple-murder special circumstance, based upon the invalid second degree murder conviction, must also be vacated. (U.S. Const., 8th & 14th Amends.) Because, as set forth in Argument I, *supra*, the other special circumstance in this case was also invalid, appellant is not eligible for the death penalty and his death sentence must be reversed and appellant resentenced to life.

Even if section 1387.1 may be applied retroactively, the Apodaca murder conviction must still be vacated, because the charges had been dismissed three times, barring refiling even under section 1387.1. Further, even if refiling were otherwise proper, the state failed to prove excusable neglect as required by the statute to justify refiling. Because appellant had a constitutionally-protected liberty interest in the correct application of state laws governing the dismissal and subsequent refiling of charges, the improper refiling of the Apodaca murder charge deprived him of the process due to him under state law, in violation of his federal due process rights. (U.S. Const., 5th and 14th Amends.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

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## III.

## THE TRIAL COURT IMPROPERLY REVOKED APPELLANT'S PRO PER STATUS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

This case must be reversed for a new trial because the court below erroneously terminated appellant's pro per status in violation of the Sixth and Fourteenth Amendments. (U.S. Const., 6th and 14th Amends.)

### A. Proceedings Below

Appellant requested and was granted leave to proceed in propria persona (pro per) in municipal court and represented himself at his preliminary hearing in September 1998. (1 Municipal Court RT 11-13; 1 CT 9-37.) In October 1998, in superior court, at the insistence of the prosecutor, appellant filed a new request to continue to proceed pro per. (1 RT 1-5; 1 CT 47-51 [Petition to Proceed in Propria Persona, filed Oct. 16, 1998]. ) One of the provisions appellant was required to initial stated "I understand that misconduct occurring outside of court may result in restriction or termination of Pro Per privileges or my Pro Per status." (1 CT 49.)

The prosecutor stressed, because this was a special circumstances case in which the state was seeking the death penalty, "we want to take a lot of time to make sure Mr. Trujeque understands all of this," including his right to advisory counsel. (1 RT 7-8.)

Appellant noted he had represented himself in three prior cases and been acquitted in one of them but agreed "it would be a good idea to have advisory counsel." (1 RT 9-10.) The court reviewed appellant's petition to proceed pro per and cautioned him about the dangers of representing himself, stressing the gravity of the case. The court agreed to continue

appellant's pro per status, and appellant was arraigned. (1 RT 11-12, 17)

Appellant continued to represent himself until his pro per privileges at the Los Angeles County jail were revoked in November 1998 for having pocket parts and a copy of the Daily Journal from the law library in his cell. (1 CT 71-102.) Thereafter, on November 25, 1998, appellant signed a substitution of counsel form stating that he substituted his then-standby counsel, Andrew Stein, for himself. (1 CT 70 [Substitution of Attorney, filed Nov. 30, 1998].)

In court on December 3, 1998, Mr. Stein announced, after conferring "sotto voce" with appellant, "I've talked with Mr. Trujeque. He is willing to give up his pro per status." (1 RT 51-52.) Appellant, however, interjected he was doing so "involuntarily." (1 RT 52.) Appellant explained to the trial court that he had signed the substitution of counsel form only because "I've been told by numerous people that today my pro per status was going to be revoked regardless of what transpires today." Appellant insisted that he still felt capable of defending himself and argued that the revocation of his library privileges violated his rights under the Sixth Amendment and article I, section 15 of the California Constitution to prepare his defense. He concluded that, under the circumstances, "there's just nothing else I can do but give up my status." (1 RT 53-54.) Deputy District Attorney Markus explained that the revocation of his library privileges did not mean that appellant could not continue to represent himself. Rather, "the materials that he needs can be supplied to him by Mr. Stein," his standby counsel. (1 RT 54-55.) Mr. Markus added, however, that "the appropriate choice to make on behalf of the defendant is to have a lawyer represent him because it is a death penalty case." (1 RT 54.)

The court then inquired of appellant whether he had signed the

substitution of attorney voluntarily, and appellant responded "yes."[32] (1 RT 55.) Mr. Stein argued it was in appellant's best interests to be represented by counsel because appellant might otherwise attempt, in effect, to "plead[ ] guilty to the death penalty" in violation of section 1018. (1 RT 56.) Mr. Stein further stated that he agreed the Sheriff's Department had provided adequate justification for terminating appellant's access to the law library, and appellant would not be "in a very good position" to represent himself if he did not have access to the law library. (1 RT 56.) Mr. Stein added that he had had a "man to man" talk with appellant and believed appellant had "intelligently, knowingly and voluntarily" given up his right to represent himself. (1 RT 56-57.) Mr. Stein urged the court to therefore accept the substitution of counsel. (1 RT 57.) The court said "I am." (1 RT 57.)

Deputy District Attorney Markus, recognizing that appellant's own

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[32]The full exchange was as follows:

> The Court: Let me just ask you this, Mr. Trujeque. Did you voluntarily sign this substitution of attorney?
>
> The Defendant: Yes.
>
> The Court: All right. You understand what that means?
>
> The Defendant: Yeah.
>
> The Court: That means that you are, in fact, substituting Mr. Stein in as your attorney.
>
> The Defendant: Yes.
>
> The Court: All right. Mr. Stein.

(1 RT 55-56.)

wishes had not been addressed, asked appellant what he wanted to do, and appellant responded "I want to represent myself and . . . be allowed to have access to the law library." (1 RT 57.) The record reflects that Mr. Stein, for the third time during the hearing, conferred "sotto voce" with appellant. (1 RT 57.) Mr. Stein then said "I'll ask the court to -- I think the court already said they've accepted the substitution of attorney." (1 RT 58.)

Deputy District Attorney Markus interjected that he was "not happy with the record" and urged the court to make a ruling because "we have documents submitted to this court that indicate that his pro per status should be, in fact, withdrawn." (1 RT 58.) The court then summarized the "Notice of Results of Administrative Hearing to Revoke Defendant's in Custody Pro per Privileges for Cause," finding that five pocket parts and one issue of the Daily Journal, stamped "LA County Jail," had been found in appellant's cell. (1 RT 58.) In addition, 750 milligrams of methocarbamol[33] and a black ball point pen were found in his cell, in violation of jail rules. (*Ibid.*) The court then recited that appellant was not "under any duress or force to sign the substitution of attorney." (1 RT 58-59.) The court concluded, "based on the seriousness of the charges, the fact that a substitution of attorney was voluntarily and willingly signed, the court will accept the substitution of attorney." (1 RT 59.) The minute order for the day reflects that appellant's "motion to withdraw substitution of attorney" was denied.

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[33]Methocarbamol is a prescription muscle relaxant which comes in tablets of 500 or 750 milligrams. (See Methocarbamol Images <www.drugs.com/Methocarbamol-images.html> [as of March 13, 2012]; AHFS Consumer Medication Information, Methcarbamol (Oct. 1, 2010) <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000718/ > [as of March 13, 2012].) Thus, appellant was apparently in possession of one or one and a half tablets of the medication.

(1 CT 103.)

**B. The Law Governing Self-Representation**

The Sixth Amendment guarantees a criminal defendant both the right to the assistance of counsel and the right to proceed *without* counsel:

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant-not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.

(*Faretta v. California* (1975) 422 U.S. 806, 820 [footnote omitted] (*Faretta*).)

The Supreme Court believed that self-representation would rarely be to a defendant's advantage. Nevertheless, "although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" (*Faretta, supra,* 422 U.S. at p. 834, quoting *llinois v. Allen* (1970) 397 U.S. 337, 350-351 (conc. opn. of Brennan, J.); see also *Martinez v. Court of Appeal of California, Fourth Appellate Dist.* (2000) 528 U.S. 152, 161 ["experience has taught us that a pro se defense is usually a bad defense"].)

Indeed, this Court has repeatedly held that "the autonomy interest motivating the decision in *Faretta*" applies equally in capital cases, despite their complexity. (*People v. Taylor* (2009) 47 Cal.4th 850, 865; accord *People v. Blair* (2005) 36 Cal.4th 686, 738-739; *People v. Koontz* (2002) 27 Cal.4th 1041, 1073-1074; *People v. Bradford* (1997) 15 Cal.4th 1229,

1364-1365; *People v. Bloom* (1989) 48 Cal.3d 1194, 1222-1223.) And even encompasses a capital defendant's right to "choose a strategy aimed at obtaining a sentence of death rather than one of life imprisonment without the possibility of parole, for some individuals may rationally prefer the former to the latter." (*People v. Taylor, supra*, 47 Cal.4th at p. 865, citing *People v. Bloom, supra*, 48 Cal.3d at pp. 1222-1223.)

Once a defendant has exercised his right to represent himself, that right may be revoked against the defendant's wishes only under very limited circumstances, such as when the defendant engages in misconduct that disrupts or undermines the integrity of the trial proceedings. (See, e.g., *People v. Butler* (2009) 47 Cal.4th 814, 826 (*Butler*); *People v. Carson* (2005) 35 Cal.4th 1, 10.) Even when a defendant engages in misconduct, the trial court must explore sanctions short of terminating his self-representation. (*People v. Carson, supra,* 35 Cal.4th at pp. 11-12.)

This Court recently reiterated that restrictions on a defendant's ability to prepare for trial – due to his limited access to the law library – are not a legitimate reason to terminate a defendant's self-representation: "while limitations on pro. per. privileges 'may be necessary ... as a result of a defendant's misconduct in jail,' they 'would not, however, preclude a defendant from making an intelligent and voluntary decision to continue to represent himself provided that he has been warned of the dangers and difficulties that such a choice might entail.'" (*People v. Butler, supra*, 47 Cal.4th at p. 827, quoting *Ferrel v. Superior Court* (1978) 20 Cal.3d 888, 892.)

Where a defendant's access to the law library has been restricted, the defendant's constitutional right to prepare his defense may be satisfied by providing him with advisory counsel, who would be able to provide the

defendant with legal research materials, and "reasonably necessary investigative assistance." (*People v. Butler*, *supra*, 47 Cal.4th at p. 827; accord *People v. Moore* (2011) 51 Cal.4th 1104, 1126.)

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The trial court's ruling terminating appellant's self-representation rested on three grounds, each of which was erroneous: (1) appellant's loss of pro per privileges at the jail law library; (2) that appellant signed a substitution of counsel; and (3) the seriousness of the charges.

### C. Appellant's Pro Per Status Could Not Properly be Terminated Because of His Loss of Library Privileges

This case bears a striking similarity to *Butler,* which was also a Los Angeles County case, tried a few years before appellant's. Butler, like appellant, was representing himself when the jail terminated his pro per privileges at the jail law library.[34] (*People v. Butler, supra*, 47 Cal.4th at pp. 818-819.) The trial court tried to persuade the defendant to abandon self-representation, warning him: "It is pretty obvious with this type of situation that pro per status is probably going to be revoked. It makes sense to me, it makes sense to you." (*Id.* at p. 820.) The prosecutor argued that the defendant was a security risk: he was on trial for stabbing another inmate; he had been caught multiple times with razor blades, drugs, and alcohol. Finally, he was caught attempting to smuggle a 4-inch shiv to court, hidden in his rectum. (*Id.* at pp. 820-821) The judge told Butler: "I think for your benefit and the safety of the deputies that I will revoke the pro per status from you." (*Id.* at p. 821.)

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[34]Appellant's infractions – stealing pocket parts – pale in comparison to Butler's, however, discussed above.

The trial court nevertheless granted Butler's renewed *Faretta* request several months later, after cautioning him that he would be extremely limited in his ability to prepare for trial: "Here is the problem: the sheriff has the absolute right to shut down any pro per privileges that you have in jail. Understand? Based on your record of incidents, that is what will happen, I am sure." (*People v. Butler, supra*, 47 Cal.4th at p. 822.) Approximately a month later, Butler's standby counsel, who had represented him in his earlier capital case, still had not provided Butler with all of the relevant legal materials he had promised: "Without further inquiry, the court revoked defendant's *Faretta* right for the second time, with this statement: 'It is not unique to your client. This is the pro per problem. You have a pro per that is in for another case; and the jail is a jail, it is not a law library. They restrict what you can do there.'" (*Id.* at p. 823.)

This Court concluded that the trial court's observation that ""it just doesn't make sense' to allow pro. per. representation under the circumstances faced by defendant may have been reasonable, but it was inconsistent with the requirements of *Faretta* and its progeny" because "*Faretta* gives [defendants] the right to make a thoroughly disadvantageous decision to act as their own counsel, so long as they are fully advised and cognizant of the risks and consequences of their choice." (*People v. Butler, supra*, 47 Cal.4th at p. 828.)

Appellant believed that the same thing that happened to Butler would happen to him: that his pro per status would be revoked because he had lost his pro per privileges at the jail law library. This mistake was reinforced by the warning on the pro per petition that "misconduct occurring outside of court may result in restriction or termination of Pro Per privileges or my Pro Per status." (1 CT 49.) Nevertheless, when appellant made clear he had

signed the substitution of counsel ***only*** because he believed his pro per status was about to be revoked, the trial court made no effort to correct appellant's misapprehension of the law. (1 RT 55-56.)

While Deputy District Attorney Markus had pointed out earlier that standby counsel could provide library materials for appellant and he *could* continue to represent himself (1 RT 55), the trial judge never confirmed this or inquired whether appellant would, understanding this, elect to continue representing himself. Appellant's own standby counsel, Mr. Stein, also failed to correct the error, arguing instead that appellant would *not* be able to represent himself without access to the jail library and asserting further that appellant should not be allowed to represent himself because he would ask for the death penalty. (1 RT 56.) While Mr. Stein's argument was doubtless well-intentioned, it – like the trial judge's ruling in *Butler* – was "inconsistent with the requirements of *Faretta* and its progeny," (*People v. Butler, supra* 47 Cal.4th at p. 828), and compounded the confusion about appellant's right to represent himself despite his loss of library privileges. It also put Mr. Stein at odds with his client.

Because the trial court never corrected appellant's mistaken belief that his status would be revoked automatically, appellant himself was never permitted, as required by *Butler*, to make "an intelligent and voluntary decision" whether "to continue to represent himself" after being warned of the drawbacks of proceeding without access to the law library. ( *People v. Butler, supra*, 47 Cal.4th at p. 827, quoting *Ferrel v. Superior Court, supra,* 20 Cal.3d at p.892.) To the contrary, the court cited appellant's loss of library privileges as a reason for ending his pro per status, thus relying on the same improper rationale as the trial judge in *Butler*. (1 RT 58.)

## D. The Substitution of Counsel, Premised on a Mistake of Law Which the Trial Judge Failed to Correct, Did Not Validly Waive Appellant's Right to Represent Himself

The substitution of counsel was not, moreover, a valid surrender of appellant's *Faretta* rights, because it was premised on appellant's misapprehension of the law (that loss of jail library privileges would necessarily result in loss of pro per status) which the court failed to correct, and appellant made clear he otherwise wanted to continue to represent himself.

While some cases have held that the right to represent oneself may be more easily waived than the right to counsel, such a waiver may be found only "if it reasonably appears to the court that defendant has abandoned his initial request to represent himself." (*People v. Kenner* (1990) 223 Cal.App.3d 56, 61, quoting *Brown v. Wainwright* (5th Cir. 1982) 665 F.2d 607, 610–611; see also *McKaskle v. Wiggins* (1983) 465 U.S. 168, 183 [defendant could not complain that standby counsel intruded on his right to represent himself when he had acquiesced in counsel's participation].)

Here, it did not "reasonably appear" that appellant had abandoned his request to represent himself. He clearly stated he did not want to give up his right to self-representation but thought it was inevitable that his pro per status would be revoked because of his loss of library privileges. (1 RT 52.) While appellant later answered affirmatively to the court's question whether he had signed the substitution of counsel voluntarily (1 RT 55-56), Deputy District Attorney Markus then asked appellant what ***he*** wanted to do, and appellant said he wanted to continue to represent himself and have access to the law library. (1 RT 57.) The court thereafter ***still*** failed to clarify that

appellant could in fact continue to represent himself even though he had lost his pro per privileges in the jail.

The trial court's intervention was crucial because, at this point, appellant's erstwhile counsel was arguing against appellant's asserted wish to represent himself. After appellant again reasserted his desire to represent himself, in response to the prosecutor's question, Mr. Stein interrupted him. (1 RT 57.) After conferring "sotto voce" with appellant, Mr. Stein attempted to short-circuit any further discussion by stating "I think the court already said they've accepted the substitution of attorney." (1 RT 58.)

In such circumstances, where – as the prosecutor recognized here (1 RT 58) – the record is far from clear that the defendant wishes to abandon his self-representation, it is advisable for the court to have "a 'personal dialogue'" with the defendant "to determine whether there is a waiver." (See *People v. Kenner, supra,* 223 Cal.App.3d at p. 61, quoting *Brown v. Wainwright, supra*, 665 F.2d at pp. 611-612 [no dialogue required where "all circumstances indicate" defendant's desire to abandon self-respresentation].) The trial court did not do so.

Moreover, in this case, unlike *Brown v. Wainwright* or *People v. Kenner, supra,* appellant did not silently acquiesce in his attorney's representation.[35] Rather, when defense counsel tried to speak for him,

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[35]In *Brown v. Wainwright, supra,* the defendant asked to proceed pro se, and the public defender representing him accordingly moved to withdraw. (*Brown v. Wainwright, supra*, 665 F.2d at p. 609.) The trial judge, who was reluctant to grant the motion, deferred ruling and asked counsel to try to resolve the differences between him and his client. (*Ibid.*) Counsel later said they had resolved their differences, and the case proceeded to trial; the defendant did not renew his motion to represent himself until shortly before closing arguments on the third day of trial, at which point the motion was denied as untimely. (*Id.* at p. 610.) The court

advising the court that appellant was "willing to give up his pro per status," appellant interrupted to assert that he was not giving up his *Faretta* rights voluntarily. (1 RT 51-52.) Appellant explained he was doing so only because he had been told his rights would be revoked anyway. (1 RT at 52-53.) Appellant's wishes were sufficiently clear that the minute order for the day states that appellant's "motion to withdraw the substitution of counsel" was denied. (1 CT 103.)

Denying a motion to withdraw a substitution of counsel might have been appropriate if the motion was another in a series of vacillations by an indecisive defendant, but that was not the case. (See, e.g., *People v. Marshall* (1997) 15 Cal.4th 1, 22) ["vacillation between requests for counsel and for self-representation [may] amount[ ] to equivocation or to waiver or forfeiture of the right of self-representation"].) Rather, because appellant interjected contemporaneously that the substitution of counsel was not voluntary, its validity was in question from the outset.

Nor was this a case like *People v. Stanley* (2006) 39 Cal.4th 913, 933, in which the defendant failed to grasp, even after the trial court's repeated efforts to explain, that if he exercised his *Faretta* rights, he could not simply change his mind in the future and expect to have counsel appointed to take over his defense. The trial court ***never explained*** that appellant could continue to represent himself even without access to the law

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of appeals found the record supported a finding of waiver. (*Id.* at p. 611.)

In *People v. Kenner, supra*, the defendant made a timely *Faretta* motion but was transferred to another county before his motion could be heard. (*People v. Kenner, supra*, 223 Cal.App.3d at pp. 58-59.) When he returned several months later, appointed counsel represented him, and the defendant never mentioned the *Faretta* motion again, until his appeal. (*Id.* at pp. 59, 62.)

library, with the assistance of his standby counsel.

### E. The Trial Court's Remaining Reasons for Revoking Appellant's Pro Per Status Were Invalid

The final reason given by the trial court for substituting Mr. Stein as appellant's attorney was the "seriousness of the charges" appellant faced. (1 RT 59.) This too was an improper ground, as this Court has repeatedly made clear, most recently in *People v. Taylor, supra*, 47 Cal.4th at p. 865.

Nor did the fact that appellant openly evinced an intention to seek the death penalty justify the termination of his pro se status as suggested by Mr. Stein. This Court has rejected that argument repeatedly. (*People v. Taylor, supra*, 47 Cal.4th at p. 865 [rejecting argument that Sixth Amendment right to self-representation must give way to Fifth and Eighth Amendment requirements that the death penalty be imposed through fair and reliable procedures]; *People v. Blair, supra*, 36 Cal.4th at pp. 736-740; *People v. Bloom, supra,* 48 Cal.3d at pp. 1222-1223.)

### F. Conclusion

The improper revocation of pro per status is reversible per se. (*People v. Butler, supra,* 47 Cal.4th at pp. 824-825.) Appellant's convictions and sentences must therefore be reversed and the case remanded for a new trial.

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## IV.

## THE TRIAL COURT ERRED BY ALLOWING APPELLANT'S AUNT AND UNCLE TO MAKE AN OVERBROAD, BLANKET ASSERTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION WHICH PRECLUDED APPELLANT FROM PRESENTING CRITICAL EVIDENCE IN HIS DEFENSE AND IN MITIGATION OF THE DEATH PENALTY IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

The trial court improperly allowed appellant's uncle, Charlie Trujeque, to make a blanket assertion of his Fifth Amendment privilege against self-incrimination at both the guilt-innocence and penalty phases of the case, without making any inquiry whatsoever into the validity of the asserted privilege or giving any weight to appellant's countervailing constitutional rights to present a defense, to compel the presence of witnesses and to present a case in mitigation of the death penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the state Constitution. The trial court also erred by allowing Elena Trujeque to make a blanket assertion of her Fifth Amendment privilege at the penalty phase when she had already testified at the guilt-innocence phase of the trial and therefore waived her privilege.

### A. Relevant Facts

Appellant's aunt and uncle, Charlie and Elena Trujeque, were both listed as prosecution witnesses at the guilt-innocence phase of the trial, to testify to appellant's motive for the murder of Max Facundo, who was their daughter Charlene's boyfriend. It was undisputed that Facundo was

extremely abusive to Charlene, beating her severely enough to give her frequent black eyes and bruises. It was also undisputed that Charlene's parents, Charlie and Elena, were very unhappy and concerned about Facundo's treatment of their daughter.

One defense theory was that Charlie and Elena Trujeque enlisted appellant's help to "take care of" Max Facundo. (5 RT 1011.) Before Charlie and Elena Trujeque were called to testify for the prosecution, the Deputy District Attorney informed the court the Trujeques might need lawyers because "there may be Fifth Amendment issues." (5 RT 1094.)

Both lawyers, Hattie Harris and Anthony Garcia, were in court the next morning, and the prosecutor announced he had supplied them with copies of Charlene, Charlie and Elena's police interviews. (5 RT 1098; 4 CT 957.) The court reiterated for the record that it was appointing counsel to advise Elena Trujeque of her rights. (5 RT 1103.) Ms. Harris, Elena Trujeque's lawyer, reported to the prosecutor, after conferring with her client, that she did not see how Mrs. Trujeque could hurt herself by testifying and advised her to take the stand. (5 RT 1104.)

**1. Elena Trujeque's Testimony**

The prosecutor subsequently called Elena Trujeque as a witness and elicited from her that appellant and Charlene wrote to each other and Charlene accepted collect calls from him. (5 RT 1252-1253.) Elena was concerned Charlene and Tommy were too friendly and that his letters were "not cousinly." (6 RT 1288.) Charlene herself did not think that appellant's letters were inappropriate. (5 RT 1055.)

Elena Trujeque agreed that – as the prosecutor put it – Charlene was "having problems" with Facundo in 1986. (5 RT 1253.) In fact, Facundo "was constantly beating her up." (*Ibid.*) Charlene's face and arms were

often "all bruised" from Facundo's beatings, and her eyes blackened between 15 and 20 times that Elena could remember. (5 RT 1254, 1296.) Charlie and Elena went to the police, but the police said they could do nothing unless Charlene pressed charges herself. (5 RT 1254.)

When appellant was released from prison in 1986, he came to Charlie and Elena's house, and Tommy and Charlene stayed up all night talking. (5 RT 1255, 1257.) The next time Elena Trujeque saw appellant was a few weeks later, on the day Facundo was killed. (5 RT 1256, 1258.) Appellant came over with his cousin Raymond. Appellant, Raymond and Charlie spoke outside for about five minutes, after which Charlie seemed nervous. (5 RT 1258-1261.) Appellant and Raymond then left with Charlene and Facundo. (5 RT 1261.) That evening, Charlie's cousin Pat phoned, and Charlie and Elena learned Facundo had been stabbed in front of Pat's house. (5 RT 1262-1265.) Later, appellant called and Elena and Charlie picked him up and gave him a ride to El Sereno. Elena said that, during the drive, Charlie berated appellant for killing Facundo, because Charlie and Elena were afraid of retaliation from Facundo's family. (5 RT 1266-1268.)

On direct examination, Elena Trujeque denied that she or her husband had ever asked appellant to hurt Facundo to stop him from beating Charlene. (5 RT 1268.) She also denied that they ever acted pleased that Facundo was dead or promised to send appellant money for killing him. (5 RT 1270.)

On cross-examination, Elena Trujeque acknowledged that Charlie planned to ask appellant to beat up Facundo, and that she and her husband had agreed to ask appellant to hurt Facundo but "not to do anything violent." (6 RT 1309.) On redirect, Elena denied that she told appellant to

hurt Facundo, though she was present when her husband did so; she also heard Charlie say to appellant one to two weeks before Facundo was killed "no, no, no, don't do that, just -- just hurt him." (6 RT 1339-1340.) Elena said her husband did specifically say that appellant should break Facundo's arms and legs to teach him a lesson, and she "was on board for that." (6 RT 1345-1346.)

After Elena Trujeque admitted on cross-examination that she and her husband had asked appellant to hurt Max Facundo, the prosecutor suggested repeatedly, during both questioning and argument, that appellant had falsely implicated his aunt and uncle in Facundo's murder and was unfairly trying to shift blame to them. (6 RT 1343-1344, 1495-96, 1498, 7 RT 1630, 1793, 1803.)

**2. Invocation of the Privilege**

After Elena Trujeque's testimony, Charlie Trujeque's counsel informed both the defense and the prosecution that he had advised Charlie Trujeque to assert his Fifth Amendment rights. (6 RT 1353.) The prosecution called Mr. Trujeque as a witness, and he confirmed his intention to invoke his Fifth Amendment rights "as to any inquiries with regards to this matter" – either "before, during, or after the alleged homicide." (6 RT 1355.) The prosecutor noted that the defense intended to call Mr. Trujeque as a witness at the penalty phase, and contended that Mr. Trujeque should be precluded from testifying in that context as well because he had invoked the Fifth Amendment, and "I would be asking him questions about the circumstances of the crime."[36] (6 RT 1356.)

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[36]Thus, despite condemning appellant for implicating his aunt and uncle in the murder, the prosecutor threatened to cross-examine them on the same topic if they testified as mitigation witnesses for the defense.

Defense counsel clarified that he intended at the penalty phase to ask Mr. Trujeque only questions pertaining to family history, and especially about appellant's father, because Mr. Trujeque was "one of the only living people" who could testify about appellant's father. The prosecution, he noted, could not cross-examine beyond the scope of direct. (6 RT 1357.)

**3. Guilt-Innocence Phase**

The court instructed defense counsel to limit his arguments to the guilt-innocence phase of the trial. (6 RT 1357.) Defense counsel argued that Mr. Trujeque should not be permitted to make a blanket assertion of his Fifth Amendment privilege as to the guilt-innocence phase either, and explained that he would like to ask Mr. Trujeque about the contents of appellant's letters to Charlene and about the death of his niece Vicki.[37] (6 RT 1358-59.) The judge interjected, however, that he had already ruled Vicki's death a collateral matter and would not allow questioning about it, though defense counsel could ask about Charlene and her relationship with Facundo. (6 RT 1359.) When defense counsel indicated he would also like to question Mr. Trujeque about Charlene's drug use, the prosecutor objected that defense counsel could not "pick just one spot and not allow the opposing party the ability to cross examine." (6 RT 1360-1362.) The court then reversed itself and ruled that Mr. Trujeque's invocation of the Fifth Amendment would preclude all questioning in the guilt-innocence phase. (6 RT 1362.) The court reserved ruling on whether Mr. Trujeque's invocation would also preclude his testifying as a defense witness at the

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[37]As discussed further in Argument VII, *infra*, defense counsel sought to elicit that Vicki had been stabbed to death by her abusive boyfriend and that this had heightened the Trujeques' fears for Charlene's safety. (6 RT 1329-1333.)

penalty phase. (6 RT 1363.)

**4. Penalty Phase**

When defense counsel attempted to call Charlie Trujeque as a witness at the penalty phase to testify about appellant's father, the prosecutor again objected that Mr. Trujeque might incriminate himself. (10 RT 2567.) Through counsel, Charlie Trujeque then did invoke the Fifth Amendment and refused to answer ***any*** questions, including about family history:

> Q: By Mr. Stein: do you have brothers and sisters?
>
> A: Yes.
>
> Q: How many brothers and how many sisters do you have?
>
> Mr. Garcia: your honor, at this time I'm going to renew my objection and ask my client not to answer on the basis of what I've indicated and renew my objection and incorporate my argument.

(10 RT 2571.) The trial judge refused to order Mr. Trujeque to answer the question, ruling it would be potentially incriminating for him to do so. (10 RT 2572.) The judge reasoned that while "the question by itself perhaps can't incriminate him, but following that question there will be other questions which ultimately will lead to what the prosecution's contention is, namely, that because of familiar relationships, your client did what he did at the behest of this witness and his wife." (10 RT 2573.)

Defense counsel objected that the information he intended to elicit could not possibly incriminate Mr. Trujeque and that sustaining the overbroad assertion of the privilege was crippling the defense's ability to present a case in mitigation and undermining the reliability of the sentencing process. (10 RT 2572.) Defense counsel also accused the prosecution of acting in bad faith, encouraging Mr. Trujeque to take the

Fifth Amendment in order to thwart the presentation of mitigating evidence. (10 RT 2572.)

The prosecutor responded that he was insulted to have his motives impugned and accused defense counsel of "exposing [the Trujeques] to additional charges for the sake of their client and hiding behind the great issue of injustice and the death penalty. And we have other issues to deal with here, and that is individual rights of witnesses." (10 RT 2574.) The prosecutor never responded to the judge's suggestion that the prosecution could offer Mr. Trujeque immunity, which would have protected both Mr. Trujeque's and appellant's rights. (10 RT 2572.)

Defense counsel subsequently attempted to ask Mr. Trujeque when his parents were born; whether his father and grandfather had been murdered; and whether he had had a brother named Manuel who died in 1968. In each instance, Mr. Trujeque asserted his privilege against self-incrimination. (10 RT 2575.) Defense counsel then attempted to ask whether Mr. Trujeque had been offered immunity from prosecution for the Facundo murder in exchange for asserting his Fifth Amendment rights. (10 RT 2576-2577.) Mr. Trujeque took the Fifth Amendment, but when ordered by the Court to answer, denied the prosecutor had promised him anything for refusing to testify for the defense. (*Ibid.*) The prosecutor also denied any promises had been made and insisted that since Mr. Trujeque had "taken the 5th amendment, no one can touch him. No witness can touch him. No prosecutor, no defense attorney. We can't use his testimony." (10 RT 2579.)

Defense counsel proffered the type of questions he would ask Mr. Trujeque:

I would ask collectively, questions about his mother, his

> father, their birth dates, their death dates, where he was raised, where his grandmother was born, his grandfather was born, when his grandmother died, his grandfather died, on his side, Trujeque. I'd ask him about his brothers, his sisters, where they were raised, if they were in foster homes, if he had fights, did they get along well. I would ask him about his brother, specifically, Tommy's father, where Tommy's father was born, where he was raised, how he was educated, where he went to school, was he in the military, was he injured during the war, did he get hooked on heroin during the war. The offer of proof is we're informed that that's the truth, he got hooked on heroin, came home a heroin addict, ended up a drug addict for the rest of his life. I would ask him about Tommy's father's temper, Tommy's father's drug use, Tommy's father beating of Tommy's mother when she was pregnant with Tommy. I would ask him if he was aware of Tommy's physical problems as a young man, his bed-wetting. I would ask him if he knew about his physical disabilities, his ears, excuse me, the operations. I would ask him what Tommy was like as a little boy, whether he's hyperactive, did he see it, did he spend any time with Tommy. And this is (*sic*) all things that would take place, your honor, between 1953 and 1962. That would be the time period that I would be inquiring about and pre '53 about the family.

(10 RT 2584-2585.)

Mr. Trujeque confirmed he intended to take the Fifth Amendment as to all of these questions. (10 RT 2586.) Defense counsel stressed again that such family history questions could not possibly have a factual nexus to the Facundo murder. (10 RT 2586.) The trial court nevertheless sustained the blanket assertion of privilege, again reasoning that "[y]ou're establishing familial relationships which could tie in with the contention that, in fact, it was this witness who requested your client, in essence, to commit a homicide." (10 RT 2586.) Defense counsel, in apparent frustration, argued that the district attorney had shown no inclination to prosecute Mr.

Trujeque and had, in fact, shaken his hand warmly when he stepped down from the witness stand, after previously invoking the Fifth Amendment, which was not consistent with an intention to prosecute him for soliciting a murder. (10 RT 2587.) The trial judge terminated the argument concerning Charlie Trujeque. (*Ibid.*)

Defense counsel then proposed, if Mr. Trujeque was unavailable, to instead call Elena Trujeque, arguing that she would be permitted to testify to hearsay statements of her unavailable husband concerning family history. (10 RT 2588.) Although Mrs. Trujeque's lawyer, Ms. Harris, was present, it was Deputy District Attorney Markus who took up the issue of Mrs. Trujeque's Fifth Amendment rights and argued vigorously that even though Mrs. Trujeque had testified at the guilt-innocence phase of the case, she still had Fifth Amendment rights with respect to whether she had perjured herself in that testimony:

> [W]e all have an obligation to protect this witness. And we know of facts that come from the witness that we're aware of from the police report and tape recorded statements and things of that nature. But once the witness starts to testify and information comes out from the witness and we say, wait a minute, we know the law. We know legal theories of culpability. We know aiding and abetting. We know conspiracy. And what she's saying now is what we didn't know before.
>
> There are 5th amendment issues. Does that mean that a court is obligated to say no matter what, no matter what we know, you still have to get up on the witness stand; you have to incriminate yourself by questions of the defense attorney; and the prosecution is entitled to prosecute you based upon what you say? That's not right, and that's what Mr. Stein is requesting this court to do.

(10 RT 2590-2591.)

Ms. Harris, Mrs. Trujeque's attorney, joined in, expressing her alarm at being informed earlier in the day, presumably by the prosecutor, that defense counsel had suggested Mrs. Trujeque had perjured herself by denying that she ever visited appellant in prison. (10 RT 2593.) "Based upon those kinds of things," Ms. Harris asserted, "it seems to me that at this point in time my client should refuse to testify on the ground that she could possibly incriminate herself for a new and different charge." (10 RT 2594.) The court clarified that defense counsel planned to ask Mrs. Trujeque about family history and inquired if Ms. Harris would advise her client to assert the privilege to those matters as well. (10 RT 2594-2595.) Ms. Harris responded she would. (10 RT 2595.)

Defense counsel explained again that he would be seeking to admit Mrs. Trujeque's testimony only as a family historian under Evidence Code sections 1310 and 1311 and would not ask her any questions relating to any events after 1980. (10 RT 2595, 2597.) If neither Charlie nor Elena Trujeque would testify, he said, he would need to find someone else alive who knew appellant's father and could testify. (10 RT 2657.) Deputy District Attorney Markus said that although he offered a week ago to give defense counsel the number of another paternal relative, he now objected to any new witnesses being called, because the sentencing phase had already gone on too long. (10 RT 2657-2659.)

Elena Trujeque was sworn and asserted she would refuse on Fifth Amendment grounds to answer any questions, including "about your husband's father, your husband's mother, your husband's brothers and sisters, your husband's grandmother and grandfather, about the date of birth of those people, about the names of those people, and about the days they died or the dates that they died." (10 RT 2661.) She said she would also

refuse to answer any questions about appellant's childhood. (10 RT 2662.)

Defense counsel asked to submit all of the questions he would ask the Trujeques, so that the court could rule whether the Fifth Amendment was invoked properly as to each individual question, but the prosecutor argued it was not necessary, and the trial court agreed, stating that apart from the Facundo murder, he agreed that Mrs. Trujeque could refuse to answer because of her possible exposure to perjury charges. (10 RT 2662-2665.)

**B. Applicable Law**

The Sixth Amendment provides criminal defendants the right to compulsory process to obtain testimony favorable to their defense. (*Washington v. Texas* (1967) 388 U.S. 14, 19.) And "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324-25, citing *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [quoting *California v. Trombetta* (1984) 467 U.S. 479, 485].)

A capital defendant has a further right under the Eighth Amendment to present evidence in mitigation of the death penalty. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-115; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plur. opn.); *Tennard v. Dretke* (2004) 542 U.S. 274, 285.) Evidence concerning a capital defendant's family and social history is indisputably constitutionally relevant mitigating evidence. (*Eddings v. Oklahoma, supra*, 455 U.S. at pp. 113-115 [sentencer could not refuse to consider capital defendant's family history as mitigating evidence]; accord *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399; see also *Wiggins v.*

*Smith* (2003) 539 U.S. 510, 524-525 [defense counsel's failure to investigate and present evidence of capital defendant's family and social history constituted ineffective assistance of counsel]; *Williams v. Taylor* (2000) 529 U.S. 362, 395-396 [same].)

A defendant's right to compulsory process must in some cases yield to a witness' valid assertion of his or her Fifth Amendment privilege against self-incrimination. (*United States v. Moore* (9th Cir. 1982) 682 F.2d 853, 856; accord *United States v. Highgate* (6th Cir. 2008) 521 F.3d 590, 593 -594; *United States v. Goodwin* (5th Cir. 1980) 625 F.2d 693, 700 (*Goodwin*).) "It is well established," however, that the privilege is properly invoked only to "protect[] against real dangers" of self-incrimination, "not remote and speculative possibilities." (*Zicarelli v. New Jersey State Comm'n of Investigation* (1972) 406 U.S. 472, 478 (*Zicarelli*); accord *Rogers v. United States* (1951) 340 U.S. 367, 374-375; *United States v. Drollinger* (9th Cir. 1996) 80 F.3d 389, 392; *McCoy v. Commissioner of Internal Revenue* (9th Cir. 1983) 696 F.2d 1234, 1236; *United States v. Neff* (9th Cir. 1980) 615 F.2d 1235, 1239; see also *United States v. Hoffman* (1951) 341 U.S. 479, 486 [witness must have "reasonable cause to apprehend danger from a direct answer"]; accord *People v. Seijas* (2005) 36 Cal.4th 291, 304.)[38]

Accordingly, a "witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself-his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified." (*United States v. Hoffman,*

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[38] Evidence Code sections 940 and 404 codify the standard of *United States v. Hoffman, supra.* (*People v. Seijas, supra,* 36 Cal.4th at p. 305.)

*supra*, 341 U.S. at p. 486, citing *Rogers v. United States, supra*, 340 U.S. 367; accord *People v. Seijas, supra*, 36 Cal.4th at p. 304.)

The scope of the privilege may validly extend to some questions but not others. (*United States v. Goodwin, supra*, 625 F.2d at p.701.) Thus, "[a] proper application" of the privilege requires that it "be raised in response to specific questions . . . a blanket refusal to answer any question is unacceptable." (*United States v. Pierce* (9th Cir. 1977) 561 F.2d 735, 741; accord *United States v. Highgate, supra*, 521 F.3d at p. 594; *United States v. Allee* (1st Cir. 1989) 888 F.2d 208, 212; *North River Ins. Co., Inc. v. Stefanou* (4th Cir. 1987) 831 F.2d 484, 486-487; *United States v. Goodwin, supra*, 625 F.2d at p. 701; *United States v. Malnik* (5th Cir. 1974) 489 F.2d 682, 685; *General Dynamics Corp. v. Selb Mfg. Co.* (8th Cir.1973) 481 F.2d 1204, 1212; *In re Marriage of Sachs* (2002) 95 Cal.App.4th 1144, 1151-1152; *Warford v. Madeiros* (1984) 160 Cal.App.3d 1035, 1045.)

It is then the trial court's duty to "make a particularized inquiry, deciding in connection with each specific area that the questioning party seeks to explore, whether or not the privilege is well-founded." (*United States v. Goodwin, supra*, 625 F.2d at p.701 [internal quotations omitted]; accord *In re Marriage of Sachs, supra;* 95 Cal.App.4th at p. 1151; *Warford v. Madeiros, supra*, 160 Cal.App.3d at p. 1045.)

Although a witness may not be required to explain in detail why his answers would be incriminating, as that would defeat the purpose of the privilege (*United States v. Hoffman supra,* 341 U.S. at p. 486), the trial court must be able conduct a meaningful evaluation of the validity of the witness' claim. If the questions posed appear innocuous, and it is not readily apparent why an answer would be incriminating, the witness must

come forward with some explanation for his or her fears. (*McCoy v. Commissioner of Internal Revenue, supra,* 696 F.2d at p. 1236; *United States v. Neff, supra*, 615 F.2d at p. 1240; *Warford v. Madeiros, supra*, 160 Cal.App.3d at pp. 1045-1046.) If the court determines that the witness is mistaken in asserting the privilege, it may order the witness to answer. (*United States v. Hoffman, supra*, 341 U.S. at p. 486; accord *People v. Seijas, supra*, 36 Cal.4th at p. 304.)

The standard of review as to whether the privilege was properly invoked is de novo. (*People v. Seijas, supra*, 36 Cal.4th at p. 304 [holding de novo review appropriate where witness' invocation of privilege affects defendant's constitutional rights.][39].)

### C. The Trial Court Erred in Allowing Charlie Trujeque to Make a Blanket Assertion of Privilege to Avoid Being Called as a Defense Witness

In this case, the trial court abdicated completely its responsibility to conduct a particularized inquiry concerning the validity of the witnesses' claims of privilege. The trial court improperly allowed Charlie Trujeque to make a blanket invocation of the privilege against self-incrimination with respect to the guilt-innocence phase when there were areas of inquiry that would not have incriminated him. There was absolutely no valid reason for Charlie Trujeque to invoke the Fifth Amendment with respect to the penalty phase.

The trial court's ruling prevented the defense from presenting

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[39]In *People v. Seijas, supra*, the constitutional right at stake was the defendant's right to cross-examine a prosecution witness who invoked the privilege. (*People v. Seijas, supra*, 36 Cal.4th at p. 304.) In this case, appellant's constitutional right to call witnesses in his behalf and to present a defense in mitigation of the death penalty is at stake.

material evidence with respect to the guilt-innocence phase and at the penalty phase effectively excluded an entire area of critical mitigating evidence concerning appellant's family history, in violation of the Sixth, Eighth, and Fourteenth Amendments.

**1. Guilt Phase**

While Charlie Trujeque was originally listed as a prosecution witness, it was the prosecutor who suggested that Mr. Trujeque might want to assert his Fifth Amendment privilege, and the prosecutor accepted Mr. Trujeque's invocation of the privilege, apparently abandoning the intention to call him as a prosecution witness. (5 RT 1094, 6 RT 1355.) At that point, the court asked defense counsel what questions they would ask Charlie Trujeque at the guilt-innocence phase, and the parties essentially proceeded to address Charlie Trujeque's claims of privilege as if he were a defense witness. (6 RT 1357-1360.) Defense counsel said he would inquire about appellant's letters to Charlene (to rebut the implication of Elena Trujeque that they were inappropriate); about the murder of Charlie Trujeque's niece Vicki and how that affected his concerns about Charlene; and whether he was concerned about Charlene's drug use. (6 RT 1358-1360.) The prosecutor objected that the defense could not choose isolated areas of inquiry and foreclose cross-examination on others to which the privilege applies. (6 RT 1361-1362.)

The judge failed to inquire, and the prosecutor did not explain, what questions the prosecutor would have asked on cross-examination that would have incriminated Mr. Trujeque. Instead, the judge stated that he was afraid, that no matter how limited the inquiry of Mr. Trujeque, "any questions that you may ask which perhaps, in and of themselves, are not incriminatory but taken before this jury, taken in context with everything

that Mrs. Trujeque has said, can incriminate him." (6 RT 1362.) Ignoring defense counsel's proposal that the court allow him to question Charlie Trujeque outside the presence of the jury to determine if his answers really would be incriminating, the court accepted Charlie Trujeque's blanket invocation of privilege as to the guilt-innocence phase and excused him. (6 RT 1358, 1362.)

Where a criminal defendant's right to present witnesses in his behalf is in tension with the witness' Fifth Amendment rights, a trial court's failure to ensure the validity of the witness' assertion of the privilege and to endeavor to accommodate the parties' competing rights, is reversible error.

In *United States v. Goodwin, supra,* the defendant sought to compel the testimony of two inmates as witnesses to establish an entrapment defense to the offense of conspiring to smuggle drugs into a prison. (*United States v. Goodwin, supra,* 625 F.2d at p. 700.) Both witnesses stated their intention to invoke the Fifth Amendment, and the court appointed them counsel. (*Ibid.*) One attorney

> referred in a hypothetical manner to potential liability for unspecified criminal activities and other, secondary criminal liability for failure to inform the authorities of other unspecified criminal activities. [The other witness'] attorney stated without elaboration that his client feared conviction "with regard to matters directly or indirectly related to this case."

(*Ibid.*) The trial judge sustained the assertions of privilege and foreclosed any questioning by defense counsel. (*Ibid.*)

The court of appeals found the trial court's inquiry "was not sufficient to allow the judge to determine accurately the nature and scope of feared incrimination." (*United States v. Goodwin, supra,* 625 F.2d at p.

701.) The court of appeals cautioned:

> Even where the judge is satisfied about the validity of the Fifth Amendment claim, he must give heed to the proper scope of such a claim. A finding of such a valid claim does not normally foreclose all further questions.

(*Ibid.*) While the witness "need not reveal the details of his possible liability," such that it would defeat the privilege, "[h]e must give a description that is at least adequate to allow the trial judge to determine whether the fear of incrimination is reasonable and, if reasonable, how far the valid privilege extends." (*Id.* at p. 702.) Finding that each witness could have offered testimony relevant to the defense that would ***not*** have been incriminating, the court of appeals held the trial court had erred in sustaining the witnesses' overbroad assertions of the privilege in violation of the defendant's compulsory process rights. (*Ibid.*)

In this case, even if the defense were foreclosed from asking any questions concerning whether Charlie Trujeque solicited Facundo's murder, there were areas that could have been safely discussed without risk of incrimination. As the judge initially recognized, Charlie Trujeque's concerns about Charlene's relationship with Facundo would have been an appropriate area of inquiry (6 RT 1359) and was central to the defense claim of imperfect defense of another. As addressed separately in Argument VII, *infra,* the circumstances of Vicki's murder were, for the same reason, also highly relevant to Charlie Trujeque's concerns about Charlene and in turn to appellant's state of mind. Questions about appellant's letters to Charlene also would not have been incriminating.

Having ridiculed any defense suggestion that the Trujeques bore some responsibility for Facundo's death, the prosecutor could not

legitimately claim that *he* intended to elicit incriminating information on that subject on cross-examination. Thus, Mr. Trujeque's Fifth Amendment rights could have been adequately protected by limiting defense counsel's areas of inquiry.

**2. Penalty Phase**

The trial court's grant of a blanket privilege was even more egregious at the penalty phase where defense counsel made clear that he would not ask any questions at all about the Facundo murder, or any events after 1980, but sought only to elicit information concerning appellant's family history on his father's side. (10 RT 2597.) The questions proffered were entirely innocuous and could not possibly have incriminated Mr. Trujeque in connection with the Facundo murder.

Mr. Trujeque, however, invoked the privilege in response to questions such as how many siblings he had and whether appellant wet the bed as a youngster. (10 RT 2571, 2584-2585.) The trial judge's reasoning that "establishing familial relationships . . . could tie in with the contention that" the Trujeques "requested your client, in essence, to commit a homicide" is contrary to defense counsel's assurance that he would not ask any questions at penalty about the Trujeques' involvement in Facundo's murder. (10 RT 2586.) Moreover, the Trujeques' "familial relationship" with appellant was already a matter of record. The questions defense counsel sought to ask were about family *history*, and in particular about appellant's long-deceased father.

The court could readily have limited the scope of questioning, as defense counsel proposed, to avoid the topic of Mr. Trujeque's more recent relationship with appellant, ensuring that Mr. Trujeque's rights were not infringed in any way. (See *United States v. Goodwin, supra,* 625 F.2d at p.

702.) In this case, the violation is worse than in *Goodwin, supra*, because the trial judge *made no inquiry at all* into the validity of the witnesses' claims of privilege and its proper scope, yet with respect to the penalty phase, the testimony the defense sought to elicit was far more removed from the crime in which the witnesses ostensibly feared incrimination than was the case in *Goodwin*. (See *id.* at pp. 701-702; see also *United States v. Highgate, supra*, 521 F.3d at p. 594 [witness erroneously excused from testifying for defense where judge failed to "question if or why [the witness] feared prosecution or whether such a belief was reasonable," mistakenly believing witnesses did not "have to do anything more than say they're taking [the Fifth Amendment]"]; *United States v. Moore, supra*, 682 F.2d at p. 857 [trial court erred by allowing co-defendant who pled guilty to make blanket assertion of privilege when "[n]othing in the record indicates that [he] could have claimed privilege to essentially all relevant questions"].)

Moreover, the trial judge failed even to consider appellant's constitutional right to present a defense in mitigation of the death penalty. To the contrary, the trial court – urged on by the prosecutor – apparently believed a witness' assertion of privilege, however spurious, took automatic precedence over the defendant's rights. (See 10 RT 2578, 2586.)

Defining the legitimate scope of the privilege is essential, both to protect the compulsory process or confrontation rights of a defendant and to prevent the privilege from being used as a subterfuge for witnesses who, for reasons quite apart from self-incrimination, simply do not want to testify. (See *United States v. Neff, supra,* 615 F.2d at p. 1240 [tax protest nature of defense in prosecution for tax evasion suggested defendant's motivation was objection to paying taxes rather than genuine fear of self-

incrimination].)

The Supreme Court has made clear that, where there were significant areas of inquiry to which the witness could respond without incriminating himself, he is required to do so. In *Zicarelli*, *supra*, the Court rejected a claim of privilege by a reputed organized crime figure who was immunized and subpoenaed to appear before the New Jersey State Commission of Investigation to answer questions about organized crime and political corruption in New Jersey. Mr. Zicarelli refused to answer any of the questions put to him, despite the grant of immunity, claiming his answers could subject him to foreign prosecution. (*Zicarelli*, *supra*, 406 U.S. at p. 478.)

Referring to the specific questions posed and the context in which they were asked, the Court found it not "even remotely likely that their answers could afford 'a link in the chain of evidence' needed to prosecute appellant in a foreign jurisdiction." (*Zicarelli, supra*, 406 U.S. at p. 479, fn. 17.) The Court concluded:

> [A]ppellant was never in real danger of being compelled to disclose information that might incriminate him under foreign law. Even if appellant has international Cosa Nostra responsibilities, he could have answered this question truthfully without disclosing them. Should he have found it necessary to qualify his answer by confining it to domestic responsibilities in order to avoid incrimination under foreign law, he could have done so. To have divulged international responsibilities would have been to volunteer information not sought, and apparently not relevant to the Commission's investigation.

(*Id.* at pp. 480-481.) Accordingly, the New Jersey courts had properly ordered Zicarelli to testify. (*Ibid.*; see also *North River Ins. Co., Inc. v. Stefanou, supra,* 831 F.2d at p. 487 [trial court correctly ruled privilege was

not properly invoked where potential for criminal liability had been narrowed significantly by guilty plea and "[f]urther concerns could have been met by good-faith responses tailored to address specific allegations in the complaint"].)

The Trujeques may have had many reasons for not wanting to testify at the penalty phase, including irritation at defense counsel and/or appellant, but they could not have had a *reasonable* fear of self-incrimination based on the questions defense counsel proffered at the penalty phase.

### D. Elena Trujeque Waived Her Fifth Amendment Privilege by Testifying at the Guilt-Innocence Phase of the Trial

When the defense attempted to call Elena Trujeque to testify at the penalty phase, Deputy District Attorney Markus asserted that although Mrs. Trujeque had testified voluntarily at the guilt-innocence phase of the trial, incriminating "information [came] out" that "we didn't know before" and therefore she should not be subject to further questioning by the defense. (10 RT 2591.)

The prosecutor's argument that a witness may invoke the Fifth Amendment, after voluntarily testifying to incriminating facts, in order to avoid providing further incriminating details is exactly wrong. The Supreme Court has held, to the contrary, that "where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details." (*Rogers v. United States, supra*, 340 U.S. at p. 373.) "To uphold a claim of privilege" in such circumstances "would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." (*Id.* at p. 371.) Accordingly, it is well established that once a witness testifies voluntarily about a subject, she may not thereafter, in the same proceeding, invoke the privilege against

self-incrimination when questioned further about the matter. (*Id.* at p. 373; accord *Mitchell v. United States* (1999) 526 U.S. 314, 321; *People v. Williams* (2008) 43 Cal.4th 584, 615.)

Elena Trujeque's lawyer also argued that she could properly refuse to testify at the penalty phase because she could be vulnerable to a charge of perjury based on her testimony at the guilt-innocence phase, which was "very different than the tape that I heard and the reports that I read." (10 RT 2595.) This too was mistaken: "It is axiomatic that a person who has been called to testify as a witness at a trial, and who has sworn to tell the truth, is morally and legally bound to do so. It follows, by necessary implication, that a witness who testifies at a trial waives his privilege against self-incrimination as to any question which is thereafter asked to test the credulity of his testimony." (*People v. Hathcock* (1971) 17 Cal.App.3d 646, 649.) Thus, having taken the stand to testify, Elena Trujeque could not invoke the Fifth Amendment simply because she was impeached with evidence suggesting her testimony was inaccurate. Allowing a witness to do so, as this Court has recognized, would distort the fact-finding process of the trial. (*People v. Williams, supra,* 43 Cal.4th at p. 616.)[40]

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[40]In *People v. Williams, supra*, this Court held a witness was properly allowed to invoke the privilege at trial after testifying at the preliminary hearing and ratifying his testimony at a subsequent in-limine hearing. (*People v. Williams, supra,* 43 Cal.4th at pp. 614-618.) The court specifically emphasized, however, that the witness' ratification of his prior testimony, which defense counsel claimed constituted a waiver of the privilege, occurred in a special hearing and not "*at trial* – a forum in which a party cannot be permitted to distort the factfinding process by allowing witnesses to give some testimony on a topic but to assert the privilege against self-incrimination to bar related questioning." (*Id.* at pp. 617-618

In any event, however, defense counsel specified he did not intend to question Elena Trujeque further about any of the circumstances surrounding the Facundo murder and her or her husband's dealings with appellant in connection with it. Counsel instead intended to inquire only about Trujeque family history and particularly about appellant's father.

## E. The Trial Court's Erroneous Ruling Allowing an Overbroad Invocation of the Privilege against Self-Incrimination was not Harmless Beyond a Reasonable Doubt where it Prevented the Jury from Hearing Evidence in Support of Appellant's Guilt-Innocence Phase Defense and Excluded Important Mitigating Evidence from the Jury's Consideration

Because the improper blanket assertion of privilege by defense witnesses violated appellant's constitutional rights to present a defense and to present evidence in mitigation of the death penalty, it is respondent's burden under *Chapman v. California* (1967) 386 U.S. 18, 24, to prove beyond a reasonable doubt that the errors did not contribute to appellant's convictions or sentence of death. (*Crane v. Kentucky, supra,* 476 U.S. at p. 691, citing *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684; *Hitchcock v. Dugger, supra,* 481 U.S. at pp. 398-399 [absent state's showing of harmlessness, exclusion of mitigating evidence requires reversal of death sentence].)

### 1. Guilt-Innocence Phase

The trial court's error in allowing Charlie Trujeque to make a blanket assertion of privilege at the guilt-innocence phase of the trial was

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[original italics].) Elena Trujeque's testimony did occur at trial. Also, whereas the witness in *Williams* had not had the advice of counsel before testifying at the preliminary hearing (*Id.* at p. 611), Elena Trujeque was advised by counsel before she elected to testify at the guilt-innocence phase.

not harmless beyond a reasonable doubt because the information elicited from him would have supported the defense theory of manslaughter based on unreasonable defense of another. As such, this error must be considered cumulatively with the trial court's error in refusing to allow any evidence about the murder of appellant's cousin Vicki by her abusive boyfriend – the major topic on which appellant had wanted to question Charlie Trujeque – and the court's refusal to instruct on unreasonable defense of another. (See Arguments V and VII, *infra*.) Had defense counsel been able to question Charlie Trujeque about Vicki's murder and how it had affected his and appellant's concerns for Charlene's safety, the defense would have had stronger grounds for an instruction on imperfect defense of another, and appellant could well have been convicted of manslaughter rather than first degree murder.

Defense counsel also sought to elicit Charlie Trujeque's opinion that appellant's letters to Charlene Trujeque were not inappropriate, thus rebutting the prosecution's theory of appellant's motive to kill Facundo. (See 7 RT 1790.) Elena Trujeque's credibility on this point was undercut by Charlene's testimony that she did not find the letters inappropriate, and also by Detective Durazo's testimony that Elena Trujeque had not expressed any concern about the letters until the week before trial. (5 RT 1055, 6 RT 1491.) Charlie Trujeque's testimony would have tipped the scales and undercut the only motive, other than protecting Charlene from Facundo's violent assaults, that the prosecution offered.

**2. Penalty Phase**

The prosecution objected to defense counsel making a detailed proffer of all the questions he would have asked the Trujeques at the penalty phase, and the trial judge agreed it was not necessary. (10 RT 2662-

2665.) Counsel was able, however, to make a general proffer of the types of questions that he intended to ask the Trujeques, including about the circumstances in which Mr. Trujeque grew up with appellant's father, Manuel; how appellant's father had been raised; whether Manuel and his siblings had been placed in foster care; information about Manuel's military service; how he became hooked on heroin in the military and about his addiction; about Manuel Trujeque's temper and his domestic violence against appellant's mother, including while she was pregnant with appellant; and about the circumstances of his death from a drug overdose in 1968. Counsel also wanted to ask what Mr. Trujeque had observed about appellant's problems as a child. (10 RT 2572, 2584-2585.)

The effect of the trial court's ruling allowing the Trujeques to make a blanket assertion of privilege at the penalty phase was thus to exclude critical mitigating evidence. In particular, the defense was able to present very little evidence about appellant's father and none about his father's family history.

The United States Supreme Court has emphasized repeatedly that the Eighth Amendment requires relevant mitigating evidence in capital cases to be construed "in the most expansive terms," including any "evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*Tennard v. Dretke*, *supra*, 542 U.S. at p. 284, quoting *McKoy v. North Carolina* (1990) 494 U.S. 433, 440; accord *Smith v. Texas* (2004) 543 U.S. 37, 44.)

Family history evidence of parental drug addiction and criminality, domestic violence, and abandonment, such as defense counsel sought to introduce here through the Trujeques' testimony, has been found repeatedly to be constitutionally relevant mitigating evidence, which the defendant is

entitled to present and which the sentencer must consider. (See, e.g., *Eddings v. Oklahoma*, *supra*, 455 U.S. at pp. 112-114 [Eighth Amendment violated where sentencing judge refused to consider evidence of defendant's troubled youth]; *Hitchcock v. Dugger, supra*, 481 U.S. at pp. 397-399 [Eighth Amendment violated where instruction may have prevented jury from considering nonstatutory mitigating evidence including family history of poverty and deprivation]; *Williams v. Taylor, supra,* 529 U.S. at pp. 395-396 [trial counsel constitutionally ineffective in failing to investigate and uncover mitigating evidence of defendant's family history of parental alcoholism, abuse and neglect]; *Wiggins v. Smith, supra*, 539 U.S. at p. 525 [trial counsel constitutionally ineffective in failing to investigate client's social history.])

Indeed, in *Smith v. Texas*, *supra,* the mitigating evidence which the Texas state courts had erroneously found to be constitutionally irrelevant and insignificant included evidence similar to what appellant sought to elicit below: that the defendant's "father was a drug addict who was involved with gang violence and other criminal activities, and regularly stole money from family members to support a drug addiction." (*Smith v. Texas, supra*, 543 U.S. at p. 41.) Because the jury instructions did not make clear how the jury was to consider and give effect to the defendant's mitigating evidence, the Supreme Court reversed the death sentence. (*Id.* at pp. 47-48.)

In this case, the jury was prevented even from *hearing* appellant's mitigating evidence concerning his father because the trial court failed to give any weight whatsoever to appellant's Eighth Amendment rights, instead sustaining a completely spurious claim of privilege, promoted by the prosecutor, on the part of the witness in the best position to provide the mitigating evidence.

Respondent cannot prove beyond a reasonable doubt that the unconstitutional exclusion of mitigating evidence due to the trial court's erroneous ruling did not contribute to the death verdict; it is therefore invalid. (*Hitchcock v. Dugger, supra,* 481 U.S. at pp. 398-399.)

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## V.

## THE TRIAL COURT ERRED BY REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS ON IMPERFECT DEFENSE OF ANOTHER OR NECESSITY AS TO THE FACUNDO MURDER COUNT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The trial court improperly denied appellant's requested instruction on imperfect defense of others in violation appellant's right to present a defense, his right to a jury trial, and his right to a reliable penalty determination, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the California Constitution. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const. art. I §§ 15, 16.)

### A. Relevant Facts

As discussed in Argument IV, *supra*, it was undisputed that Max Facundo was violently abusive to appellant's cousin Charlene Trujeque. Facundo beat Charlene severely on a regular basis, leaving her with black eyes and visible bruises on multiple occasions. (5 RT 1018-1019, 1048, 1253, 6 RT 1296, 1298.) Charlene's parents, fearing for her life, sought help from the police who said they could not intervene unless Charlene herself asked for their assistance, but Charlene would not leave Facundo or go to the police. (5 RT 1254, 6 RT 1297, 1300.)

Defense counsel argued that the jury could find that appellant had, if not a reasonable fear, then at least an *un*reasonable fear that his cousin was in imminent danger of great bodily harm, given that Charlene's parents told appellant that they were afraid Facundo would kill Charlene and that

Facundo had, on many occasions, inflicted great bodily harm on Charlene,[41] beating her savagely and leaving her bloodied and bruised. Moreover, at the time of the stabbing, Charlene had a black eye and a split lip as a result of Facundo's beatings, and Facundo and Charlene were both using PCP[42] – which, defense counsel noted, frequently triggered the beatings. (6 RT 1557-1560, 1562-1565.) Defense counsel accordingly requested the series of jury instructions on imperfect defense of others, CALJIC Nos. 5.13[43], 5.14[44], 5.16[45] and 5.17.[46] (6 RT 1560-1561.) The defense also requested

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[41]Abrasions, lacerations and bruising can constitute great bodily injury. (*People v. Escobar* (1992) 3 Cal.4th 740, 752.)

[42]Phenylcyclohexyl piperidine is a hallucinogenic street drug, originally a legal anesthetic, that induces delusions, anxiety, paranoia and violent hostility. (Brenner, *Toxicity, Hallucinogens -PCP* (April 14, 2009) <http://emedicine.medscape.com/article/1010821-overview> [as of March 13, 2012].)

[43]The defense proposed instruction, CALJIC No. 5.13, read:

> Homicide is justifiable and not unlawful when committed by any person in the defense of [himself] [herself] [(his] [her] ] if [he] [she] actually and reasonably believed that the individual killed intended to commit a forcible and atrocious crime and that there was imminent danger of that crime being accomplished. A person may act upon appearances whether the danger is real or merely apparent.

(5 CT 1210.)

[44]The proposed instruction, CALJIC No. 5.14, read:

> The reasonable ground of apprehension does not require actual danger, but it does require (1) that the person about to kill another be confronted by the appearance of a peril such as has been mentioned; (2) that the appearance of peril arouse in [his] [her] mind an actual belief and fear of the existence of

that peril; (3) that a reasonable person in the same situation, seeing and knowing the same facts, would justifiably have, and be justified in having, the same fear; and (4) that the killing be done under the influence of that fear alone.

(5 CT 1211.)

[45]Proposed defense instruction, CALJIC No. 5.16, defined a "forcible and atrocious crime" as follows:

> A forcible and atrocious crime is any felony that by its nature and the manner of its commission threatens, or is reasonably believed by the defendant to threaten, life or great bodily injury so as to instill in [him] [her] a reasonable fear of death or great bodily injury.]
>
> [Murder] [Mayhem] [Rape] [Robbery] is a forcible and atrocious crime.

(5 CT 1213.)

[46]The proposed instruction, CALJIC No. 5.17, concerning an unreasonable belief in the need to defend another read 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]

instructions on mistake of fact[47] and necessity, CALJIC Nos. 4.35[48] and 4.43.[49] (6 RT 1556-1557.) The prosecutor opposed giving any of the

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> [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his] [her] adversary's [use of force], [attack] [or] [pursuit].]

(5 CT 1214.)

[47]Imperfect defense of self or others is essentially a mistake-of-fact defense applied to the circumstances necessitating self-defense or defense of another. (See *In re Christian S.* (1994) 7 Cal.4th 768, 779, fn.3 [imperfect self-defense "is based on a defendant's assertion that he lacked malice under Penal Code section 188 because he acted under an unreasonable mistake of fact—that is, the need to defend himself against imminent peril of death or great bodily harm."]) The same is true for imperfect defense of another.

[48]CALJIC No. 4.35 concerning mistake of fact provides:

> An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime.
>
> Thus a person is not guilty of a crime if [he] [she] commits an act or omits to act under an actual [and reasonable] belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful.

(5 CT 12085 CT 1208.)

[49]CALJIC No. 4.43 concerning the defense of necessity provides:

> A person is not guilty of a crime when [he] [she] engages in an act, otherwise criminal, through necessity. The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the elements of this defense, namely:
> 1. The act charged as criminal was done to prevent a significant and imminent evil, namely, [a threat of bodily

instructions requested by the defense, arguing that Charlene Trujeque was not in imminent danger from Facundo, so that neither the defense of necessity nor the doctrine of imperfect defense of another was applicable. (6 RT 1561-62.) Defense counsel, however, maintained that there was sufficient evidence to warrant a jury instruction. (6 RT 1559-1560, 1562-1563.)

The judge responded that "[t]he totality of the evidence that has been presented, including the interview with Mr. Trujeque by Detective Durazo, I think tends to negate these instructions." (6 RT 1561.) The judge insisted "if that fear [of imminent harm] was present, it certainly did not extend to the degree of committing a homicide" and refused all of the requested instructions. (6 RT 1562-1565, 1713.)

**B. Applicable Law**

As noted above, it has long been established that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the

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harm to oneself or another person]
[or] [_____];
2. There was no reasonable legal alternative to the commission of the act;
3. The harm caused by the act was not disproportionate to the harm avoided;
4. The defendant entertained a good-faith belief that [his] [her] act was necessary to prevent the greater harm;
5. That belief was objectively reasonable under all the circumstances; and
6. The defendant did not substantially contribute to the creation of the emergency.

(5 CT 1209.)

Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324-25, citing *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [quoting *California v. Trombetta* (1984) 467 U.S. 479, 485].)

In *Crane v. Kentucky, supra*, the Supreme Court held specifically that the defendant must be permitted to present to the jury evidence concerning the circumstances in which his confession was elicited, in support of his contention that his confession was not voluntary, even though the trial court had denied a pretrial motion to suppress on the same ground, "because 'questions of credibility, whether of a witness or of a confession, are for the jury.'" (*Crane v. Kentucky, supra,* 476 U.S. at pp. 687-688, quoting *Jackson v. Denno* (1964) 378 U.S. 368, 386, fn.13.)

The right to present a defense is thus the right to have the jury, not the judge, pass on the credibility and validity of the defense. (See *Carella v. California* (1989) 491 U.S. 263, 267-268 (conc. opn. of Scalia, J.) [use of mandatory presumptions is unconstitutional in part "because it 'invade[s] [the] fact-finding function' which in a criminal case the law assigns solely to the jury," quoting *Sandstrom v. Montana* (1979) 442 U.S. 510, 522-523].) The Sixth Amendment jury trial guarantee is a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," reflecting a fundamental "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 155-156.)

The right to present a defense necessarily includes the right to have the jury instructed on the defense relied upon, for "the right to present a defense would be meaningless were a trial court completely free to ignore that defense when giving instructions." (*Taylor v. Withrow* (6th Cir. 2002)

288 F.3d 846, 851-852 [refusal to instruct on self-defense]; see also *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739 [reversal required where trial court's rulings prevented defendant from arguing his theory of defense to jury, violating defendant's rights to due process and effective assistance of counsel]; *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [in the context of the record as a whole, erroneous or denied instructions may "so infect[] the entire trial that the resulting conviction violates due process," quoting *Cupp v. Naughten* (1973) 414 U.S. 141, 147].)

As a matter of California law as well, "a defendant has a constitutional right to have the jury determine every material issue presented by the evidence," and "an erroneous failure to instruct on a lesser included offense constitutes a denial of that right." (*People v. Prince* (2007) 40 Cal.4th 1179, 1264, quoting *People v. Elliot* (2005) 37 Cal.4th 453, 475; accord *People v. Lewis* (2001) 25 Cal.4th 610, 645; *People v. Wickersham* (1982) 32 Cal.3d 307, 335 (*Wickersham*), disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200 (*Barton*)[50]; *People v. Sedeno* (1974) 10 Cal.3d 703, 720, overruled on other points in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 and in *People v. Breverman*

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[50]*Barton* disapproved *Wickersham* insofar as it treated unreasonable self-defense as a "defense" rather than as a form of the lesser included offense of voluntary manslaughter and concluded that the trial court was not obligated to instruct the jury on the theory because the defense had not requested the instruction, and it was inconsistent with the accident theory on which the defense relied at trial. (*People v. Barton, supra*, 12 Cal.4th at p. 200.) *Barton* held that a trial court had a duty to instruct sua sponte on unreasonable self-defense when supported by substantial evidence, regardless of the theory of defense. (*Id.* at pp. 200-201.) Because the defense in this case did rely on a theory of unreasonable defense of others and specifically requested the instruction, the defense was entitled to the instruction under either view.

(1998) 19 Cal.4th 142, 176 (*Breverman*).)

"In addition, 'a defendant has a right to an instruction that pinpoints the theory of the defense'" when "supported by substantial evidence." (*People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421& fn. 22; accord *People v. Ward* (2005) 36 Cal.4th 186, 214; *People v. Mincey* (1992) 2 Cal.4th 408, 437.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008 [citations omitted].)

The trial court "should not, however, measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses," for that task is "exclusively relegated to the jury." (*People v. Flannel, supra,* 25 Cal.3d at p. 684; accord *People v. Breverman, supra,* 19 Cal.4th at p. 162; *People v. Marshall* (1996) 13 Cal.4th 799, 847; *People v. Wickersham, supra,* 32 Cal.3d at p. 324.) The jury need not credit all of a witness' testimony, including the defendant's,[51] but may choose to believe only part of it. (See *People v. Geiger* (1984) 35 Cal.3d 510, 531, overruled on other grounds in *People v. Birks* (1998) 19 Cal.4th 108, 113; *People v. Thornton* (1974) 11 Cal.3d 738, 755, disapproved on other grounds in *People v. Flannel, supra,* 25 Cal.3d at p. 685, fn.12; *People v. Ceja* (1994) 26

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[51]The defense may also call into question the defendant's out-of-court statements: "Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be 'insufficiently corroborated or otherwise ... unworthy of belief.'" (*Crane v. Kentucky, supra,* 476 U.S. at p. 689, quoting *Lego v. Twomey* (1972) 404 U.S. 477, 485-486.)

Cal.App.4th 78, 86, abrogated on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82 [unintentional killing in imperfect self-defense is voluntary not involuntary manslaughter].) Thus, "substantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself." (*People v. Breverman, supra*, 19 Cal.4th at pp. 162-163; accord *People v. Elize* (1999) 71 Cal.App.4th 605, 615 ["a lesser included instruction is required even though the factual premise underlying the instruction is contrary to the defendant's own testimony, so long as there is substantial evidence in the entire record to support that premise"]; see also *Mathews v. United States* (1988) 485 U.S. 58, 64-65 [defendant entitled to instruction on entrapment defense even where he denied one element of offense], citing *Stevenson v. United States* (1896) 162 U.S. 313, 322-323 [reversible error to refuse voluntary manslaughter instruction based on provocation though primary defense was self-defense]; *United States v. Goldson* (2d Cir. 1992) 954 F.2d 51, 55 [defendant entitled to mistake-of-fact instruction in prosecution for assaulting police officer though theory was inconsistent with defendant's testimony]; *United States v. Sotelo-Murillo* (9th Cir. 1989) 887 F.2d 176, 182 [defendant entitled to instruction on entrapment as "weight and credibility of the conflicting testimony are issues properly resolved by the jury"].)

The jury is also "not required to make a binary choice between the prosecution evidence and the defense evidence; if the evidence as a whole would support a third scenario, the trial court may be required to give instructions on that scenario." (*People v. Hernandez* (2003) 111 Cal.App.4th 582, 589-90, citing *People v. Wickersham, supra*, 32 Cal.3d at p. 328.) Finally, any "[d]oubts as to the sufficiency of the evidence to

warrant instructions should be resolved in favor of the accused." ( *People v. Flannel, supra,* 25 Cal.3d at p. 685, fn. 12.)

### C. The Trial Court Erred in Refusing to Instruct on Unreasonable Defense of Others

In *People v. Randle* (2005) 35 Cal.4th 987, 997 (*Randle*), overruled on other grounds in *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1201, this Court held that the trial court erred when it refused to give the defendant's requested instructions on imperfect defense of others. As an initial matter, the court clarified that the doctrine of imperfect defense of others is recognized in California, noting that it had found previously, in *People v. Michaels* (2002) 28 Cal.4th 486, 529 (*Michaels*), that the doctrine was not sufficiently well established in 1990 to give rise to a sua sponte duty to instruct on it. (*People v. Randle, supra*, 35 Cal.4th at p. 996.) The *Michaels* court had recognized, however, that the doctrine of imperfect defense of others "follows logically from the interplay between statutory and decisional law" and such an instruction would be properly given if requested, as Randle had done.[52] (*Ibid.*, quoting *People v. Michaels, supra,* 28 Cal.4th at p. 530.)

As the *Randle* court explained, imperfect defense of others, like

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[52]The *Michaels* court also observed that the doctrine of imperfect defense of others "was of 'doubtful' applicability, given the facts of the case": the person Michaels claimed to be protecting – his girlfriend Christina – was incarcerated at the time of the killing, and the victim, Christina's mother, from whom Michaels was purportedly protecting Christina, was asleep in her apartment when she was killed. Thus, even if Michaels' girlfriend was due to be released "the next day it is doubtful that the facts would show that defendant believed, reasonably or unreasonably, that any threatened danger to Christina was 'imminent.' " (*People v. Randle, supra*, 35 Cal.4th at pp. 995-996, quoting *People v. Michaels, supra*, 28 Cal.4th at pp. 530-531.).

imperfect self-defense, "obviates [the element of] malice because that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was necessary to avoid . . . death or serious injury at the victim's hand."[53] (*People v. Randle, supra*, 35 Cal.4th at p. 995.) Thus, "one who kills in imperfect defense of others-in the actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury-is guilty only of manslaughter." (*Id.* at p. 997.) The Court rejected the so-called "alter ego" rule, holding that reasonableness was to be determined from the defendant's standpoint, not from that of the person he was trying to protect. (*Id.* at pp. 999-1000.)

In *Randle*, the defendant and his cousin, Byron, were pursued by the victim, Robinson and his cousin, Lambert, after stealing stereo equipment from a car belonging to Lambert. (*People v. Randle, supra*, 35 Cal.4th at p. 991.) Robinson and Lambert caught Byron, recovered the stolen stereo equipment, then took turns beating Byron. (*Ibid.*) Randle, hearing Byron calling for help, doubled back to assist him. (*Id.* at p. 992.) Randle said he overheard Robinson state his intention to kill Byron. Randle yelled at Robinson to "get off my cousin." (*Ibid.*) When Robinson continued beating Byron, Randle shot him. Randle admitted continuing to shoot at Byron as he ran away. (*Ibid.*) Byron later died of his wounds. (*Id.* at p.

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[53]Imperfect defense of others, like imperfect self-defense, "is not an affirmative defense, but a description of one type of voluntary manslaughter." (*People v. Michaels, supra,* 28 Cal.4th. at p. 529.) Once the doctrine is sufficiently well-established, it "should be considered a general principle for purposes of jury instruction." (*In re Christian S., supra,* 7 Cal.4th at p. 774, quoting *People v. Flannel, supra*, 25 Cal.3d at p. 682 [holding imperfect self-defense to be so established].) Because the instruction was requested in this case, however, the distinction does not matter.

993.) The court found that the error in refusing to give the requested instruction on imperfect defense of another was not harmless, particularly given that the jury had deliberated for five days even without the instruction on imperfect defense of others. (*Id.* at p. 1004.)

In this case, as in *Randle*, the defense specifically requested instructions on imperfect defense of others. (6 RT1561; 5 CT 1214.) There was substantial evidence in the record to support giving the instruction: it was undisputed that Facundo had violently abused Charlene Trujeque on numerous occasions and that her relatives were afraid Facundo would kill her.

The trial judge denied the instruction on the ground that Facundo posed no *imminent* threat to Charlene. (6 RT 1561-1563.) In focusing on the latter point, the court stressed the portion of CALJIC No. 5.14 stating "that a *reasonable* person in the same situation, seeing and knowing the same facts, would justifiably have, and be justified in having, the same fear" and CALJIC No. 5.13 stating that the defendant must have "actually and *reasonably* believed" that the victim was about to commit "a forcible and atrocious crime" on another person, and there was imminent danger of the crime being accomplished. (6 RT 1562, 1564 [empasis added].) The trial judge ignored that the defense had also requested CALJIC No. 5.17, concerning imperfect defense of another, based on an "*unreasonable* belief in the necessity to defend against imminent peril to life or great bodily injury." (6 RT 1561; 5 CT 1214.)

The jury should have been permitted to decide whether appellant was guilty of the lesser offense of voluntary manslaughter because he *unreasonably* believed his cousin Charlene was in imminent danger from her abusive partner. Certainly the evidence in this case was far more

substantial than in *Michaels*, in which this Court stated in dicta that the doctrine of imperfect defense of others was of "doubtful" applicability. (*People v. Michaels*, *supra,* 28 Cal.4th at pp. 530-531.) In *Michaels*, the defendant's girlfriend was incarcerated, away from her allegedly abusive mother. The mother, moreover, was asleep in bed when the defendant killed her. (*Ibid.*)

In this case, besides the history of violence and the fear that Charlene's parents had expressed, Charlene had a black eye, recently inflicted by Facundo, on the evening of the stabbing. (5 RT 1019, 1022.) Moreover, Charlene was with Facundo at the time, not miles away, and Facundo had just smoked a large amount of PCP, which tended to make him violent. (5 RT 1018, 1024-1026.) As defense counsel argued, these facts were sufficient to present a question for the jury, particularly as to whether appellant could have held an *unreasonable* belief that Charlene was in imminent peril.[54] (6 RT 1562-1563.)

The trial court's rationale that the requested instructions were inappropriate because the defense theory was inconsistent with appellant's own statement to police and his testimony is also directly contrary to established case law. (6 RT 1561.) This Court has held that an instruction on a lesser included offense may or even must at times be given when inconsistent with the defendant's own testimony, because the jury may choose to believe only part of the defendant's testimony, or to disbelieve it

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[54]As discussed above, the factual basis for the instructions would have been even stronger if the trial court had not erroneously excluded the evidence that appellant's cousin Vicki had recently been murdered by an abusive boyfriend, heightening the Trujeques' fears that Charlene would meet the same fate. (See Argument VII, *infra.*)

altogether. (See, e.g., *People v. Breverman, supra*, 19 Cal.4th at pp. 162-163 [trial court must instruct on lesser included offenses supported by substantial evidence "even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued"]; *People v. Barton, supra*, 12 Cal.4th at pp. 201-204 [trial court properly instructed on provocation and imperfect self-defense, over defendant's objection, although defendant testified shooting was an accident]; accord *People v. Elize*, *supra,* 71 Cal.App.4th at pp. 615-616; see also *Mathews v. United States, supra,* 485 U.S. at pp. 64-65 [defendant entitled to instruction on entrapment defense even where he denied one element of offense]; *United States v. Goldson, supra,* 954 F.2d at p. 55 [defendant entitled to mistake-of-fact instruction in prosecution for assaulting police officer though theory was inconsistent with defendant's testimony].)

In this case, defense counsel urged the jury not to credit appellant's statements, in which he made inflammatory remarks about his state of mind, because appellant was actively seeking the death penalty and therefore had an incentive to exaggerate his own culpability and to undermine an otherwise plausible defense. (7 RT 1811-1812, 1819, 1821-1826, 1829.) It would therefore have been particularly reasonable for the jury to discount appellant's own statements in this case.

### D. The Trial Court Erred in Refusing the Requested Instructions on the Defense of Necessity

The defense alternatively sought instructions on mistake of fact and the necessity defense. (6 RT 1556-1559.) The defense of necessity "was first judicially sanctioned" in California in 1974, in *People v. Lovercamp* (1974) 43 Cal.App.3d 823, where it was recognized as a defense to a nonviolent prison escape. (*People v. Heath* (1989) 207 Cal.App.3d 892,

900-901.) As the *Heath* court explained:

> By definition, the necessity defense is founded upon public policy and provides a justification distinct from the elements required to prove the crime. (*People v. Condley* [1977] 69 Cal.App.3d [999,] 1013.) The situation presented to the defendant must be of an emergency nature, threatening physical harm, and lacking an alternative, legal course of action. (*People v. Weber* (1984) 162 Cal.App.3d Supp. 1, 5.) The defense involves a determination that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged. ( *People v. Richards* (1969) 269 Cal.App.2d 768, 774-775.) Necessity does not negate any element of the crime, but represents a public policy decision not to punish such an individual despite proof of the crime. (*People v. Condley, supra*, 69 Cal.App.3d 999, 1009-1013; *People v. Beach* (1987) 194 Cal.App.3d 955, 973.)

(*Ibid.*) The necessity instruction the defense requested, CALJIC No. 4.43, includes the requirements that "the defendant entertained a good-faith belief that his act was necessary to prevent the greater harm" and "[t]hat belief was objectively reasonable under all the circumstances."[55]

Defense counsel argued that the instruction was appropriate:

> [b]ased upon what the uncle and aunt has told him, the fact that both the boyfriend and his cousin were high, that the family had gone to the police and was told the police could do nothing, that the defendant had a good-faith belief that his act was necessary to prevent a greater harm; and that belief was

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[55]In *People v. Coffman* (2004) 34 Cal.4th 1, this Court indicated that the defenses of necessity or duress should not apply in homicide cases to justify the killing of innocent third parties, expressing concern that such a defense could be deployed frequently in gang killings. (*Id.* at pp. 100-101, quoting *People v. Anderson* (2002) 28 Cal.4th 767, 777-778.) Those concerns do not apply here. Facundo was not innocent – rather, the gravamen of appellant's defense was that he sought to protect Charlene from Facundo's potentially deadly assaults.

> objectively reasonable that the harm was going to occur. Both the uncle and aunt believed that also. The defendant did nothing to contribute to the creation of the emergency, i.e., the boyfriend and the girlfriend being together.

(6 RT 1557.) Defense counsel emphasized, "[s]pecifically when the mother said they went to the police and that the police said we're sorry, there is nothing they can do, I think that 4.43 is . . . proper in this fact pattern." (*Ibid.*)[56]

The prosecutor opposed the instruction on the ground that the threat to Charlene was not sufficiently immediate. However, as the *Heath* court explained, the immediacy requirement for necessity is less than for the defense of duress. Unlike duress, "[t]he necessity defense . . . contemplates a threat in the immediate future," rather than a present threat, so that the defendant "has the time, however limited, to consider alternative courses of conduct." (*People v. Heath, supra*, 207 Cal.App.3d at p. 901.)

The prosecutor argued that "the court needs to make a factual call as to whether or not the degree of harm was imminent." (6 RT 1559.) With respect to the immediacy of the danger Facundo posed to Charlene, the parties then vigorously disputed whether Charlene had last been "bruised or injured . . . two, maybe three weeks before" the incident or whether she had fresh, visible injuries from Facundo at the time of the stabbing. (6 RT 1559-1560.) This is precisely the sort of factual dispute that should have

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[56]This case is distinguishable from *People v. Patrick* (1981) 126 Cal.App.3d 952, 961-962, in which the appellate court held "[f]or any person to successfully invoke the defense of necessity, he must personally possess a reasonable belief in the justifiability of his actions." Appellant was not relying solely on his aunt and uncle's information but also on his own observations of Charlene's plight. (See, e.g., 6 RT 1562-1565, 7 RT 1589-1590.)

been resolved by a properly instructed jury rather than by the judge. (*People v. Lovercamp, supra,* 43 Cal.App.3d at p. 832 ["Whether any of the conditions requisite to this defense exist is a question of fact to be decided by the trier of fact after taking into consideration all the surrounding circumstances"].)

### E. The Denial of the Requested Instructions Violated Appellant's Constitutional Rights and Was Not Harmless Beyond a Reasonable Doubt

This Court held in *People v. Randle, supra*, 35 Cal.4th at p. 1003, that the failure to give the requested instruction on imperfect defense of others was a state law error only and thus properly evaluated under *People v. Watson* (1956) 46 Cal.2d 818, 836.[57] Appellant submits, however, that refusing his requested instruction on imperfect defense of another violated his federal constitutional rights to present a defense, to have a jury decide issues of fact and to determine each element of the charged offense, and his right to a reliable penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.) The error must therefore be evaluated under the more demanding standard of *Chapman v. California* (1967) 386 U.S. 18, 24.

The error was not harmless beyond a reasonable doubt. The central defense at trial was that appellant had acted in a misguided effort to protect Charlene Trujeque from her violently abusive boyfriend. The evidence established that Facundo savagely beat Charlene on a regular basis; her parents were convinced that Facundo would kill Charlene and expressed that fear to appellant after the police refused to intercede; Charlene had a

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[57]The court reversed under the *Watson* standard, however, and did not address any federal constitutional issues. (*See People v. Randle, supra,* 35 Cal.4th at p. 1003.)

black eye recently inflicted by Facundo at the time of the murder; Facundo had just smoked PCP; and he was with Charlene at the time. Absent an instruction on imperfect defense of another, this evidence may have served only to establish motive and premeditation, the jury being unaware that appellant's *unreasonable* belief that Charlene was in imminent danger from Facundo would actually negate malice. (*People v. Randle, supra,* 35 Cal.4th 996-997.) If properly instructed that it could consider this evidence in defendant's favor in rendering its verdict, the jury could well have convicted appellant of the lesser offense of manslaughter or at the very least settled upon a compromise verdict of second degree murder.

Even applying the *Watson* standard, there is a reasonable probability that the jury would have convicted appellant of a lesser offense if they had been given a vehicle to take into account the danger that Facundo posed to Charlene Trujeque. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

The trial court's error also undermined the reliability of the death sentence in violation of the Eighth Amendment, because the refusal to instruct on imperfect defense of another prevented the defense from being able to develop fully and submit to the jury a defense that would have been consistent with a penalty phase theory of mitigation based on a mistaken belief in justification. (See Pen. Code §190.3, factor (f); White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care* (1993) 1993 U. Ill. L. Rev. 323, 357 [a capital defense attorney must develop a consistent theory to be used at the guilt and penalty phases].)

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## VI.

## THE TRIAL COURT ALSO ERRED IN REFUSING TO INSTRUCT ON NECESSITY OR IMPERFECT DEFENSE OF ANOTHER AS TO COUNT II, THE APODACA KILLING

Argument V above is incorporated by reference herein. After appellant had testified, defense counsel also asked that the jury be instructed on necessity, CALJIC No. 4.43, and imperfect defense of others, CALJIC Nos. 5.13, 5.14, 5.15, 5.16, and 5.17, with respect to count two, the Apodaca murder, because appellant had come to the aid of his friend Jesse Salazar who was losing a fight with Apodaca. (7 RT 1713-1718.) The prosecutor disputed whether there was any threat of immediate harm within the meaning of CALJIC No. 4.43. (7 RT 1713.) The court also questioned whether there was "no reasonable alternative" to appellant's act and whether the harm done was disproportionate to the harm avoided, as required for the defense of necessity. (7 RT 1713.)

With respect to the instructions on defense of others, the judge questioned whether Apodaca was committing a "forcible and atrocious crime" that would justify appellant's use of force. (7 RT 1717.) Defense counsel argued that Apodaca was committing "a 245" – an assault with a deadly weapon or force likely to produce great bodily injury – on Salazar, justifying appellant's intervention. (7 RT 1718.) The prosecutor maintained the evidence was insufficient, and appellant had not done "anything other than back up a premeditated murder" by Salazar. (7 RT 1719, 1721.) Ultimately, the court instructed the jury on voluntary manslaughter due to provocation or sudden quarrel, but not as to imperfect defense of another. (7 RT 1734; 5 CT 1150A-1156 [CALJIC Nos. 8.40, 8.42, 8.44, 8.50, 8.72, 8.73, and 8.74].) The jury returned a verdict of

second degree murder. (7 RT 1855-1856; 4 CT 1000.)

Defense counsel maintained that appellant, in his quest to obtain a death sentence, had exaggerated his role and that he had at most inflicted the minor wound on the back of Apodaca's neck in his attempt to aid Salazar.[58] (7 RT 1807.) Since the jury was free to disbelieve parts of appellant's testimony (*People v. Breverman, supra*, 19 Cal.4th at pp. 162-163; *People v, Elize, supra*, 71 Cal.App.4th at p. 615), it could, as defense counsel argued, have found that appellant had acted in unreasonable defense of his friend Salazar and was thus guilty only of voluntary manslaughter – the same offense of which the more culpable Salazar had been convicted. (2 CT Supp.Two 342-348, 350.)

Again, the refusal to instruct on imperfect defense of another violated appellant's federal constitutional rights to present a defense, to

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[58]As defense counsel emphasized, appellant's claim that he had stabbed Apodaca several times in the left side of his body with a screwdriver was inconsistent with the physical evidence. (6 RT 1574, 7 RT 1605, 1625-1627; 2 CT 532.) Apodaca was killed by a single, round, four-inch-deep puncture wound at the "jugular notch" of his upper chest. (5 RT 1179-1181.) The pathologist testified the wound resembled one inflicted by an ice pick, but much thicker. (5 RT 1179-1180, 1205-1206.) Apodaca had other round to oval-shaped abrasions to his chest and abdomen that were consistent with the instrument that inflicted the fatal wound striking at an angle and possibly being blocked by clothing so that it did not penetrate the skin. (5 RT 1186.) One of these wounds was three to four inches left of the midline (5 RT 1242), but there were no wounds to Apodaca's side. The only other wound that penetrated the skin was a single, very shallow puncture wound at the back of the neck, surrounded by an abrasion, which had been made with a blunter object than the weapon that inflicted the wound and abrasions on the front of Apodaca's body; the wounds were "very, very dissimilar." (5 RT 1182, 1184, 1186.) The pathologist noted that the superficial wound to the back of the neck was not the rectangular shape found in wounds inflicted by a screwdriver. (5 RT 1182.)

have a jury decide issues of fact and to determine each element of the charged offense, and his right to a reliable penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.) Reversal is required because the state cannot establish that the error was harmless beyond a reasonable doubt on this record. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Reversal is also required under state law: if the jury had been properly instructed, it is reasonably probable that it would have convicted appellant of the lesser offense of manslaughter. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

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## VII.

## THE TRIAL COURT ERRED BY IMPROPERLY PREVENTING THE DEFENSE FROM ELICITING EVIDENCE THAT APPELLANT'S COUSIN VICKI HAD BEEN KILLED BY AN ABUSIVE BOYFRIEND WHEN SUCH EVIDENCE WAS MATERIAL TO SHOW APPELLANT'S PERCEPTION OF THE DANGER FACUNDO POSED TO CHARLENE TRUJEQUE

Defense counsel attempted to elicit that another of appellant's cousins, Vicki, had been brutally murdered by her abusive boyfriend a short time before the Facundo stabbing. The defense sought to show that Vicki's murder made Charlie and Elena Trujeque even more afraid that Facundo would kill their daughter and that they had discussed Vicki's fate and their fears with appellant, thus affecting his state of mind concerning the threat that Max Facundo posed to his cousin Charlene.

### A. Proceedings Below

On cross-examination of Elena Trujeque, defense counsel established that Vicki was a niece of Charlie Trujeque, but when counsel attempted to ask if something traumatic had happened to Vicki, the prosecutor objected on grounds of lack of foundation, and the trial court sustained the objection. (6 RT 1303.) Defense counsel then established that Elena and Charlie Trujeque feared for their daughter's life, that they were close to Vicki, and that Elena had first met appellant at Vicki's house. (6 RT 1303-1304.) When defense counsel attempted to ask whether someone else in the family had recently been killed by her boyfriend, referring to Vicki, the prosecutor again objected, and the objection was sustained. (6 RT 1323-1324.) Defense counsel attempted again to lay a foundation, but when counsel asked if Elena Trujeque's fears for Charlene

had anything to do with what happened to Vicki, the prosecutor objected that Elena Trujeque had not seen Vicki get killed. The court again sustained the objection. (6 RT 1324-1325.)

The trial judge admonished defense counsel that she was "plowing the same ground until it's now very fine sand . . . And you've described Mr. Facundo as the despicable, cowardly wife beater that he was, and I think that's enough." (6 RT 1328.) Finally, over vigorous objection by the prosecutor,[59] defense counsel was permitted to proffer to the court, in a sidebar, that Vicki had been stabbed forty times by her abusive partner and that this had made Elena and Charlie Trujeque more anxious that their own daughter's life was in imminent danger; defense counsel explained that they would show that appellant's aunt and uncle had expressed their fears to him, including the impact of Vicki's murder, and that this had affected appellant's state of mind. (6 RT 1329-1333.) Although appearing to acknowledge that the circumstances of Vicki's murder were relevant to appellant's state of mind, the court announced, with no further explanation, "I'm excluding it under 352."[60] (6 RT 1333.) Similarly, when defense counsel included the circumstances of Vicki's murder as one of the topics

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[59]The prosecutor accused defense counsel of being unethical for persisting in asking about Vicki's death when his objections had been sustained. (6 RT 1329.) Counsel had tried, however, to lay a foundation for her questions after the prosecutor objected on that ground. Her subsequent request for a sidebar to discuss and argue the grounds for the prosecutor's later objection was denied. (6 RT 1324-1325.)

[60]Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

he wished to raise with Charlie Trujeque, who invoked the Fifth Amendment privilege against self-incrimination, the court ruled that Vicki's murder was a "collateral matter" and he would prohibit any such questions "under 352." (6 RT 1359.)

### B. The Trial Court Violated Appellant's Right to Present a Defense by Excluding Evidence Relevant to Establish His State of Mind

The defense was thus improperly precluded, in violation of appellant's constitutional right to present a defense, from eliciting information material to the claim that appellant acted in imperfect defense of another. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324-25; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *California v. Trombetta* (1984) 467 U.S. 479, 485; accord *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56 & fn. 13 ["Our cases establish, at a minimum, that criminal defendants have the right . . .to put before a jury evidence that might influence the determination of guilt"], citing *Chambers v. Mississippi* (1973) 410 U.S. 284, *Cool v. United States* (1972) 409 U.S. 100, *Washington v. Texas* (1967) 388 U.S. 14, and *Webb v. Texas* (1972) 409 U.S. 95.)

As this Court has made clear, "[t]he defendant's perceptions are at issue," in a claim of reasonable or unreasonable (imperfect) self-defense or defense of another. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065 (*Minifie*).) Thus, information that "may [have] color[ed]" the defendant's "perceptions" of the victim is manifestly relevant. (*Id.* at p. 1066.) For example, evidence of threats from third parties associated with the victim "are relevant to the defendant's state of mind-a matter 'of consequence to the determination of the action' [citation] -and the trier of fact is entitled to consider those threats along with other relevant circumstances in deciding whether the defendant's actions were justified." (*Ibid.*, citing Evid. Code, §

210 [defining relevant evidence].) "To support a claim of imperfect self-defense, evidence of third party threats may also be admissible if there is evidence the defendant actually, *even if unreasonably*, associated the victim with those threats." (*Id.* at p. 1069 [italics added].)

Similarly, with respect to imperfect defense of another, this Court held in *People v. Randle, supra,* that it was the point of view of the defendant rather than that of the person he sought to defend that was relevant to whether the offense was murder or voluntary manslaughter. (*People v. Randle, supra,* 35 Cal.4th at p. 1000, citing *People v. Travis* (1880) 56 Cal. 251, 256.) Thus, evidence that sheds light on the defendant's perception of the jeopardy the other person was facing is relevant, even if it establishes only the defendant's *unreasonable* belief that the person he sought to protect was in imminent danger.

In *Minifie*, this Court upheld the court of appeal's determination that the trial court had abused its discretion in excluding under Evidence Code section 352 evidence of third party threats offered to establish the defendant's state of mind: "Evidence bearing on [defendant's] state of mind was highly probative, and had no 'unique tendency' to evoke any emotional bias against the prosecution. Evidence that [defendant] might have had reason to fear for his life would not have 'confused the issue.' It would have further illuminated the situation the jury was required to evaluate." (*People v. Minifie, supra*, 13 Cal.4th at p. 1071; see also *People v. Davis* (1965) 63 Cal.2d 648, 656 [defendant in self-defense case "was entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such fear"].)

The same is true here. The evidence concerning Vicki's murder in the context of an abusive relationship was highly relevant to appellant's

state of mind: he as well as his aunt and uncle were close to Vicki. Her fate heightened their anxiety that Facundo would kill Charlene. The evidence would not have wasted time – as defense counsel indicated, it would have required only a few questions of appellant's aunt and uncle, and it would not have evoked emotional bias against the prosecution. (Evid. Code, § 352.) The jury should have been permitted to consider this evidence in evaluating appellant's state of mind.

**C. The Error Was Highly Prejudicial and Requires Reversal**

The prejudice from excluding this probative evidence was exacerbated by the prosecutor's subsequent conduct. Having successfully prevented the defense from eliciting any information about Vicki's murder, the prosecutor then used the incident for his own purposes. On redirect examination of Elena Trujeque, Deputy District Attorney Markus brought out that Vicki had been "killed" and that Elena Trujeque did not "say to Mr. Trujeque, do the exact same thing that happened to Vicki?" (6 RT 1341.) The prosecutor then asked a series of leading questions:

Q Did you think that Tommy was thinking about Aunt Vicki when he went out to stick a knife in his [Facundo's] chest?

A No.[61]

Q Did you talk to the defendant Trujeque about sticking a knife in his chest just like Aunt Vicki got when she was killed? Did you say -- did you talk about it?

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[61]Elena Trujeque's personal opinion whether appellant was "thinking about Vicki" when he stabbed Facundo was completely irrelevant and speculative. (See *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 582 [witness' speculation as to what another witness 'had in mind' is both incompetent and irrelevant"].)

A I do recall now. When we were in the truck, he did say that he stuck him -- he stuck him with a knife. I don't know how many times, but he -- I do recall him saying something like that.

Q Like what?

A Like he got the knife, and he just stuck him with it, but I don't know how many times repeatedly that he said it.

Q Did Mr. Trujeque make any reference to Vicki?

A No.

Q Did he say, I stuck him, Max Facundo, with a knife just like Vicki got stuck with a knife?

A No.

Q Did he ever bring up Vicki to you?

A No.

Q You don't know how Vicki was killed, meaning you weren't there, correct?

A No.

(6 RT 1346-1347.)

It was fundamentally unfair for the trial court to prevent the defense from eliciting evidence of the impact of Vicki's murder on the Trujeques, and their fear for Charlene's safety, while the prosecution used the same evidence to equate appellant with Vicki's killer. (See *Washington v. Texas, supra,* 388 U.S. at pp. 22-23 [state could not constitutionally bar defendants from presenting accomplice testimony while allowing prosecution to present accomplice testimony against defendants]; see also *Simmons v. South Carolina* (1994) 512 U.S. 154, 161-162 [state could not argue defendant posed a future danger while preventing defense from informing

jury defendant would not be eligible for parole if sentenced to life].)

Appellant took the stand and, having made his desire to be sentenced to death clear, testified that he had killed Facundo at his uncle's request and because Facundo "deserved it" for beating up Charlene. (7 RT 1591-1593, 1596.) Appellant stated that Vicki was his cousin and that she had been stabbed to death by her boyfriend, but said he did not know if Vicki had had a relationship with her boyfriend similar to Charlene's relationship with Facundo. (7 RT 1608-1609.)

Defense counsel argued that appellant's testimony and statements to police, after he had decided to seek the death penalty, were unreliable. (7 RT 1811-1812, 1819, 1821-1826, 1829.) In his highly inflammatory letter to the Los Angeles District Attorney, Gil Garcetti, appellant had embellished the facts of the crimes to make the offenses and his own role in them more aggravated, claiming for example that various special circumstances applied, even when there was no evidence to support his claims. (See Argument X *infra*.)

Evidence from other witnesses was thus particularly important to the defense in this case, because the jury could have chosen to disbelieve appellant's own incriminating statements. The jury should therefore have been permitted to hear more fully from appellant's aunt and uncle about Vicki's murder and its impact on all three of them with respect to their fears for Charlene.

The refusal to allow appellant to elicit this critical testimony violated his constitutional right to present a defense. (U.S. Const., 5th, 6th, 8th & 14th Amends.) Reversal is required because the state cannot establish that the error was harmless beyond a reasonable doubt. (*Crane v. Kentucky, supra,* 476 U.S. at p. 691, citing *Delaware v. Van Arsdall* (1986) 475 U.S. 673,

684.) Particularly when considered together with the trial court's related errors in sustaining Charlie Trujeque's blanket assertion of the privilege against self-incrimination and refusing to instruct the jury on imperfect defense of another, these rulings collectively deprived appellant of his central defense to the Facundo murder and thus plainly contributed to the verdict against him.

Reversal is also required under state law: If the jury had been allowed to consider and give effect to this evidence and the family's fears for Charlene's life, in the context of a defense of imperfect defense of another, it is "reasonably probable" that appellant would have been convicted of a lesser, noncapital offense. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

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## VIII.

## THE TRIAL COURT IMPROPERLY ADMITTED THE EXPERT TESTIMONY OF A PATHOLOGIST WHO DID NOT PERFORM THE AUTOPSIES OF THE DECEDENTS IN THESE CASES, IN VIOLATION OF APPELLANT'S CONFRONTATION RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

At appellant's trial, the deputy medical examiners who performed the autopsies on Apodaca and Facundo did not testify. Instead, the prosecution called Dr. Eugene Carpenter, another pathologist with the Los Angeles County Coroner's Office, who had neither participated in nor observed either autopsy, to testify to the contents of the autopsy reports prepared by others. Both of the deputy medical examiners who had performed the original autopsies, Dr. Sara Reddy and Dr. Eva Heuser, had retired, but there was no evidence they were unavailable to testify.[62]

The presentation of the contents of the autopsy reports through the testimony of a surrogate witness denied appellant his right to confront the witnesses against him, in violation of the Sixth and Fourteenth Amendments.

### A. Relevant Facts

The autopsy on Max Facundo was performed on June 23, 1986, by Dr. Eva Heuser who had retired from the Los Angeles County Coroner's office two years before the trial. (5 RT 1164.) The autopsy of Raul

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[62]Dr. Carpenter also testified at the penalty phase to the contents of the 1969 autopsy report on Allen Rothenberg, performed by a Dr. Herrera. (8 RT 2088-2089.) Dr. Carpenter testified that he had reviewed the report and agreed with Dr. Herrera's findings. (8 RT 2089.) He then described Rothenberg's multiple stab wounds and defensive wounds on his hand. (8 RT 2089-2091.)

Apodaca was conducted on January 25, 1987 by Dr. Sara Reddy who had also since retired from the Coroner's Office. (5 RT 1178-1179.) Instead of calling Dr. Heuser or Dr. Reddy, the prosecution called Dr. Eugene Carpenter, another pathologist with the Los Angeles County Coroner's Office, to testify to the contents of the autopsy reports prepared by Drs. Heuser and Reddy. (5 RT 1163-1164, 1166, 1173, 1175-1177, 1178-1179, 1181, 1184-1185, 1189.) Dr. Carpenter learned that he would be called upon to testify about the Facundo and Apodaca autopsies earlier the same morning as his testimony. (5 RT 1191.) Prior to testifying, Dr. Carpenter reviewed the contents of the autopsy reports by Drs. Reddy and Heuser, the attachments to those reports, and the related photographs. (5 RT 1165-1166, 1179.) Dr. Carpenter also reviewed Dr. Reddy's prior testimony concerning the Apodaca murder.[63] (5 RT 1224.)

Dr. Carpenter explained that, in Los Angeles County, autopsy reports are not dictated contemporaneously with the autopsy because the autopsy rooms are too noisy. Instead, the report is dictated, "even weeks later" based on handwritten notes made on the "Form 20" diagram during the autopsy. (5 RT 1171, 1214.) Dr. Carpenter referred closely to the autopsy reports during his testimony so he would not confuse the two cases. (5 RT 1166.)

With respect to Facundo, Dr. Heuser's report described the main

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[63]Dr. Reddy testified at appellant's 1987 preliminary hearing. (2 CT 398-409.) The state did not seek to introduce her prior testimony, calling Dr. Carpenter instead to testify about the contents of Dr. Reddy's report. Dr. Carpenter said he did not see errors in Dr. Reddy's preliminary hearing testimony, but he "did see areas in which I could not agree with her based on my availability of only the autopsy report and the photographs." (5 RT 1237.)

injuries as being to both lungs, the pulmonary artery, the aorta, and the liver. (5 RT 1166.) There were eight stab wounds altogether, two of them exit wounds. (5 RT 1166-1167, 1169-1170.) The report described "four components" – "one hole [stab wound] with several little nicks on it," and "four areas of damage." (5 RT 1173.) Three of the "thrusts," through the same entrance wound, caused "marked damage to the lung and pulmonary artery as it comes out of the heart," resulting in "a lot of bleeding." (5 RT 1172-1173.) These injuries were "lethal" and could have "cause[d] death within a minute." (5 RT 1173.) A second stab wound was the "mirror image" of the first, with a nick "indicating that there was more than just one thrust of the knife" through the entry wound, one component going steeply upward and exiting on top of the collar bone and another "going in different directions down into the chest hitting the right lung and causing damage to a major vessel of the right lung." (5 RT 1173.) Stab wound three struck the liver "but is described as not having caused much bleeding at all," indicating that it must have occurred after the body had "pretty much bled out." (5 RT 1174.) Stab wound four went through the skin near the armpit. (5 RT 1175.) Stab wound five, near the armpit on the opposite side of the chest, "isn't described as going into the chest space." (5 RT 1175.) Stab wound six went through the skin of the neck, and stab wounds seven and eight were through the upper left arm. (5 RT 1175-1176.) There was no indication in the report that more than one weapon was used. (5 RT 1175.) Dr. Carpenter agreed with Dr. Heuser's conclusion that the cause of death was stab wounds. (5 RT 1176.) According to the autopsy report, phencyclidine, or PCP, had been found in Facundo's system, though Dr. Carpenter testified it was not at a lethal level. (5 RT 1177.)

"Turn[ing] to the second autopsy report," on Raul Apodaca, Dr.

Carpenter testified that Apodaca's injuries consisted of one fatal, circular stab wound to the "jugular notch" on the upper chest, which was "described as having gone through the hard bone of the breast plate" and then through the aorta. (5 RT 1178, 1179-1180, 1183.) Because it was noted in the autopsy report, Dr. Carpenter knew there was also a shallow, circular puncture wound on the back of Apodaca's neck, barely visible as a "small purple dot" on the autopsy photo. (5 RT 1181-1182.) Because "this wound is described as having an abrasion around it. . . that means whatever made the wound was not so sharp." (5 RT 1182.) Comparing the two injuries, Dr. Carpenter noted "that in the report there is no abrasion to the fatal wound to the front of the chest [but] [t]here is an abrasion described to the wound to the back." (5 RT 1184-1185.) The wound to the front was four inches deep, while the wound to the back was "minuscule." (5 RT 1184.) There "was no description of any bleeding in the wound" to the back nor "of it hitting bone." (5 RT 1184.)

There were also five abrasions on Apodaca's chest and abdomen, none of which broke the skin; these injuries were "mentioned" as being 3/8 inch wide, the same width as the fatal stab wound to the chest. (5 RT 1181, 1186.) Dr. Carpenter opined that these injuries were consistent with a "nonsharp" object striking the chest at an angle and abrading but not penetrating the skin, possibly because of Apodaca's clothing. (5 RT 1186.)

The wounds on the front of the body were "very, very dissimilar" to the small wound on the back, so that Dr. Carpenter said he would be "surprised" if they were made by the same weapon. (5 RT 1186.) He subsequently said, however, that he did not have enough information to agree or disagree with Dr. Reddy's opinion, based on the two puncture wounds, that Apodaca had been stabbed with two different instruments. (5

RT 1233.) He agreed that Dr. Reddy was more qualified to make that determination since she had actually performed the autopsy. (5 RT 1233-1234.) Dr. Carpenter didn't know if Dr. Reddy had read Apodaca's hospital records. (5 RT 1235-1236.) He did agree with Dr. Reddy's conclusion that "the cause of death is a stab wound to the chest." (5 RT 1189.)

In response to defense counsel's question whether he had spoken to either Dr. Reddy or Dr. Heuser before testifying, Dr. Carpenter said he had not, but insisted "I never said that I told the jury what they saw and what they thought. I just read their autopsy report [*sic*], not their minds." (5 RT 1195-1196.) Dr. Carpenter said he had "looked at the photographs and I made up my own mind," but he admitted that since he "did not do the autopsy, he "could not have seen the inside of the wounds" (5 RT 1196), which he had described in great detail in his testimony.

**B. Applicable Law**

The Sixth Amendment's confrontation clause – a "bedrock" constitutional guarantee applicable to the states through the Fourteenth Amendment – provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." (*Crawford v. Washington* (2004) 541 U.S. 36, 42 (*Crawford*), citing *Pointer v. Texas* (1965) 380 U.S. 400, 406.) In *Crawford*, the Supreme Court held that the confrontation clause barred the admission, against the defendant, of a testimonial statement from a witness who did not testify at trial and thus was not subject to cross-examination.[64] (*Id.* at pp. 68-69.) The statement at

[64]The Court recognized an exception for the former testimony of an unavailable witness whom the defendant had had an opportunity to cross-examine. (*Crawford, supra*, 541 U.S. at p. 68.) As noted above, although

issue was a police interview of the defendant's wife, who did not testify because of marital privilege.

Though the Court in *Crawford* did not "spell out a comprehensive definition of 'testimonial,'" it identified a "core class of 'testimonial' statements" covered by the confrontation clause. (*Crawford, supra,* 541 U.S. at pp. 51, 68.) These include "'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' [citation]." (*Id.* at pp. 51–52.)

*Crawford* overruled *Ohio v. Roberts* (1980) 448 U.S. 56, which allowed an out-of-court statement to be admitted, notwithstanding the confrontation clause, if it "falls under a firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." (*Crawford, supra,* 541 U.S. at pp. 60, 68-69.) The Court found that *Roberts*' "malleable standard often fails to protect against paradigmatic confrontation violations." (*Id.* at p. 60.)

After examining the history of the Confrontation Clause, the Court

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the deputy medical examiner who performed the Apodaca autopsy had testified and been cross-examined at appellant's 1987 preliminary hearing (2 CT 398-409), the state neither proved she was unavailable to testify nor sought to introduce her prior testimony at this trial.

concluded that it "commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Crawford, supra*, 541 U.S. at p. 61; accord *Bullcoming v. New Mexico* (2011) ___ U.S. ___, 131 S.Ct. 2705, 2715 (*Bullcoming*); *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S.Ct. 2527, 2536 (*Melendez-Diaz*).)

In *Melendez-Diaz*, the Supreme Court applied *Crawford*'s rationale to certificates issued by the state crime lab, which attested that a substance found in the defendant's car was cocaine. The Court held that the certificates were testimonial and the affiants therefore witnesses who should have been subject to cross-examination. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2532; accord *Bullcoming, supra,* 131 S.Ct. at p. 2717 [laboratory report certifying defendant's blood alcohol level was testimonial, and defendant had right to confront analyst who made the certification].)

At the time of appellant's trial, before *Crawford* was decided, this Court had held that admission of an autopsy report prepared by a pathologist who did not testify at trial did not violate a defendant's confrontation rights because the report was admissible under the business records exception to the hearsay rule, a firmly rooted exception "'that carries sufficient indicia of reliability to satisfy requirements of the confrontation clause.'" (*People v. Beeler* (1995) 9 Cal.4th 953, 979, quoting *People v. Clark* (1992) 3 Cal.4th 41, 158.) Because *Beeler* and *Clark* relied on the *Roberts* standard that was repudiated in *Crawford*, they are no longer good law.[65]

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[65]As discussed further below, the *Melendez-Diaz* court held the laboratory report at issue was not admissible as a business record. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2538.) In *Bullcoming*, the trial court

This Court's decision in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), which was decided after *Crawford* but before *Melendez-Diaz* and *Bullcoming* has likewise been called into question. In *Geier*, this Court rejected a Confrontation Clause challenge to allowing a laboratory supervisor to testify regarding a DNA report she had not authored, reasoning that testimony conveying information contained in a contemporaneously-prepared report of scientific observations and recorded as "raw data" was admissible because the report and notes were nontestimonial. (*Geier, supra,* 41 Cal.4th at p. 607.)

This Court has pending before it several cases concerning the implications of *Melendez-Diaz* for *Geier*. (See, e.g., *People v. Gutierrez* (2009) 177 Cal.App.4th 654 [concluding that *Geier* remains viable], review granted Dec. 2, 2009, S176620 and *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047 [same], review granted Dec. 2, 2009, S176213; *People v. Lopez* (2009) 177 Cal.App.4th 202, 206 [concluding that *Geier* "appears" to have been disapproved by *Melendez-Diaz*], review granted Dec. 2, 2009, S177046 and *People v. Dungo* (2009) 176 Cal.App.4th 1388 [observing that some of *Geier*'s rationale has been undermined by *Melendez-Diaz* ], review granted Dec. 2, 2009, S176886.) *People v. Dungo, supra*, concerns specifically whether it violates the confrontation clause for one forensic pathologist to testify to the manner and cause of death in a murder case based upon an autopsy report prepared by another pathologist.

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had also erroneously admitted the laboratory report as a business record. (*Bullcoming, supra*, 131 S.Ct. at p. 2712.)

### C. Defense Counsel's Failure to Object Does Not Waive this Claim as *Crawford* Was an Unforeseeable Change in the Law That must Be Applied Retroactively to Cases Pending on Direct Appeal

Defense counsel did not object to Dr. Carpenter's testimony. Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later "changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703.) *Crawford* effected such an unforeseeable change in the law, and the courts of appeal have accordingly applied it retroactively to cases pending on appeal. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208; *People v. Song* (2004) 124 Cal.App.4th 973, 982; *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400; also see *People v. Saffold* (2005) 127 Cal.App.4th 979, 984 [no waiver of confrontation challenge to hearsay evidence of a proof of service to establish service of a summons or notice, because "[a]ny objection would have been unavailing under pre-*Crawford* law"]; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2 ["failure to object was excusable, since governing law at the time of the hearing afforded scant grounds for objection"].)

In addition, because appellant's arguments raise only questions of law, this court may and should exercise its discretion to address the *Crawford* and *Melendez-Diaz* issues. (See *People v. Mattson* (1990) 50 Cal.3d 826, 854, superseded by statute on another ground as noted in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173.)

## D. *Geier* Cannot Be Reconciled with *Melendez-Diaz* and *Bullcoming*

As an initial matter, this Court's decision in *Geier* must be overruled as *Melendez-Diaz* and *Bullcoming* expressly reject the rationales on which the opinion was based.

First, *Geier* relied heavily on the theory that a forensic analyst's report was not testimonial because it reported contemporaneous observations, relying on the Supreme Court's decision in *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), which held that a 9-1-1 call made during a domestic disturbance was not testimonial.[66] The central holding in *Davis* was that "[s]tatements are nontestimonial" when their "primary purpose . . . is to enable police assistance to meet an ongoing emergency" and "[t]hey are testimonial" when their "primary purpose. . . is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington, supra,* 547 U.S. at p. 822; *Michigan v. Bryant* (2011) __ U.S. __ 131 S.Ct. 1143, 1154.)

In *Melendez-Diaz,* the Court rejected the same analogy this Court made in *Geier* between a forensic report recording near-contemporaneous observations or test results and the 9-1-1 call in *Davis*. The *Melendez-Diaz* Court held that the more apt analogy was to the statements made by Amy Hammon, the complaining witness in the companion case of *Hammon v. Indiana*. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2535, citing *Davis v. Washington, supra,* 547 U.S. at pp. 820, 830 [discussing facts of *Hammon*].) While still made "sufficiently close in time to the alleged

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[66]Indeed, this Court held "[a]s we read *Davis*, the crucial point is whether the statement represents the contemporaneous recordation of observable events." (*Geier, supra,* 41Cal.4th at p. 607.)

assault that the trial court admitted [them] as a 'present sense impression,'"Amy Hammon's written and oral statements, made to police after the emergency had abated and she was no longer in immediate danger, were held to be testimonial and subject to the confrontation clause. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2535, citing *Davis v. Washington, supra*, 547 U.S. at pp. 820, 830.) Hammon's statements were testimonial because their "primary purpose" was to establish her version of events for use in a criminal prosecution. (See *Davis v. Washington, supra,* 547 U.S. at p. 830.)

Similarly, the Court concluded in *Melendez-Diaz*, that even if the forensic analysts were contemporaneously recording their observations and test results, the affidavits were plainly "testimonial" because their purpose was to memorialize the analyst's findings to serve as evidence in court. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) In any event, in this case, as in *Melendez-Diaz*, it is "doubtful" that the reports "could be characterized as reporting 'near-contemporaneous observations'" because they were completed some time later. (*Id.* at p. 2535 [affidavits completed almost a week after the tests were performed].) Dr. Carpenter testified that, in the Los Angeles County Coroner's Office, while the pathologist made notes on the Form 20 diagram during the autopsy, the autopsy reports were often prepared "weeks" later. (5 RT 1214.)

Second, *Geier* concluded that a forensic report is not testimonial because the witness preparing it is not accusatory, reasoning that "[r]ecords of laboratory protocols followed and the resulting raw data acquired are not accusatory," but rather "are neutral, having the power to exonerate as well as convict." (*Geier, supra*, 41 Cal.4th at p. 607 [internal quotation omitted].) The Supreme Court rejected that argument in both

*Melendez–Diaz* and *Bullcoming*, finding "no support in the text of the Sixth Amendment or in our case law" for the contention that forensic scientists are not subject to confrontation because they are "not accusatory" witnesses. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2533; accord *Bullcoming, supra*, 131 S.Ct. at p. 2717.) There is no such thing, the Court stressed, as "a third category of witnesses," – neither accusatory nor defense witnesses – "helpful to the prosecution, but somehow immune from confrontation." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2534.)

The Court also squarely rejected the contention that "laboratory professionals" need not be subject to cross-examination because their testimony merely relates the results of "neutral, scientific testing." (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2536.) Noting documented problems ranging from bias to outright fraud in the forensic sciences, the Court dismissed the notion that forensic science is either inherently more "neutral or . . . reliable" than other types of evidence or "uniquely immune from the risk of manipulation." (*Ibid.*; accord *Bullcoming, supra*, 131 S.Ct. at p. 2713.) Cross-examination is also vital to expose an individual "analyst's lack of proper training or deficiency in judgment." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2537; see also *Bullcoming, supra*, 131 S.Ct. at p.2715 [cross-examination of surrogate does not satisfy confrontation clause because it cannot "expose any lapses or lies on the certifying analyst's part"].)

In any event, the Supreme Court concluded, it was "settled in *Crawford*" that even "the 'obviou[s] reliab[ility]' of a testimonial statement does not dispense with the Confrontation Clause." (*Bullcoming, supra*, 131 S.Ct. at p. 2715.) The analysts who authored the report "must be made available for confrontation even if they possess 'the scientific acumen of

Mme. Curie and the veracity of Mother Teresa.'" (*Ibid.*, quoting *Melendez–Diaz, supra* 129 S.Ct. at p. 2537, fn. 6.)

### E. The Contents of the Autopsy Reports Were Testimonial Hearsay

Under *Melendez-Diaz* and *Bullcoming*, the conclusion that the contents of the autopsy reports were "testimonial" is inescapable.[67] The Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." (*Crawford, supra*, 541 U.S. at p. 54; accord *Giles v. California* (2008) 554 U.S. 353, 358.)

In *Melendez-Diaz*, the state argued in support of the admissibility of the laboratory certificates "that at common law the results of a coroner's inquest were admissible without an opportunity for confrontation." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2538.) But the Supreme Court rejected that argument: "as we have previously noted, whatever the status of coroner's reports at common law in England, they were not accorded any special status in American practice." (*Ibid.*, citing *Crawford, supra* 541

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[67]Justice Thomas concurred separately in *Melendez-Diaz* to stress that he continued to believe that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." (*Melendez–Diaz, supra* 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J.).) He subsequently joined the majority opinion in *Bullcoming* which held that an oath was not a prerequisite for finding the certificate in that case to be sufficiently formal and evidentiary in purpose to be deemed testimonial. (*Bullcoming, supra*, 131 S.Ct. at p. 2717.) Because, as discussed above, the autopsy reports at issue here were prepared in accordance with a statutory mandate, for the primary purpose of establishing facts – cause and manner of death – for potential use in later criminal proceedings, they would satisfy any reasonable definition of a testimonial statement.

U.S. at p. 47, fn. 2; *Giles v. California*, *supra*, 554 U.S. at pp. 399-400 (dis. opn. of Breyer, J.).)

Similarly, while the majority in *Melendez-Diaz* acknowledged that "there are other ways – and in some cases better ways – to challenge or verify the results of a forensic test" than through confrontation, it explicitly identified autopsy reports as an exception, observing that "[s]ome forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2536 & fn. 5.) As to these types of tests, confrontation is not just the "[c]onstitution[ally] guarantee[d]" way of verifying results, it may be the only way. (*Ibid.*)

*Beeler*, *supra*, held that autopsy reports were admissible under state evidentiary rules as business or official records, and *Geier* agreed that business records "are not testimonial" under *Crawford*. (*Geier, supra,* 41 Cal.4th at p. 606.) The Court explained in *Melendez-Diaz*, however:

> Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. [Citation.] But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.

(*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2538.)

Although it is the "business" of the coroner (or companies working for the coroner) to conduct autopsies, the purpose for doing so in suspected homicide cases is for prosecutorial use, rather than for a company's own administrative use. The resulting reports are therefore core testimonial statements covered by the confrontation clause. As the Court stressed in *Crawford*, the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history

with which the Framers were keenly familiar." (*Crawford, supra,* 541 U.S. at p. 56, fn. 7.)

Coroners and deputy coroners whose primary duty is to conduct inquests and investigations into violent deaths are peace officers under California law. (Pen. Code, § 830.35, subd. (c).) Government Code section 27491 requires the coroner "to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths; ...." (*Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1277.) Government Code section 27491.4, subdivision (a), provides in pertinent part:

> ... The detailed medical findings resulting from an inspection of the body or autopsy by an examining physician shall be either reduced to writing or permanently preserved on recording discs or other similar recording media, shall include all positive and negative findings pertinent to establishing the cause of death in accordance with medicolegal practice and this, along with the written opinions and conclusions of the examining physician, shall be included in the coroner's record of the death. ...

When there are reasonable grounds to suspect that a death "has been occasioned by the act of another by criminal means, the coroner ... shall immediately notify the law enforcement agency having jurisdiction over the criminal investigation." (Gov. Code, § 27491.1.)

A forensic pathologist conducting an autopsy for the coroner in a case of suspected homicide is therefore part of law enforcement. (*Dixon v. Superior Court, supra*, 170 Cal.App.4th at p. 1277.)

In this case, the deaths of both Facundo and Apodaca were considered homicides before the coroner undertook the autopsy. Police were called to the scene of Facundo's stabbing (5 RT 1030, 1034, 1263-

1264, 6 RT 1386), Dr. Reddy conferred with police before beginning the Apodaca autopsy, and there was a police officer present during the autopsy. (1 CT Supp. Two 60, 64.) Under these circumstances, it is reasonable to assume that Drs. Reddy and Heuser understood that the reports containing their findings and opinions would be used prosecutorially. ( See *Melendez–Diaz, supra*, 129 S.Ct. at p. 2532; see also *United States v. Moore* (D.C. Cir. 2011) 651 F.3d 30, 72-73 [autopsy reports were testimonial statements under *Melendez-Diaz* and *Bullcoming* because medical examiner's office under statutory duty to conduct autopsies to aid in law enforcement and law enforcement officers were present during autopsy]; *Derr v. State* (Md. Ct. App. 2011) 29 A.3d 533, 548-549 [recognizing prior decision finding autopsy reports nontestimonial could not survive *Melendez-Diaz* and *Bullcoming* and noting statutes governing preparation of autopsy reports contemplated their use for prosecutorial purpose]; *Wood v. State* (Tex. Ct. App. 2009), 299 S.W.3d 200, 209 -210 [autopsy report testimonial where police suspected homicide before autopsy and officer attended autopsy].)

The autopsy reports, prepared for the prosecution to prove an element of the crime charged, are thus "testimonial statements" and Drs. Reddy and Heuser are "'witnesses' for purposes of the Sixth Amendment." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) Because there was no showing that either Dr. Reddy or Dr. Heuser was unavailable to testify at trial, Dr. Carpenter should not have been permitted to testify in their steads. (*Ibid.*)

## F. The Confrontation Clause Is Not Satisfied by the Testimony of a Surrogate

In *Bullcoming*, the Court clarified that the defendant's confrontation rights were not satisfied by calling a surrogote witness who, as in this case, did not participate in or observe the testing himself:

> [S]urrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part.

(*Bullcoming*, *supra*, 131 S.Ct. at p. 2715 [footnotes omitted].) As *Bullcoming* recognized, forensic witnesses are not fungible.

Performing an autopsy is far from a simple act. In conducting and reporting the autopsies, Drs. Reddy and Heuser were required to interpret what they saw and to exercise professional judgment. (See *Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2537-2538 [methodology used in generating affidavits "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination"]; Nat. Assn. of Medical Examiners, *Forensic Autopsy Performance Stds.* (Sept. 2006) 27 Am. J. of Forensic Medicine & Pathology no. 3, stds. B4, B5, pp. 200-225 [pathologist performing autopsy exercises discretion to determine need for additional dissection and laboratory tests, and is responsible for formulating all interpretations and opinions as well as obtaining information necessary to do so].)

Dr. Carpenter could not testify to the skill and judgment of Drs. Reddy and Heuser in performing the autopsies because he was not there. Nor could he testify about whether either doctor deviated from standard procedures or about how carefully or competently she performed the

autopsy and reported her observations. (See *Bullcoming*, *supra*, 131 S.Ct. at p. 2715.) As Dr. Carpenter conceded, the doctor who actually performed the autopsy and observed the body was more qualified to form opinions about matters such as whether the injuries had been inflicted by two different weapons. (5 RT 1233-1234.) Accordingly, cross-examining the doctor who performed the autopsy was the only effective means of exploring her observations and the conclusions she reached based on them.

The prosecution clearly wanted jurors to believe that the observations of Drs. Reddy and Heuser were complete, accurate, and reliable. Otherwise, Dr. Carpenter's opinion was basically worthless. As a result of the prosecution's election to use Dr. Carpenter to convey to jurors the findings of Drs. Heuser and Reddy, appellant was denied the opportunity to meaningfully test their statements through confrontation and cross-examination. The "Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (*Bullcoming, supra*, 131 S.Ct. at p. 2716.)

*Bullcoming* did not address the situation in which an expert relies on the testimonial statements of others in forming his or her own, independent opinion. (*Bullcoming*, 131 S.Ct. at p. 2722, citing Federal Rule of Evidence 703 (conc. opn. of Sotomayor, J.).) However, the use of the autopsy reports in this case cannot be justified on the ground that Dr. Carpenter was an expert, permitted to rely on testimonial or nontestimonial hearsay in forming his opinions.

First, California courts have recognized that "any expert's opinion is only as good as the truthfulness of the information on which it is based."

(*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.) If an opinion

> is only as good as the facts on which it is based, and if those facts consist of testimonial hearsay statements that were not subject to cross-examination, then it is difficult to imagine how the defendant is expected to "demonstrate that the underlying information was incorrect or unreliable."[] According to *Crawford*, the only constitutionally sanctioned manner in which the reliability of testimonial hearsay may be tested is by cross-examination.[]

(Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony* (2008) 96 Georgetown L.J. 827, 847-848 [footnotes and citations omitted].) It follows that courts "must prohibit an expert from testifying to an opinion in those cases where the opinion relies upon testimonial hearsay to such an extent that it substantially transmits to the jury the content of the hearsay, unless the defendant has an opportunity to test the hearsay by cross-examination." (Note, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington* (2004) 55 Hastings L.J. 1539, 1540; see also Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington* (2007) 15 J.L. & Pol'y 791, 822-823 ["[T]o pretend that expert basis statements are introduced for a purpose other than the truth of their contents is not simply splitting hairs too finely or engaging in an extreme form of formalism. It is, rather, an effort to make an end run around a constitutional prohibition by sleight of hand"]) In addition, Evidence Code section 801, subdivision (b), provides that an expert may base an opinion on evidence not otherwise admissible "unless an expert is precluded by law from using such matter as a basis for his opinion." It follows that as a matter of state law an expert may not rely on something as a basis for his or her opinion if

it results in a confrontation clause violation.

## G. The Error in Admitting Dr. Carpenter's Testimony Was Not Harmless Beyond a Reasonable Doubt

The use of testimonial hearsay in this case violated appellant's rights under the Sixth and Fourteenth Amendments and was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967), 386 U.S. 18, 24.)

The contents of the reports, presented through Dr. Carpenter's testimony, "provided testimony against [appellant]" by establishing "facts necessary for his conviction" (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2533) – namely, the cause and manner of death as to both Facundo and Apodaca. (5 RT 1171, 1175-1177, 1179, 1183, 1189.) The erroneously admitted evidence therefore "contribute[d] to the verdict obtained," and reversal is required. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

The error was particularly prejudicial with respect to Apodaca, because appellant's role, if any, in the stabbing was hotly disputed, and a critical question was whether it could be determined from the autopsy if two different weapons were used. At trial, defense counsel argued that appellant's confession to the Apodaca murder was unreliable and that he had exaggerrated his role to further his stated aim of securing a death sentence. (7 RT 1810-1812, 1821-1826, 1829.) Jesse Salazar, whom the prosecution did not contest was the more culpable party, had pled guilty to manslaughter more than ten years earlier, and received a sentence of credit for time served. (2 CT Supp.Two 342-348, 350.) Previously, the prosecution tried to implicate appellant by claiming Apodaca had been stabbed with two different weapons, one inflicting the tiny, superficial wound on the back of the neck. (1 CT Supp. One 37.) In 1998, appellant told police that when Apodaca began to get the better of Salazar, appellant

tried to break up their fight, but after Apodaca struck him, he grabbed a screwdriver and stabbed Apodaca on the left side of his body two to three times. (2 CT 532.)

There were, however, no stab wounds to Apodaca's left side. There was a single, fatal stab wound at the jugular notch and a number of abrasions on his chest and abdomen.[68]

When Dr. Reddy testified at the preliminary hearing of appellant's codefendant, Jesse Salazar, she gave inconsistent answers about the extent of her communications with police prior to conducting the autopsy. She first acknowledged that she routinely spoke to police before conducting an autopsy "to learn what they know." (1 CT Supp. Two 60.) She then backtracked, denying that she discussed the facts of a case with the police before the autopsy and insisting that she did not conform her findings to the facts related by the police. (1 CT Supp. Two 61-62.) She initially said she did not remember who was present for the autopsy, then acknowledged that, according to the autopsy report, a Detective Jones was present. (1 CT Supp. Two 62-64.)

At appellant's preliminary hearing, Dr. Reddy acknowledged that she had not read the hospital report, even though it was appended to the coroner's report, because she could not read the writing. (1 CT Supp. One 49-50.) Dr. Carpenter testified that he did not know if Dr. Reddy had reviewed the hospital records related to Apodaca's death. (5 RT 1235-1236.)

This strongly suggests that, had Dr. Reddy been called to testify,

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[68]As noted previously, there was one abrasion three to four inches to the left of the midline (5 RT 1242), but this was on the front of Apodaca's torso, not on the side of his body.

appellant would have had fruitful grounds for cross-examination concerning the extent of Dr. Reddy's communications with police and how these may have influenced her findings as well as to how thorough her work was, given that she had not taken into account the records of the hospital that treated Apodaca. Because the prosecution called Dr. Carpenter to testify instead, the autopsy report was effectively laundered so that appellant was unable to explore any of the potential lapses in Dr. Reddy's methods.

Under the Confrontation Clause, appellant was entitled to have the jury, not Dr. Carpenter, evaluate the "honesty, proficiency, and methodology" of Dr. Reddy through the crucible of cross-examination. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2538; accord *Bullcoming, supra*, 131 S.Ct. at p. 2715.)

Even with the laundered autopsy evidence, the jury convicted appellant of the lesser offense of second degree murder in the Apodaca case. Had defense counsel been able to cross-examine Dr. Reddy and call her findings into doubt, he could have further strengthened his contention that appellant's admissions were false, resulting in acquittal or conviction of a lesser offense. Because such a finding would have eliminated the only valid special circumstance, appellant would not have been eligible for the death penalty. Thus, at a minimum, appellant's conviction for the second degree murder of Raul Apodaca must be reversed, as well as the multiple-murder special circumstance.

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## IX.

## THE TRIAL COURT'S ERRONEOUS REFUSAL TO SEVER THE MURDER CHARGES FROM AN UNRELATED AND HIGHLY PREJUDICIAL ROBBERY CHARGE THAT OCCURRED MORE THAN A DECADE LATER DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND A FAIR AND RELIABLE PENALTY DETERMINATION

The trial court's refusal to sever the unrelated robbery charge, for a crime that occurred a decade after the Apodaca and Facundo murders, deprived appellant of a fair trial by improperly bolstering the state's otherwise weak evidence of intent on the murder charges, resulting in convictions for second and first degree murder, respectively, which made appellant eligible for the death penalty. (U.S. Const., 5th, 8th and 14th Amends.; Cal. Const., art I, §§ 15 and 16.)

### A. Relevant Facts

Appellant moved before trial to sever counts I (the Facundo murder) and II (the Apodaca murder) from count III (the robbery of the Spartan Burgers restaurant), which occurred more than a decade after both of the charged murders and had nothing in common with them. (2 CT 496-511 [Defendant's Notice of Motion and Motion to Sever the Trial of Count III of the Amended Information from Counts I and II (Motion to Sever)]; 3 RT 737-747.) The prosecution conceded evidence concerning the robbery would not otherwise be admissible in either murder trial or vice versa but disputed whether appellant was prejudiced by the joinder of the charges. (3 CT 598-608 [People's Opposition to Defendant's Motion to Sever Count III from Counts I and II (Opposition to Severance)].) The trial court denied appellant's motion on the ground that no "serious prejudice" would result from the joinder. (4 RT 752.)

The prosecution called Ronni Mandujano, the cashier at the Spartan Burgers restaurant to testify about the robbery. According to Ms. Mandujano, the robber, whom she later identified as appellant, entered the Huntington Park restaurant around 8 p.m. on January 21, 1998. Ms. Mandujano, the cook, and the owner were in the restaurant. (6 RT 1398-1399.) Ms. Mandujano testified appellant first ordered food – something that was not on the menu – then pulled out a small black handgun and demanded money. (6 RT 1400-01.) The owner, seeing that Ms. Mandujano was nervous, came over and gave appellant a money box. (6 RT 1401.) Appellant asked the owner if there was more money, and the owner said there was more in the back of the store. (6 RT 1402.) Appellant then forced Ms. Mandujano to go with him and the owner to the back of the store, pointing the gun at her back and then at her head. (6 RT 1402.) Appellant then directed them back to the front of the store and left. (6 RT 1402.) On April 29, 1998, Ms. Mandujano picked appellant out of a six-man photo lineup. (RT 1403-04.) She also identified him in the courtroom. (6 RT 1404.)

During closing argument, the prosecutor linked the "robbery of this poor girl" with the murders, arguing that "when she took the witness stand, we all looked at her -- and Max Facundo's not alive and Raul Apodaca's not alive -- and we're sitting there looking at this girl on the witness stand after hearing what we heard and we thought to ourselves, you know what? I'm so glad you're alive. I am so glad. . . . [Y]ou looked at her and you thought to yourself, this guy points a gun at her, and we're glad she's here to testify." (7 RT 1800.)

## B. Applicable Law

Section 954, which governs joinder and severance of counts under California law, provides that while "[a]n accusatory pleading may charge . . . two or more different offenses of the same class of crimes" jointly,[69] the trial court may sever offenses or counts "in the interest of justice and for good cause shown." (*People v. McKinnon* (2011) 52 Cal.4th 610, 630; *People v. Cummings* (1993) 4 Cal.4th 1233, 1283.) This "provision reflects an apparent legislative recognition that severance may be necessary in some cases to satisfy the overriding constitutional guarantee of due process to ensure defendants a fair trial." (*People v. Bean* (1988) 46 Cal.3d 919, 935 [finding no misjoinder], habeas relief granted sub nom, *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084 [finding misjoinder amounted to due process violation].)

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[69]While section 954.1, enacted by Proposition 115, states that "evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together," that statement essentially codified the preexisting rule that "lack of cross-admissibility is not, by itself, sufficient to show prejudice and bar joinder." (*People v. Geier* (2007) 41 Cal.4th 555, 575, citing *Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285-1286.)

Similarly, article I, section 30, subdivision (a), also enacted by Proposition 115, which states that the Constitution "shall not be construed . . . to prohibit the joining of criminal cases as prescribed by the Legislature," or through the initiative process, is consistent with this Court's prior rulings regarding joinder and severance. (See, e.g., *People v. Memro* (1995) 11 Cal.4th 786, 849 [where statutory requirements for joinder are met, a defendant seeking severance must "clearly establish that there is a substantial danger of prejudice"].)

Thus, "[n]either of these limitations divests trial courts of their discretion under Penal Code section 954 to sever cases, otherwise properly joined, 'in the interests of justice.'" (*Belton v. Superior Court, supra*, 19 Cal.App.4th at p. 1285.)

The trial court's decision is reviewed for abuse of discretion, in light of the record before the court at the time of its ruling. (*People v. McKinnon, supra,* 52 Ca.4th at p. 630; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120; *People v. Price* (1991) 1 Cal.4th 324, 388.)[70] Where the charges include capital murder the exercise of that discretion is reviewed with the highest degree of scrutiny. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 454, superceded by statute in part as stated in *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1229, fn. 19 (*Alcala*).)

In *Alcala*, this Court concluded that the "heightened analysis" required in *Williams* is "no longer called for" in light of the passage of section 790, subdivision (b), which provides specifically for the joinder of capital cases. (*Alcala v. Superior Court, supra,* 43 Cal.4th at p. 1229, fn. 19.) At the same time, *Alcala* continued to list "whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case" as a factor to be considered in reviewing a trial court's ruling on a motion for severance. (*Id.* at p. 1221; accord *People v. McKinnon, supra,* 52 Cal.4th at p.630.) Appellant submits that heightened scrutiny is still required by the Eighth Amendment as joinder may heighten the risk of

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[70]While "the law prefers" consolidation (see, e.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 408), the grounds which generally support consolidation and demonstrate its efficiency do not apply here. Thus, consolidation "ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts [are] tried" in separate trials (*id.* at p. 409); but appellant implicitly waived any claim that separate trials would constitute harassment (see *Williams v. Superior Court, supra*, 36 Cal.3d at p. 451 [concern about needless harassment of defendant is "totally irrelevant [where] it is the defendant who has moved for separate trials, thereby waiving this concern"]). Moreover, the same facts would not have been retried in separate trials, because the facts relevant to the various charges were distinct.

an "unwarranted conviction" in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638; cf. *Gregory v. United States* (D.C. Cir.1966) 369 F.2d 185, 189 ["It may be seriously questioned whether it is proper in any capital case to join trial offenses occurring at different times and places. The danger arising from the cumulative effect of evidence of other offenses on the minds of the jurors is too great to tolerate in such cases"].)

The misjoinder of charges violates the due process clauses of the federal Constitution if it renders a defendant's trial fundamentally unfair. (*Bean v. Calderon, supra,* 163 F.3d at p. 1084, citing *United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 and *Featherstone v. Estelle* (9th Cir.1991) 948 F.2d 1497, 1503; see also *People v. McKinnon, supra*, 52 Cal.4th at p. 632 ["A pretrial ruling that was correct when made can be reversed on appeal only if joinder was so grossly unfair as to deny due process"]

**C. The Trial Court Abused its Discretion by Denying Appellant's Motion to Sever Murder and Robbery Cases that Occurred More than a Decade Apart and Were Not Cross-Admissible, Resulting in a Highly Prejudicial Spill-Over Effect**

The denial of a motion to sever "may be an abuse of discretion if the evidence related to the joined counts is not cross-admissible; if evidence relevant to some but not all of the counts is highly inflammatory; if a relatively weak case has been joined with a strong case so as to suggest a possible 'spillover' effect that might affect the outcome; or one of the charges carries the death penalty." (*People v. McKinnon, supra,* 52 Cal.4th at p. 630, quoting *People v. Cummings, supra*, 4 Cal.4th at p. 1283.)

Cross-admissibility – "whether the evidence pertinent to one case would have been admissible in [a separate trial of] the other under Evidence Code section 1101, subdivisions (a) and (b) – is evaluated first, because

"'cross-admissibility would ordinarily dispel any possibility of prejudice.'" (*Belton v. Superior Court, supra,* 19 Cal.App.4th at p. 1283, quoting *Williams v. Superior Court, supra*, 36 Cal.3d at p. 448.)[71] If the evidence is not cross-admissible, the trial court must consider the potential for prejudice with respect to the remaining factors. (See *People v. Thomas* (2011) 52 Cal.4th 336, 350; *Williams v. Superior Court, supra*, 36 Cal.3d at pp. 448, 451-452; *Belton v. Superior Court supra,* 19 Cal.App.4th at p. 1284; *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129,139-140.)

**1. Cross-admissibility**

While the cross-admissibility of evidence "is not the sine qua non of joint trials" (*People v. Marquez* (1992) 1 Cal.4th 553, 572), whether the evidence of these separate charges was cross-admissible is still a key consideration in deciding whether it was proper to join them for trial. (*People v. Memro, supra,* 11 Cal.4th at p. 850.) If "[j]oinder is generally proper when the offenses would be cross-admissible in separate trials" (*People v. Arias* (1996) 13 Cal.4th 92, 126), it follows that joinder is less appropriate where the evidence is *not* cross-admissible.[72] Indeed, "there is

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[71]Evidence Code section 1101, subdivision (b), allows the admission of evidence of the defendant's past conduct, including uncharged crimes, where the evidence is relevant to prove some fact other than the disposition to commit the crime, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

[72]While section 954.1 "prohibits the courts from refusing joinder *strictly* on the basis of lack of cross-admissibility of evidence" (*Belton v. Superior Court, supra*, 19 Cal.App.4th at p. 1285 [italics added]), nothing in section 954.1, or the cases construing it, suggests that the absence of cross-admissibility cannot be considered as a factor weighing against joinder. (See *People v. Osband* (1996) 13 Cal.4th 622, 667 [section 954.1 codifies rule of *People v. Sandoval* (1992) 4 Cal.4th 155, 173, that lack of cross-admissible evidence is not sufficient to establish prejudice].)

'a high risk of undue prejudice whenever ... joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.'" (*Bean v. Calderon, supra,* 163 F.3d at p. 1084, quoting *United States v. Lewis* (9th Cir.1986) 787 F.2d 1318, 1321.) This is because jurors at a joint trial cannot adequately "compartmentalize" damaging information about the defendant, and because such a trial often "prejudice[s] jurors' conceptions of the defendant and of the strength of the evidence on both sides of the case." (*United States v. Lewis, supra,* 787 F.2d at p. 1322; accord *Bean v. Calderon, supra,* 163 F.3d at p. 1084; Hein, *Joinder and Severance* (1993) 30 Amer. Crim. L.Rev. 1139, 1144-1145 ["joinder of counts has a synergistic impact" which bolsters weak charges with evidence of stronger ones; risk of conviction "rises substantially when offenses are joined"].)

Here, the prosecution did not argue, and the trial court did not find, that the evidence of the Spartan Burgers robbery was cross-admissible as to either murder charge. As appellant emphasized, the crimes were committed over a decade apart and differed in almost every respect: (1) appellant knew both of the victims in the murder cases but the victim of the robbery was a stranger; (2) neither murder was committed for financial gain – Max Facundo was killed to protect appellant's cousin Charlene from further domestic violence at Facundo's hands and Apodaca was killed in a brawl among associates; and (3) the murders were committed with a knife or other sharp instrument while the robbery was committed with a gun. In these circumstances, the prosecution properly did not claim there was any similarity, or common design or plan between the offenses. Indeed, the prosecution did not allege the murders and robbery had any relevance whatsoever to one another. (3 CT 601 [Opposition to Severance].) Their

argument was solely that appellant had not demonstrated that he would be prejudiced by the joinder. (3 CT 607.) As discussed further below, this claim was erroneous.

**2. Prejudicial Effect**

**a. Inflammatory Evidence**

This Court has recognized that error arises when the trial court joins an inflammatory charge with a less egregious one "under circumstances where the jury cannot be expected to try both fairly." (*People v. Mason* (1991) 52 Cal.3d 909, 934.) "The danger to be avoided is 'that strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case' on another crime." (*Ibid.*, quoting *People v. Walker* (1988) 47 Cal.3d 605, 623.)

The evidence of the robbery was inflammatory because it involved the use of a firearm, against a stranger, for the purpose of financial gain. In contrast to the murder cases, which each involved victims known to appellant and extenuating circumstances, the robbery of a stranger served to invoke jurors' fears of crime – the most potent of which is the fear of being preyed on by a stranger with a gun. (2 CT 505-506 [Motion to Sever].)

**b. Joinder Of A Weak Case With A Stronger Case**

Joinder should never be a vehicle for bolstering one or two weak cases against a defendant. (*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 453-454; see also *Bean v. Calderon*, *supra*, 163 F.3d at p.1085 [potential for undue prejudice from joinder of strong evidentiary case with a weaker one]; *Lucero v. Kerby* (10th Cir. 1998) 133 F.3d 1299, 1315 [danger in consolidation of offenses because state may join a strong evidentiary case with a weaker one hoping that an overlapping consideration of the evidence

will lead to convictions of both].) Even where joinder is technically proper, severance is favored if there is a great disparity between the gravity of the offenses, or if, in light of the weight of the evidence offered for the different counts, there is the possibility that the defendant will be convicted due to the prejudicial atmosphere created by the joinder and not by the evidence itself. (See *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 453.)

As appellant argued below, the murder cases were weak with respect to the level of intent involved, whereas the robbery demonstrated an unambiguous criminal intent. (2 CT 506-507 [Motion to Sever.])

**c. The Charges Included A Capital Offense**

Because the Apodaca and Facundo cases were both alleged to be capital offenses, this Court must "analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454; see also *People v. Lucky* (1988) 45 Cal.3d 259, 277; *People v. Smallwood* (1986) 42 Cal.3d 415,430-431.[73])

The prosecution argued below that joining the robbery charges with the murder did not affect the likelihood of the death penalty being imposed for either murder charge, asserting that "defendant's attempt to associate a premeditated and deliberate intent to kill, with an intent to deprive certain victims of their property is groundless." (3 CT 606-607 [Opposition to

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[73]In *People v. Bean* (1988) 46 Cal.3d 919, 939, this Court disapproved *People v. Smallwood* (1986) 42 Cal.3d 415, 429, to the extent that it conflicted with *Williams v. Superior Court, supra,* 36 Cal.3d 441, 452, and other cases holding that the defendant carries the burden of showing potential prejudice on a motion to sever.

Severance].) This argument assumes there was no question that appellant possessed the most culpable state of mind as to the murders and thus that the mere intent to deprive someone of property could not possibly be prejudicial in comparison.

It was, however, precisely because the existence of "a premeditated and deliberate intent to kill" was very much in dispute that the joinder of the robbery charge was prejudicial. (3 RT 740, 743-744.) This prejudice was realized at trial: After successfully opposing the severance motion, the prosecutor in closing argument specifically invoked the robbery to do precisely what the defense had warned against – to urge the jury to resolve against the defense any doubts about appellant's state of mind. The prosecutor argued that though appellant had admitted to the murders while on the stand, he had not similarly taken responsibility for the robbery, committed against "this poor girl," because it was a cowardly act, "and he doesn't want to admit to that." (7 RT 1800.) The prosecutor invited the jury to infer from appellant's willingness to "point[] a gun at her" that he was a cold-blooded murderer who would just as easily have killed Ms. Mandujano as robbed her: "and Max Facundo's not alive and Raul Apodaca's not alive -- and we're sitting there looking at this girl on the witness stand after hearing what we heard and we thought to ourselves, you know what? I'm so glad you're alive." (7 RT 1800.)

While the prosecution asserted in its responsive pleading that "[t]he murder charges carry their own felony-murder special circumstances," this is not correct. (3 CT 606.) There was no felony-murder special circumstance alleged as to either murder. (1 CT 108-114 [Amended Information, filed January 22, 1999].) The prosecution did allege the multiple-murder special circumstance (*ibid.*), but this would not have been

found true if appellant had been convicted only of manslaughter in the Apodaca case. Because robbery was used by the prosecution to improperly undermine the defense to the Apodaca charges, the erroneous joinder of the robbery charge directly affected appellant's eligibility for the death penalty, as discussed further below.

**d. The Benefits Of Joinder Were Minimal**

In contrast to the potential for prejudice discussed above, the benefits of joinder were negligible. (See *People v. Bean*, *supra*, 46 Cal.3d at p. 936, 940 [benefits of joinder must be weighed against prejudicial effect]; *People v. Smallwood*, *supra*, 42 Cal.3d at p. 430.) These cases involved no common witnesses – other than a police officer to lay the foundation for the admission of appellant's confession into evidence. Since the evidence of the charges was not cross-admissible, "there simply was no significant judicial economy to be gained from joinder." (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 430.)

To the contrary, the trial was already complicated by trying the two murder cases – which occurred six months apart and were completely unrelated – together, requiring the prosecutor to constantly ask the jury to switch its attention from one crime to the other. (See, e.g. 6 RT 1365, 1385, 1396, 1407, 1517.) The addition of a third offense, which occurred more than a decade after the other two cases and was unrelated to either of them, served to only further confuse the presentation of evidence at trial.

Here, as in *Smallwood*, "'[t]he only real convenience served by permitting joint trial of [these] unrelated offenses against the wishes of the defendant [was] the convenience of the prosecution in securing a conviction.'" (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 430, quoting *United States v. Foutz* (4th Cir. 1976) 540 F.2d 733, 738.) Moreover, even

if separate trials would have involved additional time and expense,"the pursuit of judicial economy must never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 451-452; see also *People v. Smallwood*, *supra*, 42 Cal.3d at p. 428.) It was thus an abuse of discretion to try the robbery and homicide charges together.

**3. Reversal Is Required**

The joinder of the stronger evidence of the robbery caused an improper "spillover effect" resulting in the first degree murder verdict for Facundo and a second degree murder verdict for Apodaca because, "in the jurors' minds, [the two cases became] one case which [was] considerably stronger than [either of them] viewed separately." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454.)

As to the Apodaca homicide charge, there was doubt whether appellant actually participated in the stabbing, inflicted only a single superficial wound, or was simply a bystander, as his confession was inconsistent with the physical evidence. Moreover, even if appellant's confession was credited, there was a strong argument that it established only manslaughter, based on provocation. Similarly, with respect to the Facundo murder, although the trial court erroneously denied appellant's requested instructions on imperfect defense of another, the jury could reasonably have found him guilty of second degree murder. Instead, he was convicted of first degree murder.

The prosecutor used the robbery charge in his summation to support his argument that both murders were premeditated and deliberated, maintaining that appellant's criminal disposition was such that Ms. Mandujano was lucky she was not a murder victim herself. This argument

went to the heart of the defense to both of the murder charges.

In the Apodaca case, appellant was convicted of second degree murder, indicating that the jury did not accept the state's case in its entirety. Absent the prejudicial effect of the joinder, appellant could well have been convicted of manslaughter only, in which case there would have been no multiple-murder special circumstance. This verdict would have been consistent with the conviction of appellant's co-defendant and with the magistrate's 1987 order, holding appellant to answer only for manslaughter on this charge. (2 CT Supp.Two 342-348, 350 [Salazar]; 2 CT 356, 421 [appellant].) Because as set forth in Argument I, *supra*, the prior murder conviction on which the prosecution relied to establish the second special circumstance was invalid, appellant would not have been eligible for the death penalty.

Thus, what this Court foresaw in *Williams* happened here: At the prosecutor's urging, "the jury [] aggregate[d] all of the evidence, though presented separately in relation to each charge, and convict[ed] on [all] charges in a joint trial, whereas, at least arguably, in separate trials, there might not be convictions on [all] charges" – or there might have been convictions of lesser offenses – and appellant would not have been subject to the death penalty. (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 453.)

This Court has said that an assertedly erroneous joinder may be upheld on appeal "in [a] capital case[] . . . where the evidence on each of the joined charges is so strong that consolidation is unlikely to have affected the verdict." (*People v. Lucky, supra,* 45 Cal.3d at p. 277, citing *People v. Smallwood, supra,* 42 Cal.3d at pp. 429-430.) The evidence in this case did not meet that standard.

## D. The Trial Court's Failure To Sever The Charges Made Appellant's Trial Fundamentally Unfair

The trial court's abuse of its discretion in this case rendered appellant's trial fundamentally unfair, in violation of the federal and state constitutions. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art I, §§ 15, 16, and 17; *People v. Arias*, *supra*, 13 Cal.4th at p. 127; *Bean v. Calderon*, *supra*, 163 F.3d at p. 1084.) Accordingly, reversal is required because the state cannot establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal is also compelled under state law because failing to sever the robbery and homicide charges resulted in demonstrable prejudice to appellant in this capital case. (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 630 [defendant must show prejudice].)

Trying these charges together also violated appellant's right to be tried by an unbiased jury, under article I, section 16 of the California Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution, which is a structural defect requiring reversal per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 265-266, disapproved on other grounds in *Johnson v. California* (2005) 545 U.S. 162; *Gray v. Mississippi* (1987) 481 U.S. 648, 668.) Further, appellant had a constitutionally-protected liberty interest in the correct application of state laws governing joinder and severance, and joining these offenses deprived him of the process due to him under state law, in violation of his federal due process rights. (U.S. Const., 5th & 14th Amends.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) Finally, given the prejudicial effect of joinder in this case, the jury's verdict cannot be considered reliable, and therefore violates the Eighth Amendment. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 643.)

## X.

## THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE APPELLANT'S LETTER TO THE DISTRICT ATTORNEY GOADING HIM TO SEEK THE DEATH PENALTY AS THE LETTER WAS FAR MORE PREJUDICAL THAN PROBATIVE UNDER EVIDENCE CODE SECTION 352, MISLED THE JURY AND UNDERMINED THE RELIABILITY OF THE SENTENCING PROCESS

The trial court improperly admitted, over defense objection, a highly inflammatory letter appellant wrote to the elected District Attorney, demanding the death penalty and threatening to kill someone else if he was not sentenced to death. The letter was not relevant to any legitimate issue in the case and any marginal relevance it did have was far outweighed by the danger of unfair prejudice. (Evid. Code, § 352.) Admission of the letter, which became a focal point of the prosecution's penalty phase closing argument, violated appellant's constitutional rights to a fair trial and to a fair and reliable sentencing. (U.S. Const. 5th, 6th, 8th & 14th Amends.)

### A. Proceedings Below

In September 1998, shortly before his preliminary hearing and while he was representing himself, appellant wrote a highly provocative letter to then-Los Angeles County District Attorney, Gil Garcetti. In the letter, appellant expressed his desire to be sentenced to death. He took responsibility for both the Apodaca and Facundo murders but in each instance added fictitious aggravating circumstances to his description of them. Appellant denied the existence of any mitigating circumstances concerning his mental state, denied in the most inflammatory terms feeling any remorse, taunted Mr. Garcetti to prove his manhood by securing a death sentence, and threatened to kill someone in prison if he did not receive the

death penalty in this trial:

MR. GARCETTI:

WITHOUT BEATING AROUND THE BUSH AND/OR TRYING TO ARTICULATE MYSELF IN ANY CERTAIN AND LEGAL TERMINOLOGY, PLEASE ALLOW ME TO GET RIGHT TO THE POINT: WHEN I MURDERED MAX FACUNDO (FOR HIRE) IN JUNE OF '86 AND THEN MURDERED RAUL APODACA IN FEBRUARY OF '87 WHILE I WAS ROBBING HIM. I WASN'T DRUNK; I WASN'T UNDER THE INFLUENCE OF ANY DRUG AND I DEFINATELY (*sic*) WASN'T SUFFERING ANY MENTAL DISORDER I.E. RETARDATION! INSTEAD, I WAS FULLY AWARE OF ALL OF MY MENTAL FACULTIES. IN OTHER WORDS, I KNEW EXACTLY WHAT THE FUCK I WAS DOING, AND JUST AS I FELT THEN I FEEL TODAY - THAT THE BOTH OF THOSE COWARDS DESERVED WHAT THEY GOT: DEATH AND AN EARLY EXPIRATION IN LIFE, TO SAY THE LEAST! NEEDLESS TO SAY, SIR, **[EXCLUDED AT GUILT PHASE:** *I DIDN'T FEEL BAD ABOUT THEIR UNTIMELY DEMISE THEN, NOR DID I REGRET MY ACTIONS IN ANY WAY, SHAPE OR FORM - AND I DEFINATELY (sic) DON'T SHARE/EXPERIENCE THOSE FEELINGS & EMOTIONS TODAY! AS A MATTER OF FACT, IF]* I HAD THE OPPORTUNITY TO DO IT OVER I WOULD CUT-OFF THEIR HEADS AND SEND 'EM BOTH TO THEIR FAMILY!

SO, YOU NEEDN'T "CRY FOR ME ARGENTINA," BECAUSE I'M MORE THAN READY, WILLING AND ABLE TO FACE THE MUSIC AND ACCEPT RESPONSIBILITY FOR MY ACTIONS, AS WELL AS PAY WHATEVER PRICE THERE IS TO PAY – FOR "PLAYING THE GAME"! YES. IT IS ALL A BIG GAME, AND THE ONLY REASON I LOST PART OF THE GAME, IS BECAUSE I GOT CAUGHT,THAT'S ALL. **[EXCLUDED AT GUILT AND PENALTY PHASE:** *BUT, I DIDN'T GET CAUGHT FOR TWO (2) OTHER 187S THAT I COMMITTED IN PRISON SO I GUESS THAT YOU CAN SAY I'M BATTING .500, RIGHT?* ☺] **[EXCLUDED AT GUILT PHASE:** *IN ANY CASE, SIR, IF "YOU" DON'T HAVE ENOUGH BALLS & GUTS TO GIVE ME WHAT I DESERVE, BY SENDING MY ASS TO THE "GAS CHAMBER," THEN MY ONLY OTHER RECOURSE IS TO KILL SOMEONE ELSE – ONCE I RETURN TO PRISON – IN ORDER TO FINALLY RECEIVE THE "ULTIMATE PUNISHMENT" THAT EVEN THE MAN UPSTAIRS KNOWS I DESERVE! SO, IF YOU WANT THAT ON YOUR CONSCIENCE, THEN THAT'S ENTIRELY UP TO*

*YOU!*] BUT, WHATEVER YOU DECIDE TO DO, YOU CAN REST ASSURED, AND BET YOUR LAST MONEY THAT TOMMY ADRIAN TRUJEQUE AKA "EL KILLER DE VARRIO WHITE FENCE" WILL MOST DEFINATELY *(sic)* PREVAIL IN HIS FUTURE ENDEAVORS! YOU CAN BELIEVE THAT, IF NOTHING ELSE! AND IF YOU'RE THINKING THAT I AM JUST ONE OF THOSE PSYCHOTIC & PARANOID SYCHSOPHRENICS *(sic)* THAT WILL SOMEDAY ALL OF A SUDDEN SWITCH HIS ATTITUDE, STATEMENTS AND TRUE FEELINGS TO THE COMPLETE OPPOSITE OF WHAT THEY ARE TODAY – AS SOME IDIOTS ON DEATH ROW HAVE RECENTLY DID *(sic)*, LET ME ASSURE YOU THAT YOU'RE WASTING YOUR TIME & ENERGY! WHY? BECAUSE I'M 110% SINCERE IN MY DECLARATIONS AND I AIN'T CHANGING JACK SHIT ABOUT WHAT I'VE SAID TO YOU OR ANYONE ELSE – IN REGARDS TO THE TWO (2) COWARDS THAT I AM PROUD OF TAKING OUT!
**[EXCLUDED AT GUILT PHASE**: *YES, I AM CURRENTLY REPRESENTING MYSELF AND PLAN TO DO SO FOR THE DURATION OF THESE PROCEEDING – BECAUSE I DON'T NEED SOME MOUTHPIECE TO TRY AND TELL ME WHAT TO SAY AND WHAT NOT TO SAY – NOR DO I DESIRE TO HAVE ONE REPRESENT ME! I'M VERY CAPABLE OF DEFENDING MYSELF IN THE JUDICIAL SYSTEM, AS I HAVE MANY TIMES BEFORE! MY ONLY HOPE IS THAT SUCH PROCEEDINGS WON'T DRAG ON AND LAST FOREVER AS THERE IS ABSOLUTELY NO NEED FOR DELAYS! AT LEAST IN MY EYES I SEE NO NEED FOR ANY!*]

IN CLOSING, I SAY THIS: WHATEVER YOU PLAN TO DO WITH THIS LI'L INCRIMINATING NOTE (AS YOU PROBABLY REFER TO IT AS) IS ENTIRELY UP TO YOU! IT MAKES NO DIFFERENCE TO ME! FOR ALL I CARE, YOU CAN RUB IT IN YOUR CHEST, MR. DISTRICT ATTORNEY!
SINCERELY YOURS,
TOMMY A. TRUJEQUE

(Peo. Ex. 8B for identification; Peo. Exs. 8 & 8A)

During the guilt-innocence phase of the trial, the prosecutor announced his intention to introduce the letter into evidence. (6 RT 1424.) Defense counsel promptly objected that the letter should be excluded under Evidence Code section 352, pointing out that the letter, the purpose of

which was to secure a death sentence, was riddled with inaccuracies and inflammatory language and had no probative value. (6 RT 1424, 1454-1455; 4 CT 972-984 [Notice of and Motion to Exclude Prejudicial Evidence, filed August 23, 1999].) The trial judge, who characterized the letter as "probably one of the most literal and coherent letters and eloquent letter, in its own way, that I've read in a long time" (6 RT 1442), agreed to exclude, at the guilt phase, appellant's reference to committing two other murders for which he had not been caught; appellant's claim to have no remorse; and appellant's threat to kill again in order to secure a death sentence.[74] (6 RT 1443-1444.)

Defense counsel argued that appellant's claim to be proud of what he'd done should be excluded as further expressing lack of remorse, but the prosecutor maintained the statement was relevant to prove premeditation. (6 RT 1445.) Similarly, the prosecutor argued that the sentence: "If I had the opportunity to do it over I would cut off their heads and send 'em both to their family!" was relevant to rebut the argument that either murder was a voluntary manslaughter. (6 RT 1461.) The judge, who had initially said that this statement was inadmissible, reversed himself and allowed it in. (6 RT 1443.)

During the trial, the prosecutor questioned appellant extensively about the letter, including asking him about his claims that the Facundo murder was for hire and that he had killed Apodaca during a robbery: "isn't this all the stuff that makes you eligible for the death penalty?" (7 RT

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[74]Trial counsel argued that lack of remorse was not relevant at the guilt-innocence phase, initially suggesting it might be relevant at the penalty phase, but counsel later opposed the letter's admission at the penalty phase as well. (6 RT 1443, 1454.)

1681-1687.) Appellant claimed not to know what a special circumstance was and was generally noncommital in response to the prosecutor's questions. (*Ibid.*)

At the penalty phase, over renewed defense objection, the trial judge admitted a different version of the letter into evidence, this time including the previously redacted portions, except for the claim to have committed two other murders. (9 RT 2267-2268; Peo. Ex. 8A.) In his opening argument at the penalty phase, the prosecutor emphasized that in his letter to Mr. Garcetti, appellant had threatened to kill someone in custody if he did not get the death penalty. (8 RT 1890.) Again, in closing, the prosecutor reminded the jury, "the most important thing that sets a theme to this closing argument is the defendant's letter":

> And you haven't had the opportunity to read this portion because it was blocked out before because it wouldn't have been right to give it to you in guilt phase. But he says in his letter that he writes to the district attorney, "in any case, sir, if you don't have enough balls and guts to give me what I deserve by sending my ass to the gas chamber, then my only other recourse is to kill someone else once I return to prison in order to finally receive the ultimate punishment even the man upstairs knows I deserve."

(11 RT 2957.) He then urged the jurors to sentence appellant to death, because "by doing so, you know, in your mind as jurors that you've done everything you can so that that last sentence doesn't happen." (*Ibid.*)

**B. The Letter was not Admissible at the Guilt-Innocence Phase of the Trial**

Under Evidence Code section 352, a trial court must exclude even relevant evidence if "its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Evidence is

prejudicial within the meaning of Evidence Code section 352 if it 'uniquely tends to evoke an emotional bias against a party as an individual' [citations] or if it would cause the jury to '"prejudg[e]" a person or cause on the basis of extraneous factors' [citation]." (*People v. Cowan* (2010) 50 Cal.4th 401, 475; accord *People v. Kipp* (2001) 26 Cal.4th 1100, 1121; *People v. Bolin* (1998) 18 Cal.4th 297, 320.) Thus, "evidence should be excluded 'when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose' [citation]." (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1091-92, quoting *People v. Howard* (2010) 51 Cal.4th 15, 32.)

If the proffered evidence is of dubious reliability, its probative value is necessarily diminished and therefore of less weight in the balancing process. (See *People v. Maury* (2003) 30 Cal.4th 342, 432-433 [trial court properly excluded evidence under Evidence Code section 352 given its "doubtful reliability"]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 [source and reliability of other crimes evidence considered in assessing probative value]; *People v. Harris* (1989) 47 Cal.3d 1047, 1094 [Cal. Const., art. 1, § 28, subd. (d), declaring that no relevant evidence shall be excluded in a criminal proceeding, does not mandate admission of unreliable evidence; unreliability of evidence diminishes its relevance and probative value and hence may be excluded on those grounds under section 352].)

For example, in *People v. Coleman* (1985) 38 Cal.3d 69, this Court held that letters written by a homicide victim a substantial time before the crime, stating that the defendant had talked about killing his family, should

have been excluded under Evidence Code section 352, because the letters were far more prejudicial than probative. (*Id.* at pp. 81-83.) In its assessment of the letters' probative value, the Court noted similar letters had been found inadmissible as unreliable hearsay, where the author had "a motive to misrepresent or exaggerate the conduct of the accused." (*Id.* at p. 85.)

The probative value of appellant's letter to Mr. Garcetti was negligible. The letter added nothing in terms of actual evidence of appellant's guilt: the prosecution had already introduced appellant's confession, through Detective Durazo, and presented the testimony of several other witnesses concerning both the Facundo and Apodaca homicides. Appellant's admissions of guilt in the letter were therefore entirely cumulative and, as defense counsel stressed, the letter was riddled with hyperbole, untruths, and deliberately provocative and offensive statements designed to appeal to jurors' fears and emotions. The danger of unfair prejudice therefore greatly outweighed whatever minimal probative value the letter had and should have rendered it inadmissible.

Like the letters excluded in *People v. Coleman, supra*, appellant's letter was unreliable because its author – in this case, appellant – had "a motive to misrepresent or exaggerate the conduct of the accused." (*People v. Coleman, supra,* 38 Cal.3d at p. 85.) Outside the presence of the jury, the prosecutor acknowledged that appellant's claims that he "murdered" Apodaca "while I was robbing him" and had "murdered" Facundo "for hire" were not true and that appellant was just "bragging" and asserting the existence of additional special circumstances (robbery and financial gain) in

an effort to enhance his chances of getting a death sentence.[75] (7 RT 1701-1702.) Nevertheless, the prosecutor claimed, and the trial judge agreed, that

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[75]For this reason, appellant's letters are different from those at issue in *People v. Kipp, supra,* in which a capital defendant wrote letters to his wife which were intercepted by prison staff. (*People v. Kipp, supra*, 26 Cal.4th at pp. 1120-1122.) Kipp wrote the letters after he had been convicted of one murder and was awaiting sentencing for that offense, several years before his trial and sentencing for a second murder, at which the letters were introduced. Kipp sought to exclude the intercepted letters which included admissions, references to Satan, and threats of future violence. (*Id.* at p. 1122.)

First, while Kipp claimed his letter contained false admissions made while he was angry and dejected after his conviction, the letters were not – as in this case – directed to the prosecutor with the stated intention of securing a death sentence; they were written to his wife. (*People v. Kipp, supra*, 26 Cal.4th at p. 1120.) This court rejected Kipp's claim of unreliability, on the ground that he had not "plausibly explain[ed]" what "would cause him to falsely admit culpability for crimes he had not committed." (*Id.* at p. 1122.)

The Court did acknowledge that Kipp admitted to sodomizing the victims, though there was no evidence of sodomy, but concluded that even if these statements "could be attributed to exaggeration or embellishment" they did not "substantially detract[ ]" from the defendant's admission that he, rather than someone else, had committed the murder and rape. (*People v. Kipp, supra*, 26 Cal.4th at p. 1122.) Here, as discussed above, appellant's admissions did not add anything to the prosecution's evidence, which included other admissions by appellant. Moreover, the prosecution admitted appellant's letters contained false statements that enhanced his culpability. Thus, the letters in *Kipp* were not as unreliable as the letter in this case and had more plausible probative value.

Second, the letters in *Kipp* were also relevant to a legitimate issue at the penalty phase. Kipp's letters contained threats of violence against prison staff and references to Satan. Kipp unlike appellant, however, presented evidence of his good character and remorse in mitigation, arguing that the murders were a brief aberration. Thus, unlike appellant, Kipp opened the door to his letters being introduced to rebut his case in mitigation. (*People v. Kipp, supra*, 26 Cal.4th at pp. 1132-1133, 1134-1135.)

the letter was admissible because it "screams premeditation and deliberation." (6 RT 1445.)

Specifically, the prosecutor argued that the sentence "and just as I felt then I feel today - that the both of those cowards deserved what they got," was relevant to prove premeditation (6 RT 1445) and that the sentence: "If I had the opportunity to do it over I would cut off their heads and send 'em both to their family!" was relevant to negate the defense of provocation and to contradict the argument that either murder was a voluntary manslaughter. (6 RT 1457, 1461.)

In fact, neither sentence speaks to appellant's state of mind at the time of the incidents as much as both speak to appellant's desire, over a decade later, to secure a death sentence – by making provocative claims about his lack of remorse. The prosecutor had properly conceded that lack of remorse was not relevant at the guilt phase of the trial, agreeing that the sentence "I didn't feel bad about their untimely demise then, nor did I regret my actions in any way, shape or form - and I definately (sic) don't share/experience those feelings & emotions today!" was not admissible at the guilt-innocence phase. (6 RT 1457, 1460.) Appellant's highly inflammatory statement about cutting off heads immediately follows this excluded sentence and is an illustration of appellant's asserted lack of remorse. It therefore should have been excluded along with the preceding sentence, of which it was a continuation.

Moreover, the assertion that the victims got what they deserved or that appellant would do it again was not inconsistent with a voluntary manslaughter argument based on provocation or imperfect defense of another. In both cases, the defendant would be expected to believe, after the fact, that the killing was justified.

In any event, whatever marginal relevance these assertions may, theoretically, have had to appellant's state of mind 13 or 14 years earlier was negated completely by their unreliability, appearing as they did in a letter which the prosecution conceded contained numerous inaccuracies and exaggerations and was intended by appellant to secure a death sentence. Just as appellant made false statements about the circumstances of the crimes to appear more culpable, the accompanying, outrageous and provocative statements were for the same effect. These statements included referring to cutting off the victims' heads and sending them to their families, characterizing the crimes as a "big game," claiming to be proud of "taking out" the "two cowards," and – admitted at the penalty phase – questioning whether Mr. Garcetti had "the balls" to "send[] my ass to the gas chamber" and threatening to kill someone else to get a death sentence. Appellant's purpose was made still more clear by his invitation to Mr. Garcetti to use "this l'il incriminating note" however he pleased – i.e., to persuade a jury to convict appellant of special circumstances murder and sentence him to death.

The letter thus aided the prosecution's case primarily by shocking and frightening the jury. This is precisely the type of prejudice Evidence Code section 352 is supposed to prevent: the introduction of evidence that invites the jury to resolve the case on the basis of emotion and fear. (See, e.g. *People v. Rivera* (2011) 201 Cal.App.4th 353, 365 [demonstration of murder by defendant in court was unduly prejudicial where it was "likely to inflame the emotions of the jury and evoke an emotional bias, while having exceedingly negligible probative value, if any, on the issues"].)

Indeed, having argued the letter "screamed premeditation and deliberation" and was therefore relevant and admissible at the guilt-

innocence phase (6 RT 1445), the prosecutor referred to the letter twice in his closing argument at the guilt-innocence phase, and neither time did he cite it as evidence of premeditation or deliberation. (7 RT 1804, 1833.) The true effectiveness of the letter was in the emotional impact of its lurid and provocative language.

The trial court's abuse of discretion in admitting this highly inflammatory letter with no legitimate probative value whatsoever was so prejudicial that it rendered appellant's trial fundamentally unfair in violation of the due process clause. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439.) Reversal is also required under state law: had appellant's jury not heard the inflammatory evidence in this case, in which there was a genuine dispute as to the degree of appellant's culpability, it is reasonably probable that appellant would have been convicted of a lesser offense on at least one of the murder counts. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Specifically, as argued above, there was a strong case that appellant should have been convicted of no more than manslaughter for his role in Apodaca's death, and appellant then would not have been eligible for the death penalty. (See Argument I, *supra*, concerning invalidity of prior-murder special circumstance.)

Finally, appellant had a constitutionally-protected liberty interest in the correct application of state evidence laws, and the trial court's error deprived him of the process due to him under state law, in violation of his federal due process rights. (U.S. Const., 5th & 14th Amends.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

**C. The Letter Was Not Admissible at the Penalty Phase**

At the penalty phase, the previously redacted portions of the letter

were admitted, including appellant's statement that he did not "regret my actions in any way, shape or form" and his threat to kill someone in custody if he did not get the death penalty in his current trial. (9 RT 2267-2268; Peo. Ex. 8A.) These additional portions of the letter had no probative value because they were not relevant to any statutory aggravating circumstance. They were relevant only to show lack of remorse and future dangerousness, respectively.

At the penalty phase of a capital trial, the "prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in section 190.3." (*People v. Crittenden* (1994) 9 Cal.4th 83, 148, citing *People v. Boyd* (1985) 38 Cal.3d 762, 772–776.) Because it is not a statutory aggravating circumstance, lack of remorse may therefore be considered in aggravation, as a circumstance of the crime under factor (a) of section 190.3, only insofar it relates to the "defendant's overt remorselessness *at the immediate scene of the crime*.... On the other hand, *postcrime* evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1231-1232 [original italics, citing *People v. Boyd, supra,* 38 Cal.3d at pp. 771–776], superseded by statute on other grounds as stated in *Barnett v. Superior Court* (2010) 50 Cal.4th 890; accord *People v. Collins* (2010) 49 Cal.4th 175, 227; *People v. Pollack* (2005) 32 Cal.4th 1153, 1184-1185; see also *United States v. Walker* (N.D.N.Y. 1995) 910 F. Supp. 837, 855 [defendant's assertion that he and co-defendant had "killed the 'motherf* * *er'" was more prejudicial than probative and was not admissible to prove nonstatutory aggravating circumstance of lack of remorse].)

Future dangerousness is likewise not a statutory aggravating

circumstance, and evidence of future dangerousness is not admissible in the prosecution's case in chief, but may be admitted to rebut evidence offered by a defendant in mitigation that he would not pose a danger if sentenced to life without possibility of parole. (*People v. Malone* (1988) 47 Cal.3d 1, 31, citing *People v. Boyd, supra* 38 Cal.3d at pp. 775-776 and *People v. Murtishaw* (1981) 29 Cal.3d 733, pp. 767-768; accord *People v. Wright* (1990) 52 Cal.3d 367, 427, fn. 21, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

As a matter of Eighth Amendment law, because of the death penalty's unique severity and finality, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; accord *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.)[76]

Appellant's assertion he had no regrets did not relate to his "overt remorselessness *at the immediate scene of the crime*." (*People v.*

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[76]Paradoxically, this Court has approved the application of section 352 at the penalty phase to exclude mitigating evidence proffered by the defense. (See, e.g. *People v. Virgil* (2011) 51 Cal.4th 1210, 1273 [upholding exclusion of photographs proffered by the defense as cumulative]; *People v. Yeoman* (2003) 31 Cal.4th 93, 141 [third-party culpability evidence excluded].) And it has consistently held that trial judges have *less* discretion to exclude prosecution evidence at the penalty phase where "the risk of an improper guilt finding based on visceral reactions is no longer present," (*People v. Bonilla* (2007) 41 Cal.4th 313, 353-54), and the jury's task is merely to decide whether the defendant "is the type of person who deserves to die." (*People v. Ray* (1996) 13 Cal.4th 313, 350; accord *People v. Solomon* (2010) 49 Cal.4th 792, 841; *People v. D'Arcy* (2010) 48 Cal.4th 257, 298-99; *People v. Jablonski* (2006) 37 Cal.4th 774, 834.) Appellant submits this stands the Eighth Amendment on its head.

*Gonzalez, supra*, 51 Cal.3d at pp. 1231-1232 [original italics].) It was a characterization made 13 to 14 years later – plainly "*postcrime* evidence of remorselessness," which "does not fit within any statutory sentencing factor, and thus should not be urged as aggravating." (*Ibid.* [original italics]; accord *People v. Collins*, *supra,* 49 Cal.4th at p. 227.) Appellant's conditional and completely unspecific threat of what he might do if not sentenced to death, did not constitute criminal conduct and was similarly inadmissible. (*People v. Thomas* (2011) 52 Cal.4th 336, 363 [alleged "criminal activity" must violate a penal statute]; accord *People v. Boyd, supra,* 38 Cal.3d at pp. 777-778.)

Nevertheless, the prosecutor used the letter in both his opening and closing arguments at the penalty phase, characterizing it as the "the most important theme" in his argument for the death penalty. (8 RT 1890, 11 RT 2957.) He quoted specifically appellant's challenge to the district attorney, "in any case, sir, if you don't have enough balls and guts to give me what I deserve by sending my ass to the gas chamber, then my only other recourse is to kill someone else once I return to prison in order to finally receive the ultimate punishment even the man upstairs knows I deserve." (11 RT 2957.) He then urged the jurors to sentence appellant to death, so they would know "you've done everything you can so that that last sentence doesn't happen." (*Ibid.*)

The prosecutor thus used the letter, which had no legitimate probative value at the penalty phase, purely to capitalize on jurors' fears. One of the consequences of allowing future dangerousness to figure in the sentencing process is that "future dangerousness invites jurors to fear responsibility for the defendant's violent future acts, and this fear has the ability to render the defendant's culpability entirely irrelevant." (Shapiro,

*An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports* (2008) 35 Am. J. Crim. L. 145, 170.) In this case, the prosecutor made the invitation explicit, using the letter to tell the jurors that they were personally responsible for preventing future acts of violence by appellant. (11 RT 2957, 2974.)

Not only was the danger of unfair prejudice, which Evidence Code section 352 is intended to prevent, fully realized, but the error in admitting appellant's letter undermined the reliability of the sentencing process in violation of the Eighth Amendment.

At the penalty phase of a capital trial, "a more exacting standard of review" is applied to "assess the prejudicial effect of state-law errors." (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Reversal is required if "there is a 'reasonable possibility' such an error affected a verdict." (*Ibid.*)

Because "the guided discretion through which jurors reach their penalty decision must permit each juror individually to assess" the sentencing factors (*People v. Bell* (2007) 40 Cal.4th 582, 621), the potential impact of an error on individual jurors must be considered: "If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another." (*People v. Hamilton* (1963) 60 Cal.2d 105, 137, overruled on another point in *People v. Morse* (1964) 60 Cal.2d 631, 649; accord *In re Lucas* (2004) 33 Cal.4th 682, 734, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 537 [finding prejudicial error where "there is a reasonable probability that at least one juror would have struck a different balance" between aggravating and mitigating factors].)

Empirical studies have found "that concerns regarding the defendant's dangerousness may weigh heavily in jury decision making and consume a majority of the sentencing deliberation time across a variety of capital sentencing frameworks," even when no expert testimony is admitted and even when future dangerousness is not a statutory aggravating circumstance. (Claussen-Schulz et al., *Dangerousness, Risk Assessment, and Capital Sentencing* (2004) 10 Psychol. Pub. Pol'y & L. 471, 481-482 [reviewing literature].) "This suggests that jurors may be especially primed to give inappropriate weight to evidence concerning the defendant's dangerousness." (*Ibid.*)

In this case, the prosecution did present evidence of violent acts appellant had committed while incarcerated, but these incidents were, as defense counsel noted, more than twenty years before the trial – between 1976 and 1978.[77] (8 RT 1945, 2099, 2114, 2193.) The prosecution introduced no evidence of violent behavior during appellant's 1988-1997 stint in prison.

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[77]In 1976, in the LA county jail, appellant and two other inmates assaulted and attempted to rob a fourth inmate, Rondelle Self. (8 RT 1945-1971.) Appellant was convicted of attempted robbery. (8 RT 2281.) In 1978, appellant assaulted another inmate in Chino, Ruben Gaxiola. (8 RT 2096-2123.) Appellant was convicted of the attempted murder of Gaxiola. (8 RT 2282.) The prosecution also presented evidence of an uncharged incident from 1977, involving another inmate in Folsom, Allen O'Hare. O'Hare was a schizophrenic with a lengthy record, including an attempted escape from the Orange County Courthouse in which he took a gun from a bailiff and tried to kill him. (8 RT 2183, 2189, 2192.) O'Hare asked for special housing in exchange for testifying against appellant. (8 RT 2190.) O'Hare testified that appellant stabbed him in a dispute over some coffee that appellant owed O'Hare. Appellant was never charged, apparently because there was some question who started the fight and whether O'Hare was also armed. (8 RT 2184, 2201-2205.)

The long delay in prosecuting appellant attests to the fact that the murder of Max Facundo was not one of the most aggravated and least mitigated of homicides, calling out for the death penalty. (See *Roper v. Simmons* (2005) 543 U.S. 551, 568 ["Because the death penalty is the most severe punishment . . . [it] must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution,'"quoting *Atkins v. Virginia* (2002), 536 U.S. 304, 319.) Indeed, the state was apparently content, until appellant confessed again to the crime, not even to prosecute it.[78]

Absent appellant's letter, calculated to appeal to jurors' fears by threatening violence in the future, there is at least a reasonable possibility that one or more jurors would likely have struck a different balance between aggravating and mitigating circumstances and voted for life without possibility of parole.

The error here was, moreover, not merely one of state law. Rather, its effect was to undermine the reliability of the sentencing process as a whole, in violation of the Eighth Amendment, for "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38, quoting *Gardner v. Florida* (1977) 430 U.S. 349, 357-358 (opn. of White, J.).)

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[78]The police acknowledged that appellant had phoned the night of Facundo's stabbing and confessed to it, telling the police to let Charlene and Raymond Guzman go. Appellant was arrested but not prosecuted for the murder. (6 RT 1392, 1396.)

This Court has recognized the state's responsibility to ensure the constitutional reliability of the capital sentencing process, even when the defendant, as here, wishes to be sentenced to death. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1299 [trial counsel properly withheld consent to guilty plea in capital case]; *People v. Chadd* (1981) 28 Cal.3d 739, 753-755 [defendant may not discharge counsel and represent himself to avoid effect of section 1018 prohibiting guilty plea in capital case without consent of counsel where defendant "simply wants state to help him commit suicide"]; *People v. Stanworth* (1969) 71 Cal.2d 820, 833-834 [defendant in capital case may not waive automatic appeal pursuant to section 1239, because "the state, too, has an indisputable interest in (the appeal) which the appellant cannot extinguish"].)

In *People v. Guzman* (1988) 45 Cal.3d 915 (*Guzman*), overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13, this Court acknowledged that while a capital defendant has a fundamental right to testify, the state also "has a strong interest in promoting the reliability of a capital jury's sentencing determination."[79] (*Id.* at p. 962, citing *People v. Deere* (1985) 41 Cal.3d 353, 362–364 and *People v. Burgener* (1986) 41 Cal.3d 505, 541–542.) The court found that allowing the defendant to express his preference for death did not in that case undermine the reliability of the sentencing where the prosecutor "did not mention defendant's death-preference testimony in his closing argument" and the jury understood its duty independently to weigh

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[79]As discussed further below, appellant here, unlike in *Guzman*, is not challenging the admissibility of his own testimony, which was neither as inflammatory nor as heavily emphasized by the prosecution as the Garcetti letter.

mitigating cirumstances. (*Ibid.*)

In this case, in contrast to *Guzman*, the prosecutor not only introduced but also "capitalize[d]" on appellant's letter to Mr. Garcetti demanding the death penalty, characterizing it as "the most important theme" in his penalty phase argument. (*People v. Guzman, supra,* 45 Cal.3d at p. 963; 11 RT 2957.) Moreover, as discussed further below, there was no limiting instruction given, advising the jurors of their obligation, notwithstanding the defendant's desire for a death sentence, "to decide for itself, based on the statutory factors, whether death is appropriate." (See *People v. Guzman, supra,* 45 Cal.3d at p. 962 [suggesting that such an instruction would be appropriate to balance "the conflicting public and constitutional policies" concerning a defendant's right to testify and the state's interest in a reliable sentencing determination]; *People v. Webb* (1993) 6 Cal.4th 494, 535 [finding no error in allowing defendant to testify regarding appropriateness of death penalty, including purported admission of other murders for which he had not been caught, where *Guzman* instruction was given].)

Consequently, because the erroneous admission of the letter undermined the reliability of the sentencing process, appellant's death sentence must be reversed. (*Johnson v. Mississippi* (1981) 486 U.S. 578, 584, 589 [death sentence reversed where reliability of death sentence undermined by jury's consideration of inaccurate and prejudicial aggravating evidence].)

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## XI.

## THE TRIAL COURT HAD A SUA SPONTE DUTY TO INSTRUCT THE JURY ON ITS RESPONSIBILITY INDEPENDENTLY TO DECIDE THE APPROPRIATENESS OF THE PENALTY DESPITE APPELLANT'S STATED DESIRE FOR A DEATH SENTENCE

As argued above, the trial court could, and should, have excluded appellant's letter at both the guilt-innocence and penalty phases of the trial as more prejudicial than probative, but if this Court finds it was not error to admit the letter at the penalty phase, then at the very least, the trial court should have given a cautionary instruction such as this Court proposed in *People v. Guzman* (1988) 45 Cal.3d 915, 962 (*Guzman*), overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13, to mitigate the impact of the letter on the jury's sense of its sentencing responsibility and ensure the reliability of their sentencing determination. This Court has "stress[ed] that the federal Constitution, the 1978 death penalty law, and the CALJIC instructions must be understood as requiring that the jury determine for itself whether, based on the statutory factors, death is appropriate in a given case." (*Id.* at 961-62.)

The *Guzman* Court reasoned that a "constitutionally permissible way[ ]" of balancing "the conflicting public and constitutional policies" between a defendant's right to testify and express his preference for the death penalty and the state's interest in a reliable sentencing determination, would be for the trial court to "give the jury a specially crafted 'limiting instruction,'" after evidence of a defendant's death preference has been introduced, informing the jury that, despite the defendant's wishes, "it remains obligated to decide for itself, based on the statutory factors,

whether death is appropriate." (*People v. Guzman, supra*, 45 Cal.3d at p. 962.)

The *Guzman* court found that, on the record in that case, there was no duty to give a sua sponte instruction because the prosecutor did not mention the defendant's preference for the death penalty in his closing argument and the jury was otherwise adequately instructed on "its duty to exercise discretion to determine the appropriate sentence." (*People v. Guzman, supra*, 45 Cal.3d at p. 962; see also *People v. Webb* (1993) 6 Cal.4th 494, 535 (*Webb*) [no error in allowing defendant to testify regarding appropriateness of death penalty, including purported admission of other murders for which he had not been caught, where *Guzman* instruction was given].)

In this case, the trial court did have a duty to give a sua sponte instruction for at least two reasons. First, *Guzman* and *Webb*, both of which were decided well before appellant's trial, put trial courts on notice that a sua sponte instruction would be appropriate in a case in which evidence of a defendant's desire for the death penalty is presented to the sentencing jury.

*Guzman*'s holding is consistent with the well-established principle that "the trial judge 'has the responsibility for safeguarding both the rights of the accused and the interest of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.'" (*People v. McKenzie* (1983) 34 Cal.3d 616, 627, abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364, quoting ABA Standards for Criminal Justice - Special Functions of the Trial Judge, std. 6-1.1; accord

*People v. Ponce* (1996) 44 Cal.App. 4th 1380, 1387.)

As this Court properly recognized in *Guzman*, when a capital defendant actively seeks the death penalty, a special instruction may be necessary to "remedy any potential diminution of 'juror responsibility.'" (*People v. Guzman, supra,* 45 Cal.3d at p. 962.) This is precisely the sort of circumstance that raises "essential questions of law" on which "[i]t is the duty of the trial judge to charge the jury . . . whether requested or not." (*Kelly v. South Carolina* (2002) 534 U.S. 246 256, quoting Wright, Federal Practice & Procedure (3d ed. 2000) § 485, p. 375; accord *People v. Young* (2005) 34 Cal.4th 1149, 1200; *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Sedeno* (1974) 10 Cal.3d 703, 716; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

The need for a special instruction was clearer here than in *Guzman* because the letter expressing appellant's desire for the death penalty was introduced not by the defense but by the prosecution, which then made the letter the central theme of its argument for the death penalty.

In *Webb*, the defendant, like appellant, apparently sought to "inflame" the jury by not only requesting the death penalty but making the case for it by admitting to other crimes. (*People v. Webb*, *supra*, 6 Cal.4th at pp. 513, 535.) Noting that "a defendant's absolute right to testify cannot be foreclosed or censored based on content," this Court held that "any potentially improper effect is to be alleviated with a limiting instruction where 'appropriate.'" (*Id.* at p. 535.) The trial court in *Webb* had given such an instruction, as requested by the defense, and this Court therefore found no error. (*Ibid.*) This case is indistinguishable from *Webb*, in which this Court found the special instruction to have been properly given, except for the fact that the trial court here *could* have excluded the Garcetti letter.

Having decided to admit the letter, however, it was the trial court's duty to ensure that the jury did not take its sentencing responsibilities less seriously as a result of appellant's stated desire to be sentenced to death.

Because the jury's "sense of responsibility for determining the appropriateness of" a death sentence was undermined, in violation of the Eighth Amendment, by the admission of the Garcetti letter and not corrected by an instruction, as this court suggested in *Guzman*, appellant's death sentence must be reversed. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Reversal is also required as a matter of state law because there is a reasonable possibility that the verdict would have been more favorable to appellant if the instruction had been given. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

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## XII.

## THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO IMPEACH APPELLANT WITH A CONSTITUTIONALLY INVALID 30-YEAR-OLD SECOND DEGREE MURDER CONVICTION.

As set forth in Argument I, *supra*, incorporated by reference herein, appellant's 1971 conviction for second degree murder, which established the prior-murder special circumstance, was constitutionally invalid as it was obtained in violation of double jeopardy. This conviction was not only used to establish the prior-murder special circumstance, it was also used to impeach appellant when he testified at the guilt-innocence phase of the trial. (7 RT 1705.) The use of an invalid 30-year-old prior murder conviction as impeachment, in a trial for two homicides in which the degree of appellant's culpability was hotly disputed, violated appellant's rights under both California law and the due process clause of the Fourteenth Amendment and requires reversal. Moreover, even if the 1971 conviction was not invalid, the trial court abused its discretion in allowing the conviction to be used when it had no genuine probative value as impeachment evidence and served only to improperly persuade the jury of appellant's propensity to commit murder.

### A. Relevant Facts

The facts and law establishing the invalidity of the second degree murder conviction are set out in Argument I, *supra*. In addition, when appellant insisted on testifying, defense counsel argued vigorously that use of appellant's 1971 second degree murder conviction for impeachment should be barred by Evidence Code section 352, because the conviction was extremely remote: the underlying crime occurred more than 30 years earlier,

appellant was barely 16 years old at the time, a murder conviction is not as probative of a witness' credibility as other offenses that specifically involve dishonesty, and the prosecution could impeach appellant with other, more recent felony convictions. (6 RT 1505-1515, 7 RT 1578-1582.) Moreover, in the circumstances of this case, where appellant was seeking the death penalty, the danger was not, counsel argued, that appellant would provide false exculpatory testimony, but that he would be "more than honest" and exaggerate his culpability, as he did in his confession and his letter to District Attorney Garcetti. (6 RT 1507.) Consequently, the prior conviction had no genuine probative value as impeachment. On the other hand, introducing the old murder conviction posed an extremely high risk of unfair prejudice where appellant was on trial for two other murders. (6 RT 1505-1515, 7 RT 1578-1582.) Indeed, trial counsel argued that the prior murder conviction was so prejudicial that if it came in, the defense "might as well pack it in."[80] (6 RT 1508.) The trial court nevertheless denied the request to preclude use of appellant's prior murder conviction as impeachment. (7 RT 1582.)

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[80]Trial counsel did not rely upon the invalidity of the prior conviction on double jeopardy grounds as a reason to exclude its use as impeachment. As set forth in Argument I, *supra,* however, the interests of judicial economy favor resolving issues of the constitutional validity of a prior conviction at the earliest opportunity. (*People v. Horton* (1996) 11 Cal.4th 1068, 1138-1139.) Thus, if this Court finds the conviction invalid, its use as impeachment evidence should also be addressed in this direct appeal.

## B. The Improper Use of Appellant's Invalid Second Degree Murder Conviction as Impeachment Requires Reversal of the Convictions

This Court has made clear that "the use of a constitutionally invalid prior conviction" to impeach a testifying defendant is an error not only of California law but of federal constitutional law as well. (*People v. Coffey* (1967) 67 Cal.2d 204, 218 (*Coffey*), citing *People v. Hamilton* (1948) 33 Cal.2d 45, 50; *Macfarlane v. Dept. Alcoholic Bev. Control* (1958) 51 Cal.2d 84, 89; *People v. Banks* (1959) 53 Cal.2d 370, 382, fn. 7.) The use of a constitutionally invalid conviction "at the trial of a subsequent offense, for any purpose leading to a conviction for such subsequent offense, is violative of the due process clause of the Fourteenth Amendment." (*People v. Coffey, supra*, 67 Cal.2d at p. 218.) Accordingly, such an error requires reversal of the subsequent conviction unless the state can establish that it was harmless beyond a reasonable doubt. (*Ibid.*, citing *Chapman v. California* (1967) 386 U.S. 18.)

In *Coffey*, the prior conviction was obtained in apparent violation of the defendant's right to counsel – he pled guilty to a felony in Oklahoma in 1949; he was indigent but had not been appointed counsel and had not waived his right to counsel. (*People v. Coffey, supra*, 67 Cal.2d at p. 210.) The trial court erroneously refused to hear Coffey's motion to strike the prior and allowed it to be used to impeach him when he testified. (*Id.* at p. 211.)

Coffey, who was charged with assault to commit murder on four police officers and assault with a deadly weapon, testified that he had not intended to harm any police officer but was trying to drive them off his property because they did not have a warrant. (*People v. Coffey, supra*, 67 Cal.2d at p. 220.) This Court found the prosecution had failed to prove

beyond a reasonable doubt that the erroneous use of Coffey's prior to impeach him "'did not contribute to the verdict obtained'" with respect to the offenses that required proof of the defendant's intent, but did find the error harmless as to the assault with a deadly weapon charges. (*Id.* at pp. 222-223.)

For the reasons set forth in Argument I, *supra*, appellant's second degree murder conviction was constitutionally invalid. The question is therefore whether the state can establish beyond a reasonable doubt that the introduction of appellant's invalid prior murder conviction as impeachment evidence at the guilt-innocence phase of the trial did not contribute to the verdicts against him. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

It is well documented that using a prior conviction that is for the same offense for which the defendant is on trial is especially prejudicial: "In this situation, despite any limiting instructions there is an obvious danger of misuse of the evidence," particularly that the jurors will "give more weight to the past convictions as evidence that the accused is the kind of man who would commit the crime charged or even that he ought to be imprisoned without much concern for present guilt, than they will to the convictions' legitimate bearing on credibility." (1 McCormick, Evidence (6th ed. 2006) § 42, p. 198 & fn. 67 [citing empirical studies documenting the misuse of prior conviction evidence]; accord *United States v. Sanders* (4th Cir. 1992) 964 F.2d 295, 298 [Because evidence of a similar offense does little to impeach the credibility of a testifying defendant while "undoubtedly prejudicing him," despite limiting instructions, such evidence "should be admitted sparingly if at all" under Federal Rule of Evidence 609].)

This Court has also recognized the prejudicial effect of impeaching a defendant with a prior conviction for an offense similar to the one for which

he is on trial. (*People v. Gurule* (2002) 28 Cal.4th 557, 608 [trial court abused its discretion in allowing prior conviction to be used as impeachment where it was for crime very similar to that for which defendant was on trial, applying pre-Proposition 8[81] factors set out in *People v. Beagle* (1972) 6 Cal.3d 441, 454.]) The similarity of the offense to be used for impeachment to that for which the defendant is on trial remains a relevant factor weighing against admissibility under Evidence Code section 352. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 296 [when exercising discretion under Evidence Code section 352, trial court "must always take into account factors traditionally deemed pertinent," citing *People v. Beagle, supra*, 6 Cal.3d at p. 454].)[82]

In this case, the effect of the prior murder conviction could only be devastating. As discussed above, appellant's state of mind and degree of culpability were disputed with respect to both the Apodaca and Facundo murders. Appellant was convicted only of the second degree murder of

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[81]Proposition 8, the so-called "Victim's Bill of Rights," was passed in an initiative measure in June 1982 and is codified in article I, section 28 of the California Constitution. (*People v. Smith* (1983) 34 Cal.3d 251, 257.) Article I, section 28, subdivision (f)(4), provides: "[a]ny prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment...." (Cal. Const., art. I, § 28, subd. (f)(4).) Prior convictions are still subject to exclusion under Evidence Code section 352. (*People v. Castro* (1985) 38 Cal.3d 301, 312-313.)

[82]Because appellant's prior conviction was invalid, it was not admissible even as to credibility, so that CALJIC No. 2.23 stating that a witness' prior conviction may be considered "only for the purpose of determining the believability of that witness" (7 RT 1747; 5 CT 1117), could cure the error. For the reasons explained above, moreover, such limiting instructions are ineffective.

Apodaca, demonstrating that the jury did not entirely accept the state's theory of the crime. There was real doubt whether appellant had in fact assaulted Apodaca or had actually been only a bystander, confessing falsely to enhance his chances of securing a death sentence. As to Facundo, it was undisputed that appellant had acted in response to Facundo's repeated beatings of appellant's cousin Charlene Trujeque. Because the trial court refused appellant's requested instruction on the unreasonable defense of others, the jury was not given the option of convicting appellant of manslaughter but could well have returned a verdict of second degree murder if not for the prejudicial impact of learning appellant had a prior conviction for murder.

As the above authorities recognize, that conviction could only cause the jury to conclude that appellant had a propensity to commit murder and therefore resolve against him any doubts it had concerning his culpability. In these circumstances, the use of appellant's constitutionally invalid, 30-year-old second degree murder conviction cannot be found harmless beyond a reasonable doubt.

### C. It Is Not Clear from this Record That Appellant's Juvenile Misconduct Would Have Been Independently Admissible

In this case, the error cannot be found harmless on the ground that appellant could have been impeached with the prior murder, regardless of conviction, as misconduct showing dishonesty or moral turpitude. The admissibility of the underlying juvenile misconduct was not addressed in the trial court, and the record suggests appellant's case may fall within a category of juvenile misconduct that is not admissible for impeachment.

Before the passage of Proposition 8, juvenile adjudications could not be used for impeachment because they are not criminal proceedings and do

not result in criminal convictions. (Welf. & Inst. Code, § 203; *In re Ricky B.* (1978) 82 Cal.App.3d 106, 114, fn. 2.) With the passage of Proposition 8, article I, section 28, subdivision (f)(4) of the California Constitution, now provides that: "[a]ny prior felony conviction of any person in any criminal proceeding, *whether adult or juvenile*, shall subsequently be used without limitation for purposes of impeachment...." (Cal. Const., art. I, § 28, subd. (f)(4) [italics added].) This Court has construed article I, section 28, subdivision (d), of the California Constitution, also enacted by Proposition 8, to remove "most restrictions on the admission of relevant credibility evidence in criminal cases, including the rule that felony convictions are the only form of conduct admissible for impeachment." (*People v. Wheeler, supra,* 4 Cal.4th at pp. 295-296.) The court held that any misconduct involving moral turpitude was admissible as impeachment, subject to the limitations of Evidence Code section 352. (*Ibid.*)

This reasoning has been extended to allow the prosecution to "introduce prior conduct evincing moral turpitude even if such conduct was the subject of a juvenile adjudication." (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1740.) There is an exception, however, where the defendant received an honorable discharge from the California Youth Authority under Welfare and Institutions Code section 1772. (*Ibid.*)

Welfare and Institutions Code section 1772 provides, in pertinent part, that "[e]very person honorably discharged from control by the Youthful Offender Parole Board who has not, during the period of control by the authority been placed by the authority in state prison shall thereafter be released from penalties and disabilities resulting from the offense or crime for which he or she was committed...." (Welf. & Inst. Code, § 1772.) In *People v. Jackson* (1986) 177 Cal.App.3d 708, 711 (*Jackson*), the court

of Appeal held that Welfare and Institutions Code section 1772 "manifests a strong public policy that those persons honorably discharged from the Youth Authority have been rehabilitated and should no longer suffer the 'penalties and disabilities'" of their past misconduct, including "impeachment by former offenses." (*Id.* at p. 713.) The court concluded, the "use of a prior conviction extinguished by [Welfare and Institutions Code] section 1772 is unduly prejudicial and accordingly subject to exclusion in a subsequent criminal proceeding in the exercise of the trial court's discretion." (*Ibid.*)

In this case, defense counsel noted in another context that appellant had a "certificate of pardon" from the California Youth Authority. (4 CT 788.) This document is not in the record, but defense counsel's remark raises the question whether appellant's discharge from the Youth Authority comes within Welfare and Institutions Code section 1772. Because appellant's second degree murder conviction was treated as a valid, adult conviction for impeachment purposes, the circumstances of appellant's discharge from the Youth Authority and the possible applicability of section 1772 were not addressed in the trial court.

A finding of harmless error therefore cannot be predicated on the assumption that the underlying juvenile misconduct would have been admissible as impeachment, because that issue was not resolved below. Since the use of appellant's invalid prior conviction as impeachment cannot, on this record, be found harmless beyond a reasonable doubt under *Chapman v. California* and *People v. Coffey, supra,* appellant's conviction must be reversed.

### D. Even If the Prior Conviction Were Found to Be Valid, it Should Have Been Excluded under Section 352

Finally, even if there is no other bar to admissibility, appellant's 1971 second degree murder conviction and the underlying misconduct should have been excluded under Evidence Code section 352. (See *People v. Castro* (1985) 38 Cal.3d 301, 317 [emphasizing admissibility of prior convictions still subject to Evidence Code section 352]; *People v. Wheeler, supra,* 4 Cal.4th at p. 296 [in deciding admissibility under Evidence Code section 352, "a court must always take into account, as applicable, those factors traditionally deemed pertinent in this area"].)

First, the conviction was extremely remote: the underlying murder was committed in February 1969, more than 30 years before appellant testified at trial. (See *People v. Burns* (1987) 189 Cal.App.3d 734, 737-738 [remoteness is still a relevant factor in deciding admissibility under section 352, and while there is no rigid cut-off, " a conviction that is 20 years old ... certainly meets any reasonable threshold test of remoteness"].) Second, "convictions which are assaultive in nature do not weigh as heavily in the balance favoring admissibility as those convictions which are based on dishonesty or some other lack of integrity." (*People v. Castro, supra*, 38 Cal.3d at p. 315, quoting *People v. Rist* (1976) 16 Cal.3d 211, 222.)

Third, the conviction had absolutely no genuine probative value as impeachment since appellant, who was seeking the death penalty (7 RT 1601), did not provide exculpatory testimony. Rather, as he had in his statement to police and his letter to District Attorney Garcetti, appellant acknowledged guilt of both murders. (7 RT 1590, 1595, 1600, 1605, 1622-1623, 1644-1645, 1653, 1660.)

Against the complete absence of probative value for impeachment

purposes, there was, as discussed above, an exceedingly high risk of unfair prejudice given that appellant was on trial for two murders. The danger that a jury will – notwithstanding any limiting instructions – misuse such evidence as substantive evidence of guilt has been empirically demonstrated. (See McCormick on Evidence, *supra*, § 42, p. 198 fn. 67; see also Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence* (1999) 48 Drake L. Rev. 1, 31 ["Numerous studies conducted over the last forty years show [that] . . . jurors do use prior conviction evidence to infer criminal propensity and frequently ignore or fail to understand limiting instructions"].)

Thus, even if the 1971 murder conviction had been constitutionally valid, the trial court abused its discretion in allowing the conviction to be used as impeachment.[83]

The fact that appellant sought to inculpate himself did not render the use of his prior conviction harmless. To the contrary, defense counsel urged the jury to discount appellant's inculpatory statements, because of his desire for a death sentence, and to focus on the other evidence in the case.

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[83]Courts have repeatedly refused to allow defendants to impeach witnesses with such evidence. (See *People v. Abilez* (2007) 41 Cal.4th 472, 503 [upholding trial court's decision in murder and forcible sodomy case to prevent defendant from impeaching co-defendant with 20-year-old juvenile adjudication for attempted sexual intercourse with a minor]; *People v. Clair* (1992) 2 Cal.4th 629, 654 [upholding trial court's decision to prevent defense from impeaching prosecution witness with a 22-year-old conviction for manslaughter]; *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1555 [upholding trial court's decision preventing defendant from impeaching prosecution witness with 11- year-old murder, committed when witness was 15 or 16 years old].)

(7 RT 1811-1812, 1819, 1821-1826, 1829.) As discussed above, this evidence raised genuine questions about appellant's culpability and state of mind with respect to both murders.

On this record, it is apparent that the benefit to the prosecution of admitting the second degree murder conviction was not to impeach appellant's credibility but rather to establish his propensity to commit murder so that the jury would resolve its doubts about appellant's state of mind and culpability against the defense. It is not only reasonably probable that a result more favorable to appellant would have occurred if not for the erroneous admission of his 1971 second degree murder conviction (*People v. Watson* (1956) 46 Cal.2d 818, 836), but the prejudice was so substantial that it rendered appellant's trial fundamentally unfair in violation of the due process clauses of the Fifth and Fourteenth Amendments.[84] (*Estelle v. McGuire* (1991) 502 U.S. 62, 72-73.)

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[84]The prosecutor characterized the question for the trial court as whether the conviction was so profoundly prejudicial that to allow its use as impeachment would deny appellant a fair trial. (6 RT 1505-1506.)

**ARGUMENT XIII PAGES 225 THROUGH 250**

**FILED UNDER SEAL**

## XIV.

## THE TRIAL COURT'S REFUSAL TO CONDUCT AN ADEQUATE HEARING TO RESOLVE DISPUTED ISSUES OF FACT CONCERNING JUROR MISCONDUCT VIOLATED APPELLANT'S RIGHT TO AN IMPARTIAL JURY AND TO A RELIABLE SENTENCING DETERMINATION

The jurors' attempt, on the eve of their penalty deliberations, to share with the prosecutor a cartoon depicting an overzealous cross-examination raised serious issues concerning possible juror bias and a failure to take the penalty proceedings with the constitutionally-required degree of seriousness. Despite these concerns, the trial court failed to conduct an adequate inquiry into the alleged misconduct, even when the bailiff and a juror gave conflicting accounts of their conversation concerning the cartoon and the juror's answers indicated she had discussed the cartoon with other jurors. The failure to conduct a hearing to resolve material, disputed facts regarding the juror misconduct was an abuse of discretion and violated appellant's rights to a fair and impartial jury and to a reliable sentencing determination. (U.S. Const. 6th, 8th & 14th Amends.; Cal. Const., Art. I § 16.)

### A. Proceedings Below

On Tuesday, September 21, 1999, after the jury had received its penalty phase instructions, the attorneys alerted the judge that Juror No. 12 had given a cartoon cut from the Los Angeles Times to the bailiff and asked him to show it to the prosecutor. (11 RT 2940.)

The court described the cartoon for the record: "[It] appears to depict a courtroom, the judge sitting behind the bench, counsel seated at counsel table and what appears to be a female with a hockey stick pinning another person against the wall next to the witness stand. And the cartoon reads,

'objection sustained. Counsel will refrain from body-checking the witness and slamming him against the doors.'" (11 RT 2939; 4 CT Supp. V 999; 1 CT Supp. VI 46.)[85] The juror gave the cartoon to the bailiff the same day the jury received their penalty phase instructions, and the first court day after the defense had finished presenting its case in mitigation. (5 CT 1083-1084 [Minute Order for September 21, 1999]; 5 CT 1068-1069 [Minute Order for September 17, 1999].)

When questioned by the court, the bailiff (Rick Allen) explained how he got the cartoon:

> The Bailiff: I don't remember what juror number she is. I believe it was juror number --
>
> Mr. Markus: I think it's 12.
>
> The Bailiff: -- 12 came up to me and handed me the cartoon and let me read it, and I did, and then she asked me to hand it to the D.A. and I let him read it. And then I brought it back to you to read, and then I showed it to the public defender -- I mean, excuse me -- to Andy Stein to read also.

(11 RT 2940.)

Defense counsel asked that the juror be removed for misconduct, for making an improper attempt to communicate with the prosecutor and showing bias toward the prosecution and also asked the court to question the other jurors. (11 RT 2940-2941, 2943-2944.) Defense counsel Holtz said she had observed Juror No. 12 waiting and trying to make eye contact

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[85]A copy of the cartoon was appended as Exhibit B to Appellant's Request to Complete, Correct, and Settle the Record on Appeal. (4 CT Supp.V 999.) Appellant's request to augment the record on appeal with the copy of the cartoon, contained in Exhibit B to the motion, was granted. (1 CT Supp. VI 46.)

with the prosecutor to see his reaction to the cartoon. (11 RT 2941.) The prosecutor disagreed that there had been any misconduct, maintaining that the juror stood by the door smiling, looked at both the bailiff and the prosecutor, then left the court room after he (the prosecutor) gave the cartoon to Ms. Holtz. (11 RT 2942.)

The court questioned the juror, who denied that she had asked the bailiff to show the cartoon to any of the attorneys:

> The Court: My bailiff indicated to me that you handed this cartoon to him.
>
> Prospective Juror 12: Yes.
>
> The Court: Okay. And you asked him to show this cartoon to Mr. Markus.
>
> Prospective juror 12: He asked if he could have it. I just said we wanted to give it to him, yeah. Rick [the bailiff].
>
> The Court: Okay. The bailiff asked you if he could have it?
>
> Prospective Juror 12: Yes.
>
> The Court: Was it your intention to specifically give this cartoon to the prosecutor?
>
> Prospective Juror 12: It was just in the paper. We just wanted to give it to Rick. It was nobody's -- no, it wasn't.
>
> The Court: It wasn't meant for any of the attorneys.
>
> Juror No. 12: No, no, no, no. We just thought it was funny. No. It wasn't like give it to him for him. No.
>
> The Court: Okay. All right. You simply wanted to give it to Rick?

Juror No 12: To Rick, yeah.

The Court: All right. Because you thought it was humorous.

Juror No. 12: Yeah.

The Court: Okay. That's all.

Juror No. 12: Oh, okay.

The Court: Thank you.

(11 RT 2944-2945.) The juror's account contradicted the bailiff's because she denied asking the bailiff to show the cartoon to the prosecutor; the juror also referred several times to "we," suggesting that she had discussed the cartoon with the other jurors. Defense counsel therefore asked the court to conduct a further inquiry, questioning the bailiff and the other jurors under oath, to resolve the conflict. (11 RT 2946-2947.) Despite the discrepancy between the juror's version of events and the bailiff's, the court refused to make any further inquiry of the bailiff or of the other jurors and denied defense counsel's request to excuse Juror No. 12. (11 RT 2946-49.) The court said it was "accept[ing] the representation by her [Juror No. 12] that she intended this cartoon for the bailiff and no one else, and ... the bailiff wanted to share it with someone else." (11 RT 2948.)

**B. The Trial Court Abused its Discretion by Refusing to Conduct a Further Inquiry to Resolve Disputed Issues of Fact**

The right to a fair trial by an impartial jury is among a criminal defendant's most fundamental rights guaranteed under the federal and state constitutions. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149; *Turner v. Louisiana* (1965) 379 U.S. 466, 471-472; *People v. Wheeler* (1978) 22 Cal.3d 258, 265-266,

overruled in part on other grounds in *Johnson v. California* (2005) 545 U.S. 162; *People v. Galloway* (1927) 202 Cal. 81, 92; *People v. Diaz* (1984) 152 Cal.App.3d 926, 933.) Jury impartiality at sentencing also implicates due process and the right to a fair and reliable capital penalty determination. (U.S. Const., 8th & 14th Amends.) Moreover, the Supreme Court has stressed that "[f]rom beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect." (*Wellons v. Hall* (2010) ___ U.S. ___, 130 S.Ct. 727, 728 (*Wellons*).) Jurors' failure to conduct themselves with appropriate seriousness during the penalty phase "raise[s] a serious question about the fairness of a capital trial." (*Id.* at p. 731.)

Section 1089 provides for the discharge of a sitting juror upon "good cause shown." (*People v. Lomax* (2010) 49 Cal.4th 530, 588-589; *People v. Keenan* (1988) 46 Cal.3d 478, 532.) "Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty 'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged." (*People v. Cowan* (2010) 50 Cal.4th 401, 505-06, citing *People v. Martinez* (2010) 47 Cal.4th 911, 941–942; *People v. Hedgecock* (1990) 51 Cal.3d 395, 417; *People v. Burgener* (1986) 41 Cal.3d 505, 520.)

While a defendant is not entitled to an evidentiary hearing in every case of alleged juror misconduct, an evidentiary hearing should be held when "necessary to resolve material, disputed issues of fact." (*People v. Hedgecock, supra,* 51 Cal.3d at p. 415; accord *People v. Dykes* (2009) 46 Cal.4th 731, 809; *People v. Avila* (2006) 38 Cal.4th 491, 604; *People v. Tuggles* (2009) 179 Cal.App.4th 339, 379-380; *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1465.) The failure to conduct a hearing may be "an

abuse of discretion subject to appellate review." (*People v. Burgener, supra,* 41 Cal.3d at p. 520, citing *People v. Huff* (1967) 255 Cal.App.2d 443, 447-448; accord *People v. Barnett* (1998) 17 Cal.4th 1044, 1117.)

Juror contact or attempted contact with attorneys, parties, or witnesses constitutes misconduct, even when not case-related, when it engenders or reflects bias on the part of the jurors. (*People v. Ryner* (1985)164 Cal.App.3d 1075, 1082 [juror's conversation with officer-witness improper but not prejudicial]; *People v. Hardy* (1992) 2 Cal.4th 86, 175 [juror's unauthorized contact with witness-detective was improper but did not require hearing where misconduct was "de minimis" and there were no disputed questions of fact to resolve].)

In this case, there was a material, disputed issue of fact in that the juror and the bailiff gave inconsistent accounts of the cartoon incident. (See *People v. Hedgecock, supra,* 51 Cal.3d at p. 415 [trial court should have conducted evidentiary hearing where bailiff's and jurors' affidavits were factually inconsistent concerning misconduct by bailiff during deliberations].) The bailiff's version of events suggested an effort by the juror to communicate with the prosecutor, by sharing a joke about the conduct of the trial, on the eve of the jury's penalty deliberations. (11 RT 2940.) The juror, on the other hand, denied asking the bailiff to show the cartoon to the prosecutor but did suggest she had discussed the cartoon with the other jurors who had all wanted to pass it on to the bailiff for his amusement. (11 RT 2944-2945.)

If true, jurors sharing a joke with the prosecutor, as they began their deliberations to decide if appellant should be sentenced to death, is serious misconduct that is both indicative of bias against the defense and reflects a failure to appreciate the gravity of the jury's duties when deciding whether

a defendant should be sentenced to death. (See *Wellons v. Hall*, *supra,* 130 S.Ct. at p. 728.)

In *Wellons*, a group of jurors in a capital case involving a rape and murder, "either during or immediately following the penalty phase," gave the judge and bailiff suggestively-shaped chocolates as a gag gift. (*Wellons v. Hall*, *supra,* 130 S.Ct. at p. 729.) The Supreme Court found that these gifts and the failure to disclose them "raise[d] a serious question about the fairness of a capital trial." (*Id.* at p. 731.) While the federal appeals court had rejected the petitioner's claims of bias and misconduct as resting on "speculation" and "surmise" concerning the meaning of the gifts, this was not the petitioner's fault. (*Id.* at p. 730.) If he had been granted the discovery and evidentiary hearing he had repeatedly requested, the Court reasoned, "Wellons may have been able to present more than 'speculation' and 'surmise.'" (*Ibid.*) The Supreme Court therefore remanded the case to the federal appellate court to reconsider whether the petitioner was entitled to an evidentiary hearing in federal court to discover the circumstances surrounding the gag gifts.

In this case, as in *Wellons*, the juror's conduct raised questions of possible bias and reflected a failure to treat the decision whether appellant should be sentenced to death with appropriate gravity. And, as in *Wellons*, the defense was unable to resolve disputed questions of fact or get to the bottom of the jurors' misconduct because the court failed to conduct an adequate inquiry despite an overt conflict between the bailiff's and the juror's account of the matter. (11 RT 2946-2947.) The trial court should have questioned the other jurors to "ascertain the relevant facts," including whether they had discussed the cartoon with Juror No. 12, whether they sought specifically to share it with the prosecutor and, if so, why. (*People*

*v. Hedgecock, supra,* 51 Cal.3d at p. 415.) If necessary, the trial court should also have questioned the bailiff under oath. The failure to conduct a further inquiry was an abuse of discretion that requires the case to be remanded for a hearing. (*People v. Hedgecock, supra,* 51 Cal.3d at p. 420; *People v. Burgener, supra,* 41 Cal.3d at p. 520.)

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## XV.

## THE PENALTY PHASE INSTRUCTION ON MORAL JUSTIFICATION IMPOSED A HIGHER STANDARD TO ESTABLISH THE MITIGATING CIRCUMSTANCE THAN IS REQUIRED FOR THE GUILT PHASE DEFENSE OF IMPERFECT DEFENSE OF ANOTHER AND THEREFORE PREVENTED THE JURY FROM CONSIDERING RELEVANT MITIGATING EVIDENCE IN THIS CASE, IN VIOLATION OF THE EIGHTH AMENDMENT

Appellant's defense to the Facundo stabbing was that he acted in imperfect defense of another, to protect his cousin Charlene from the violently abusive Facundo. Even if this Court rejects appellant's argument that the trial judge erroneously refused to instruct the jury on this defense at the guilt-innocence phase of the trial, the jury should have been allowed to consider Facundo's abusive conduct and the fears of Charlene's family as a mitigating circumstance at the penalty phase of the trial. Over defense objection, however, the jury was given the unmodified version of CALJIC No. 8.85, which directs the jury to consider whether appellant acted with a *reasonable* belief that his conduct was morally justified, thereby precluding the jury from giving effect to mitigating evidence of appellant's *unreasonable* belief that killing Facundo was necessary to protect Charlene, in violation of the Eighth Amendment.[86]

This Court has acknowledged that federal constitutional error occurs

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[86]The defense requested that the standard instructions be modified so the jury could consider "whether or not the present offense was committed under circumstances which the defendant honestly believed to be a moral justification or extenuation for his conduct." (5 CT 1249-1250 [Defendant's Proposed Special Instruction No. 28].) This instruction was refused. (11 RT 2907-2908.)

"when any barrier, whether statutory, instructional, evidentiary, or otherwise [citation] precludes a jury or any of its members [citation] from considering relevant mitigating evidence." (*People v. Mickey* (1991) 54 Cal.3d 612, 693, citing *Mills v. Maryland* (1988) 486 U.S. 367, 374, *McKoy v. North Carolina* (1990) 494 U.S. 433, 438, *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 and *Hitchcock v. Dugger* (1987) 481 U.S. 393, 394, 398-399.) "When the claimed barrier to the jury's consideration of relevant mitigating evidence is an instruction, the crucial question for determining error 'is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of' such evidence." (*People v. Mickey, supra*, 54 Cal.3d at p.693, quoting *Boyde v. California* (1990) 494 U.S. 370, 386.)

The standard instruction, given in this case, tracking section 190.3, factor (f), directs the jury to consider "if applicable . . . [w]hether or not the offense was committed under circumstances which the defendant *reasonably* believed to be a moral justification or extenuation for his conduct." (CALJIC No. 8.85 [italics added]; 5 CT 1192; 11 RT 2930.)

Under California law, "one who kills in imperfect defense of [another]-*in the actual but unreasonable belief* he must defend another from imminent danger of death or great bodily injury-is guilty only of manslaughter." (*People v. Randle* (2005) 35 Cal.4th 987, 997 [italics added], overruled on other grounds in *People v. Sarun Chun* (2009) 45 Cal.4th 1172.) Consistent with *People v. Randle, supra*, appellant did not claim that he acted in *reasonable* fear that Facundo posed an imminent threat to Charlene, only that he had an actual but *unreasonable* fear for Charlene's safety. Because appellant's requested instructions on imperfect defense of another were denied, the jury had no opportunity to give legal

effect to this evidence at the guilt-innocence phase and was not aware that an unreasonable belief in the need to defend another would make a killing manslaughter rather than murder. (See Argument V, *supra.*)

At the penalty phase, the statutory mitigating factor of section 190.3, factor (f), and its corresponding jury instruction set a higher standard for appellant to meet than would have been required for him to be convicted of the lesser offense of manslaughter at the guilt-innocence phase. This stands the Eighth Amendment on its head.

In *Eddings v. Oklahoma*, the state appellate court committed error because

> [i]t found that the evidence in mitigation *was not relevant because it did not tend to provide a legal excuse from criminal responsibility*. Thus the court conceded that Eddings had a "personality disorder," but cast this evidence aside on the basis that "he knew the difference between right and wrong ... and that is the test of criminal responsibility." [citation] Similarly, the evidence of Eddings' family history was "useful in explaining" his behavior, but it did not "excuse" the behavior. *From these statements it appears that the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability.*

(*Eddings v. Oklahoma* (1982) 455 U.S. 104, 113 [italics added].)

It is thus the most fundamental Eighth Amendment error to conflate the standards that apply to evidence in mitigation of the death penalty with those required to establish a defense to the underlying crime, and yet factor (f), in this case, goes further, by setting the standard even *higher*.

This Court has nevertheless insisted that it is not improper to give the factor (f) instruction, reasoning in a case involving a claim of imperfect self-defense that

> the jury was instructed that a defendant's reasonable belief in moral justification was a mitigating circumstance [citation], thus possibly raising the negative inference that an unreasonable belief was not a proper consideration. However, the jury was also instructed to consider in mitigation "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." [Citation.] Had the jury believed defendant's evidence that he harbored an honest but unreasonable belief in the need for self-defensive action, the instructions permitted consideration of that information as a mitigating factor under [§ 190.3,] factor (j)-(k). [Citation.]

(*People v. Murtishaw* (1989) (*Murtishaw II*) 48 Cal.3d 1001, 1017; accord *People v. Murtishaw* (2011) (*Murtishaw III*) 51 Cal.4th 574, 593-594; *People v. Lang* (1989) 49 Cal.3d 991, 1037.)

Appellant submits, however, that a reasonable juror would, at a minimum, be confused by the juxtaposition of these two instructions. It is, for example, "a well-established tenet of statutory construction that a specific statute controls over a general statute."[87] (*S.V. v. Sherwood Sch. Dist.* (9th Cir. 2001) 254 F.3d 877, 880-81 [where two statutes of limitation could apply to plaintiff's claim, statute applying specifically to claims against school districts and public bodies would apply over general "catchall" statute of limitation "that applies broadly to any claim alleging a 'liability created by statute'"]; accord *In re Hubbard* (1964) 62 Cal.2d 119, 126-127 [use of "specific words and phrases connotes an intent to exclude

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[87]While other rules of construction – including the principle that a statute must be interpreted to avoid unconstitutionality (*In re Smith* (2008) 42 Cal.4th 1251, 1269) – compel the interpretation that jurors must be allowed to consider *any* belief in moral justification – reasonable or not – as a mitigating circumstance, the issue here is whether a reasonable juror could interpret the provision otherwise.

that which is not specifically stated"], overruled in part on other grounds in *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63, fn. 6; *Martin v. Bd. of Election Com'rs of City & County of San Francisco* (1899) 126 Cal. 404, 411 ["The more specific provision [of law] controls the general"].)

It would therefore be eminently reasonable for a juror to conclude that the very specific factor (f) controls over the general, catchall factor (k) such that the defendant's belief in moral justification may be considered as a mitigating circumstance *only if* the defendant's belief in his justification is "reasonable." That is, a juror could very reasonably take literally the introductory language of factor (k) referring to "any *other* circumstance" to mean evidence of a type *not* mentioned in the preceding list of sentencing factors. The likelihood that a juror would so construe the instruction is even greater because – unlike "extreme" emotional disturbance or "substantial" domination – the jury here was not being asked to consider a lesser form of "reasonable belief" under factor (k), but the *opposite* or *absence* of a reasonable belief.

In this case, the likelihood that the jury applied the instruction in this manner is reinforced by the trial court's order denying modification of the death sentence, in which the court stated there was no evidence to support the factor (f) moral justification mitigating circumstance and did not mention anywhere in his discussion of the mitigating evidence Facundo's abuse of Charlene or the fact that her family, including appellant, feared for her life. (5 CT 1324-1326A.)

Thus, there is a "reasonable likelihood" that the jurors in this case "understood the challenged instructions to preclude consideration of relevant mitigating evidence" – appellant's unreasonable belief that he was morally justified in killing Max Facundo to prevent him from further

brutalizing appellant's cousin, Charlene Trujeque. (See *Boyde v. California, supra,* 494 U.S. at p. 386.) Appellant's death sentence must therefore be reversed.

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## XVI.

## THE TRIAL COURT'S REFUSAL TO GIVE LEGALLY ACCURATE INSTRUCTIONS REGARDING THE SCOPE OF AGGRAVATING AND MITIGATING EVIDENCE AND THE JURORS' SENTENCING DISCRETION VIOLATED STATE LAW AND APPELLANT'S RIGHT TO A FAIR AND RELIABLE PENALTY DETERMINATION

The defense requested a number of special penalty phase instructions that accurately reflected the law and would have ensured a more fair and reliable sentencing determination.

Specifically, the defense requested instructions clarifying the definition of mitigating circumstances (5 CT 1231, 1244, 1245,1249-1253, 1254; 11 RT 2904, 2907[Defendant's Proposed Special Instructions 13, 23, 24, 28 and 29]), the scope of aggravating circumstances (5 CT 1233, 1248, 1271-1272, 11 RT 2904, 2907, 2908 [Defendant's Proposed Special Instructions 15, 27, and 45]), the nature of the weighing process (5 CT 1256, 1259, 1273, 1275, 1277, 1283, 1284, 1286; 11 RT 2904, 2907-2908, 2909, 2910, 2912 [Defendant's Proposed Special Instructions 31, 34, 46, 48, 51, 58, 59, 61]); and the jury's ability to consider sympathy or mercy in deciding what sentence to impose (5 CT 1219, 1220, 1221, 1230, 1237-1238, 1255, 1257, 1258, 1279, 1281; 11 RT 2898, 2899, 2902-2904, 2907, 2908, 2910, 2912 [Defendant's Proposed Special Instructions 2, 3, 4, 12, 19, 30, 32, 33, 53, 56].) These were all denied.

The trial court's refusal to give these instructions violated state law as well as appellant's Eighth and Fourteenth Amendment rights to a fair penalty trial and reliable penalty determination.

## A. Applicable Law on Jury Instructions

A "defendant is entitled to instructions which direct attention to evidence or amplify legal principles from which the jury may conclude that his guilt" – or his desert of a death sentence – "has not been established." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 257, citing *People v. Sears* (1970) 2 Cal.3d 180, 190.) Thus, even if the standard instructions address the relevant legal principles, the defendant is entitled to have a requested instruction given if it correctly states applicable law. (See *People v. Kane* (1946) 27 Cal.2d 693, 698, 700 [trial court committed prejudicial error by refusing pinpoint instruction that was correct statement of law pertinent to defendant's theory of the case and showing its application to the evidence presented]; *People v. Mayo* (1961) 194 Cal.App.2d 527, 537 [although court's instructions regarding elements of offense were generally correct and adequate, it prejudicially erred in refusing specific instructions pinpointing theory of defense]; *People v. Sears, supra,* 2 Cal.3d 180, 190 [refusal to give reasonable doubt instruction pinpointing theory of defense erroneous despite generally adequate reasonable doubt instruction]; *People v. Thompkins, supra* 195 Cal.App.3d at pp. 256-257 [error to refuse defendant's proposed pinpoint instructions "intended to supplement or amplify more general instructions" on ground they were incomplete and duplicated standard CALJIC instructions]; see also Pen. Code, § 109.3, subd. (f) [trial court must instruct jury "on any points of law pertinent to the issue, if requested by either party"].)

At the penalty phase of a capital trial the defendant similarly has "a right to 'clear instructions which not only do not preclude consideration of mitigating factors' [citation omitted], but which also 'guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the

individual offense and the individual offender.' [Citation omitted.]" (*People v. Gordon* (1990) 50 Cal.3d 1223, 1277, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835; see also *People v. Davenport* (1985) 41 Cal.3d 247, 286-287 [appellant denied right to a fair and reliable sentencing determination where instructions misled jury regarding scope of mitigating evidence it could consider].)

While "a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative," or if "it might confuse the jury" (*People v. Gurule* (2002) 28 Cal.4th 557, 659), none of these reasons applied to the instructions proffered by the defense in this case.

To the contrary, each of the requested instructions discussed below was an accurate statement of the law, which would have ensured a fair and reliable sentencing determination as required by the Eighth and Fourteenth Amendments to the U.S. Constitution. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [Eighth Amendment "gives rise to a special 'need for reliability'" in capital cases], citing *Gardner v. Florida* (1977) 430 U.S. 349, 363-364 (conc. opn. of White, J.) and *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

**B. The Trial Court Erred by Refusing to Give a Legally Accurate Instruction Clarifying the Definition of "Mitigating" Circumstances**

The defense requested a special instruction to clarify the definition of "mitigating circumstance" as follows:

> A mitigating circumstance is any circumstance arising from the evidence which does not constitute a justification or excuse for killing, or which (does not) reduce it to a lesser degree of crime than first degree murder, but which nevertheless may be considered as extenuating or reducing the

> moral culpability of the killing, or which makes this murder less deserving of extreme punishment than other first degree murders with special circumstances.

(5 CT 1231 [Defendant's Proposed Special Instruction No. 13].) The instruction was refused. (11 RT 2904.)

The requested instruction was an accurate statement of the law, and it clarified the technical legal terms of "justification" and "excuse" as well as the word "extenuate," which were used in the version of CALJIC No. 8.88 given in this case. (5 CT 1205-1206; 11 RT 2936-2938.) Studies have shown that the CALJIC instructions given in this case are not readily understood by lay people, because the vocabulary used is archaic. (See Haney & Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments* (1997) 21 Law and Human Behavior 575.) The 1997 Haney and Lynch study tested the comprehensibility of the revised CALJIC No. 8.88, which incorporated the same definition of aggravating and mitigating circumstances as was given in this case. (*Id.* at p. 577.) The study used college students, who would be expected to understand the instructions more easily than the average juror, as subjects. (*Ibid.*) The subjects were read the instructions three times and then asked, first, to define aggravating and mitigating in their own words and then to classify the list of sentencing factors from section 190.3 and CALJIC No. 8.85 as either aggravating or mitigating. (*Id.* at p. 578.)

Ten percent of the subjects were unable to offer any definition of "mitigation" whatsoever, while 39 percent provided an incorrect definition, 5 percent of these believed the word meant the opposite of its actual meaning. (See Haney & Lynch, Clarifying Life and Death, *supra*, at p.

580.) The word "extenuation" was even less comprehensible: eight percent of the subjects could not provide any definition while 74 percent provided an incorrect definition (seven percent of those believing the word meant its opposite), meaning that fully 82 percent of the subjects did not understand what the term "mitigating" meant. (*Ibid.*) The results for "aggravation" were considerably better (only 29 percent could not define the word or gave an incorrect definition), because the word is used more commonly by lay people. (*Ibid.*) With respect to the specific mitigating circumstances that were applicable in this case, 26 percent of jurors incorrectly believed that the moral justification mitigating circumstance was actually an aggravating circumstance; and 28 percent misclassified the factor k catchall as aggravating. (*Id.* at p. 581.)

Thus, the instructions actually given were *not* sufficient.[88] (Cf. *People v. Smith* (2003) 30 Cal.4th 581, 638 [no prejudice from refusing defense instructions where standard instructions adequate].) California law recognizes that "[t]o perform their job properly and fairly, jurors must *understand* the legal principles they are charged with applying. It is the trial judge's function to facilitate such an understanding by any available means.

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[88]Appellant acknowledges that this Court has previously rejected challenges to CALJIC No. 8.88 based on these studies, reasoning that "[t]he presumption that the jurors in this case understood and followed the mitigation instruction supplied to them is not rebutted by empirical assertions to the contrary based on research that is not part of the present record and has not been subject to cross examination." (*People v. Welch* (1999) 20 Cal.4th 701, 773; accord *People v. Lee* (2011) 51 Cal.4th 620, 652.) Appellant submits, however, that the study should, at a minimum, be grounds for reconsidering this Court's unsupported assumption that "the terms 'aggravating' and 'mitigating' are commonly understood and do not require further elaboration." (See *People v. Lee, supra*, 51 Cal.4th at p. 652.)

The mere recitation of technically correct but arcane legal precepts does precious little to insure that jurors can apply the law to a given set of facts." (*People v. Thompkins, supra,* 195 Cal.App.3d at p. 250 [original italics].)

Here, the requested instruction clarified the terms essential for the jury to give effect to mitigating evidence as required by the Eighth Amendment. It is "firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246; accord *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plur. opn. of Burger, C.J.).)

The instruction requested by appellant would have explained that "justification or excuse for the killing" meant reducing it to a lesser degree of crime than first degree murder, and it explained that "extenuating" meant "reducing the moral culpability of the killing," thus clarifying terms that are particularly confusing to lay people. (5 CT 1231.)

Because "there is a reasonable likelihood" that the failure to clarify the meaning of mitigating circumstances caused the jury to disregard relevant mitigating evidence, or even to treat it as aggravating, appellant's death sentence must be reversed. (*Boyde v. California* (1990) 494 U.S. 370, 386.)

### C. The Trial Court Erred by Refusing to Give Legally Accurate Instructions Concerning the Limitations on Aggravating Circumstances

The instructions appellant requested concerning aggravating circumstances were also legally correct. First, appellant's requested instruction correctly stated that any factor used to convict appellant may not also be used as an aggravating circumstance. (11 RT 2907; 5 CT 1248 [Defendant's Special Requested Instruction 27].) It is improper to double count the same facts as both circumstances of the crime and as a special circumstance under factor (a). (*People v. Monterroso* (2004) 34 Cal.4th 743, 789-790, citing *People v. Melton* (1988) 44 Cal.3d 713, 768-769.) Indeed, this Court has held that such an instruction should be provided on request. (*Ibid.*)

Appellant also sought an instruction that aggravating circumstances are limited to those enumerated in the statute, while there is no such limit on mitigating evidence. (11 RT 2908; 5 CT 1271-1272 [Defendant's Proposed Special Instruction No. 45].) This was a correct statement of the law. (See, e.g., *Hitchock v. Dugger* (1987) 481 U.S. 393, 398-399 [mitigating circumstances could not be limited to those enumerated in statute]; *People v. Hawthorne* (2009) 46 Cal.4th 67, 92 [aggravating circumstances are limited to those enumerated in statute], abrogated on other grounds by *People v. McKinnon* (2011) 52 Cal.4th 610; accord *People v. Boyd* (1985) 38 Cal.3d 762, 775–776.) The requested instruction was vital in this case because the prosecution relied heavily on appellant's letter to District Attorney Garcetti which was relevant primarily to the non-statutory aggravating factors of lack of remorse (to which appellant had not opened the door) and future dangerousness, which was the dominant theme of the prosecutor's closing argument. (See Argument X, *supra*.) There is a more

than reasonable likelihood that the jurors, because they were not properly instructed regarding the limitations on aggravating circumstances, weighed these nonstatutory factors heavily in their sentencing decision.

Finally, appellant requested an instruction specifying that the absence of mitigating circumstances may not be considered aggravating. (11 RT 2904; 5 CT 1233 [Defendant's Proposed Special Instruction No. 15]). This too is a correct statement of the law. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Davenport*, *supra* 41 Cal.3d at pp. 289-290.)

This instruction has been given in other capital cases, in which it was cited by this Court as neutralizing any harm caused by reading the entire list of sentencing factors over defendant's objection. (See, e.g. *People v. Thomas* (2011) 51 Cal.4th 449, 507; *People v. Smithey* (1999) 20 Cal.4th 936, 1006.)

In this case, the proposed instruction was particularly important because, as addressed in Arguments V and XV, *supra*, the central defense at trial had been imperfect defense of another, which applies when a defendant has an *unreasonable* belief that deadly force is necessary to protect another from imminent danger. Thus, the defense never claimed that appellant's belief that Facundo's killing was justified to prevent him from further brutalizing Charlene was reasonable. Rather, the defense sought to show that appellant had an actual but unreasonable belief in the necessity of killing Facundo to protect Charlene.

The jury was (erroneously) not instructed on the guilt phase defense and therefore was not aware that appellant's *unreasonable* belief in the necessity of killing Facundo would have reduced his offense to manslaughter. (See Argument V, *supra*.) The jury was instructed only as to

the statutory mitigating circumstance which actually, and unconstitutionally (see Argument XV, *supra*), set a higher bar than the guilt phase defense.

Not only is there a "reasonable likelihood" (*Boyde v. California, supra,* 494 U.S. at p. 386) that the erroneous factor (f) instruction prevented the jury from giving effect to critical mitigating evidence, but the court's refusal to give the requested instruction that the absence of a statutory mitigating circumstance is not aggravating also made it reasonably likely that the jury would consider the failure to meet factor (f)'s standard as an aggravating circumstance. The effect of the error was therefore not only to remove evidence from the mitigating side of the scales but to move that same evidence to the aggravating side of the scales, thereby undermining the reliability of the jury's sentencing determination in violation of the Eighth and Fourteenth Amendments.[89] Because of these erroneous instructions, appellant's death sentence must be reversed.

### D. The Trial Court Erred by Refusing to Give Legally Accurate Instructions Concerning the Weighing Process

The defense asked that the jurors be instructed that "you are never required to return a verdict of death . . . unless you conclude as a matter of your own independent moral judgment that death is the only appropriate penalty" (5 CT 1283 [Defendant's Proposed Special Instruction No. 58]), that any one mitigating circumstance could be sufficient by itself to warrant a life sentence (5 CT 1243, 1256 [Defendant's Proposed Special Instruction

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[89]Appellant submits that the cases holding it is not error to refuse this instruction, even though it is "a correct statement of the law" are wrongly decided and should be overruled. (See *People v. Coddington* (2000) 23 Cal.4th 529, 639-40, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, citing *People v. Livaditis* (1992) 2 Cal.4th 759, 784.)

Nos. 22 & 31]), even if several aggravating circumstances were found (5 CT 1284, 1288 [Defendant's Proposed Special Instruction Nos. 59 & 61]), and that the defendant's life could be spared for any reason (5 CT 1259 [Defendant's Proposed Special Instruction No. 34]) even if aggravating circumstances outweighed the mitigating circumstances that were found to be present (5 CT 1273 [Defendant's Proposed Special Instruction No. 46]).

This Court has stressed the "broad power of leniency and mercy" the jury retains under California's death penalty law, explaining that the "'weighing' process" required by the 1978 death penalty law did not alter the jury's ability to "spare the defendant's life regardless of its view of the aggravation-mitigation balance" because a jury could properly "interpret the 1978 law to mean that aggravating factors 'outweigh' mitigating factors only when it believes that death is the appropriate sentence." (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1026-1027 (*Murtishaw II*), quoting *People v. Easley* (1983) 34 Cal.3d 858, 882 fn. 15, 884, fn. 19.) Thus, the defendant's special requested instruction that "you are never required to return a verdict of death . . . unless you conclude as a matter of your own independent moral judgment that death is the only appropriate penalty" (5 CT 1283), and that the defendant's life could be spared for any reason (5 CT 1259), even if aggravating circumstances outweighed the mitigating circumstances (5 CT 1273), were accurate statements of the law.

The proposed instructions would have clarified for the jury the nature of the process of moral weighing in which they were to engage by demonstrating that any single factor in mitigation might provide a sufficient reason for imposing a sentence other than death. (5 CT 1243, 1256, 1284, 1286; see *People v. Sanders* (1995) 11 Cal.4th 475, 557 [noting with approval instruction that "expressly told the jury that penalty was not to be

determined by a mechanical process of counting, but rather that the jurors were to assign a weight to each factor, and that a single factor could outweigh all other factors"].) This Court has indicated that such an instruction "significantly reduce[s] the risk of juror misapprehension" concerning their "discretion to determine the appropriate penalty." (*Id.* at pp. 557-558; see also *People v. Anderson* (2001) 25 Cal.4th 543, 599 [approving an instruction that "any one mitigating factor, standing alone," can suffice as a basis for rejecting death]; *People v. Edelbacher, supra,* 47 Cal.3d at pp. 1036, 1040 ["properly worded instruction . . . to the effect that one mitigating circumstance 'may be sufficient to support a decision that death is not the appropriate punishment in this case' and that the weight to be given any factor was to be decided by each juror individually" would have helped ensure jury accurately understood scope of its sentencing discretion];[90] see also *People v. Moon* (2005) 37 Cal.4th 1, 40-41 [jury's sentencing decision is "moral endeavor" in which jury may "exercise unbridled discretion" once defendant has been found death-eligible, citing *California v. Ramos* (1983) 463 U.S. 992, 1009, fn. 22].)

Because there is a "reasonable likelihood" that the failure to give the requested instruction prevented the jury from giving effect to appellant's mitigating evidence and undermined the reliability of the sentencing

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[90]In other cases, this Court has held such an instruction unnecessary, reasoning that "[b]y stating that death *can* be imposed only in one circumstance—where aggravation substantially outweighs mitigation—the [standard] instruction clearly implies that a sentence less than death *may* be imposed in all other circumstances." (*People v. Roybal* (1998) 19 Cal.4th 481, 525, quoting *People v. Ray* (1996) 13 Cal.4th 313, 355-56 [original italics].) However, because the proposed instruction was a correct statement of the law, and the point was not specifically covered in the standard instructions, the requested instruction should have been given.

determination, appellant's death sentence must be reversed. (See *Boyde v. California, supra,* 494 U.S. at p. 386.)

### E. The Trial Court Erred by Refusing to Accurately Instruct the Jury that it Could Consider Sympathy and Mercy in Deciding Whether to Impose a Death Sentence

The defense asked that the jury be instructed:

> If a mitigating circumstance or an aspect of the defendant's background or his character arouses sympathy, empathy, or compassion such as to persuade you that death is not the appropriate penalty, you may act in response thereto and opt instead for life without possibility of parole.

(5 CT 1255 [Defendant's Proposed Special Instruction No. 30].)[91] This instruction was also an accurate statement of the law, being drawn nearly verbatim from *People v. Lanphear* (1984) 36 Cal.3d 163, 167.

The United States Supreme Court recognizes that its modern death penalty jurisprudence retains a role for mercy. "[T]he isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." (*Gregg v. Georgia* (1976) 428 U.S. 153, 203.) Indeed, the Eighth Amendment requires that capital sentencing "'reflect a reasoned *moral* response to the defendant's background, character, and crime.'" (*Roper v. Simmons* (2005) 543 U.S. 551, 603 [original italics], quoting *California v. Brown* (1987) 479 U.S.

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[91]Several other proposed special instructions were to the same effect and would also have instructed the jurors that they had the discretion to return a sentence of life based on compassion or sympathy for the defendant, (5 CT 1220, 1230, 1238, 1257, 1258 [Defendant's Proposed Special Instruction Nos. 3, 12, 20, 32 & 33]), and that they were allowed to exercise mercy, (5 CT 1279, 1281 [Defendant's Proposed Special Instruction Nos. 53 & 56]).

538, 545 (conc. opn. of O'Connor, J.).) In exercising "this essentially normative task," the jurors "may apply [their] own moral standards to the . . . evidence presented" and "may reject death if persuaded to do so on the basis of *any* constitutionally relevant evidence or observation." (*People v. Allen* (1986) 42 Cal.3d 1222, 1287 [internal citations and quotation marks omitted, original italics]; see also *People v. Rodriguez* (1986) 42 Cal.3d 730, 779 ["the sentencing function is inherently moral and normative, not factual"].) Mercy offers a means for the jurors to deliver a life verdict even if they find that the aggravating factors outweigh the mitigating factors, or fail to find any mitigating factors. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 [a juror may determine that the evidence is insufficient to warrant death even in the absence of mitigating circumstances].)

The failure to give the requested instruction was particularly prejudical in this case because the prosecutor in his penalty phase closing argument urged the jurors to dismiss the mitigating evidence because it was "designed to be emotional" and because the defense was "asking you to judge on emotions" rather than "facts." (11 RT 2953.) Thus, there is a reasonable likelihood that the jury excluded consideration of mercy and did not give effect to the mitigating evidence presented in the mistaken belief that any emotional response to the evidence was not permissible. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 295-296 [Texas' jury instructions unconstitutionally prevented jury from considering mitigating evidence that could "have served as a basis for mercy"]; *California v. Brown, supra*, 479 U.S. at pp. 545-546 (conc. opn. of O'Connor, J.) [noting that attempts to "remove emotion from capital sentencing" may impermissibly mislead jurors to ignore mitigating evidence].) Appellant's death sentence must therefore be vacated.

## XVII.

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

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

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

### A. Penal Code Section 190.2 Is Impermissibly Broad

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

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

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

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

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 5 CT 1192-1193; 11 RT 2929-2931.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the

killing, and the location of the killing. In this case, for instance, the prosecutor argued that the circumstances of the Facundo murder were aggravating because of the manner of the killing, the location of the killing, and because the defense had argued the murder was in defense of Charlene, which the prosecutor deemed offensive to battered women. (11 RT 2964-2965.)

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

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

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

### 1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590 (*Anderson*); *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. In fact, the prosecutor stressed in his penalty phase closing argument "I can't emphasize that enough . . . it's not a standard beyond a reasonable doubt." (11 RT 2959.)

*Blakely v. Washington* (2004) 542 U.S. 296, 303-305 (*Blakeley*), *Ring v. Arizona* (2002) 536 U.S. 584, 604 (*Ring*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 (*Apprendi*), require any fact that is used to support an increased sentence (other than a prior conviction) to be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 5 CT 1205-1206; 11 RT 2936-2938.)

Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring* and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

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

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36

Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

### 2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (5 CT 1192-1193, 1205-1206; 11 RT 2929-2931, 2936-2938), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137 (*Lenart*).) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190 (*Arias*).) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the Court to reconsider

its decisions in *Lenart* and *Arias, supra.*

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

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

#### a. Aggravating Factors

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

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

(1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

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

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

**b. Unadjudicated Criminal Activity**

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally

provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 5 CT 1194; 11 RT 2931-2932.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson , supra*, 25 Cal.4th at pp. 584-585.) Here, the prosecution presented evidence of unadjudicated criminal activity allegedly committed by appellant – an assault with a dead weapon on fellow inmate Frank O'Hare in Folsom Prison in 1978 – and argued that such activity supported a sentence of death. (See, e.g., 9 RT 2180-2189, 11 RT 2964.)

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

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

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

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 5 CT 1205-1206; 11 RT 2937.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

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

### 5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299,

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

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

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

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

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts

with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

### 7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

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

circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

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

### 8. The Penalty Jury Should Be Instructed on the Presumption of Life

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

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

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

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

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

the necessity of written findings.

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

### 1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 5 CT 1192-1193; 11 RT 2929-2931) 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, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

### 2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See, e.g., CALJIC No. 8.85 (e) [victim participation], (g) [duress or domination], (i) [age of defendant], (j) [minor participation].) The trial court failed to omit those factors from the jury instructions (5 CT 1192-1193; 11 RT 2929-2931), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

### 3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (5 CT 1192-1193; 11 RT 2929-2931.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

## F. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Imposition of the Death Penalty

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

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

## G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

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

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

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

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

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## XVIII.

## REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming arguendo that this Court concludes that none of the errors in this case was sufficiently prejudicial, by itself, to require reversal of appellant's conviction and death sentence, the cumulative effect of the many errors that occurred below nevertheless requires reversal of both appellant's convictions and sentences. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may "so infect[] the trial with unfairness" as to violate due process and require reversal. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty judgments in capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *Parle v. Runnells* (9th Cir. 2007) 505 F.3d 922, 927-928 [principle that cumulative errors may violate due process is "clearly established" by Supreme Court precedent].)

The death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [cumulative effect of penalty phase errors prejudicial under state or federal constitutional standards]; *People v. Brown* (1988) 46 Cal.3d 432, 463 [applying reasonable possibility standard for reversal based on cumulative

error].)

In this case, the trial court improperly barred the defense from eliciting evidence necessary to appellant's defense of imperfect defense of another, precluding any questioning about the fact that appellant's cousin Vicki had recently been murdered by her abusive boyfriend, which intensified the family's fears that appellant's cousin Charlene Trujeque would meet the same fate at the hand of her abusive boyfriend, Max Facundo. (Argument VII, *supra.*) The trial court also erroneously allowed Charlie Trujeque – who could have testified about Vicki – to make a blanket assertion of his privilege against self-incrimination at the guilt-innocence phase. (Argument IV, *supra.*) Finally, the trial court refused to instruct the jury on unreasonable defense of another despite substantial evidence that appellant acted with an actual but unreasonable belief that Charlene Trujeque faced imminent danger from Facundo. (Argument V, *supra.*) These errors, if not individually, then collectively, violated appellant's right to present a defense.

At the same time that the trial court's rulings excluding evidence hamstrung the defense, the court also allowed the prosecution to introduce completely irrelevant and highly prejudicial evidence, including the provocative and outrageous letter appellant wrote to the district attorney seeking the death penalty (Argument X, *supra*), and impeaching appellant with a 30-year-old constitutionally invalid prior murder conviction that had no probative value whatsoever as impeachment since appellant's testimony was inculpatory (Argument XII, *supra*). The trial court also refused to sever the armed robbery that occurred more than a decade after the other two offenses for which appellant was on trial and which was not cross-admissible in any way. (Argument IX, *supra.*) These errors all tended to

inflame the jurors' fears that appellant was a dangerous, habitual criminal, making it likely that they would resolve against appellant any doubts about his culpability for the Facundo and Apodaca killings.

The combined effect of limiting appellant's ability to present a defense while simultaneously allowing prejudicial and inflammatory prosecution evidence to be admitted, along with the other errors raised in this brief, was to render appellant's trial fundamentally unfair. Appellant's convictions must therefore be reversed.

At the penalty phase, the trial court excluded critical mitigating evidence when it erroneously allowed both Charlie and Elena Trujeque to invoke their privilege against self-incrimination even with respect to questions about appellant's father and his family history (Argument IV, *supra*), and when it excluded from the jury's consideration appellant's juvenile probation records that contained information about appellant's early childhood compiled by the State of California when appellant first became a ward of the state and on which the state relied in placing him in an institutional setting at the age of nine (Argument XIII, *supra*).

The standard instruction on the mitigating circumstance of reasonable belief in moral justification further skewed the sentencing process toward death by misleading the jury to believe it could not give effect to mitigating evidence of appellant's *unreasonable* belief that the killing of Max Facundo was justified to protect Charlene Trujeque from further violence at Facundo's hand. (Argument XV, *supra.*) There was, moreover, a reasonable probability that the court's refusal to instruct the jury that the absence of a mitigating circumstance could not be considered as aggravating misled the jury to treat the absence of a *reasonable* belief in moral justification as an aggravating circumstance (Argument XVI, *supra*),

skewing the balancing process toward a death verdict.

The balancing process was further skewed by the introduction of even more prejudicial portions of the inflammatory Garcetti letter which the prosecutor made the focal point of his argument for the death penalty. (Argument X, *supra.*) The trial court failed, however, to instruct the jurors that appellant's desire to be sentenced to death did not diminish their responsibility to determine the appropriateness of the death penalty. (Argument XI, *supra.*)

These errors, combined with the additional penalty-phase instructional errors that further impeded the jury's ability to give effect to mitigating evidence, (Arguments XVI & XVII, *supra*), the guilt-innocence phase errors discussed above, and the other errors raised in this brief, deprived appellant of a fundamentally fair and reliable sentencing determination, requiring that his death sentence be vacated.

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## XIX.

## THE 25 YEARS TO LIFE SENTENCE FOR COUNT II REFLECTED IN THE ABSTRACT OF JUDGMENT MUST BE CORRECTED ON REMAND TO REFLECT THE LEGALLY AUTHORIZED SENTENCE OF 15 YEARS TO LIFE

In the abstract of judgment, appellant's sentences for both counts two and three are listed as 25 years to life, and the box is checked indicating appellant was sentenced pursuant to sections 1170.12, subdivisions (a)-(d), and 667, subdivisions (b)-(i). (5 CT 1327.) In the amended information on which appellant was tried, however, the three-strikes sentencing law, sections 1170.12, subdivisions (a)-(d), and 667, subdivisions (b)-(i), was alleged to apply only to count three, not to count two.[92] (1 CT 108, 111.) Accordingly, the sentence specified for count two – appellant's conviction for the second degree murder of Raul Apodaca – is erroneous and must be corrected to conform to the requirements of section 190, subdivision (a), which prescribes a sentence of 15 years to life for the offense of second degree murder. (See *People v. Turk* (2008) 164 Cal.App.4th 1361, 1365, fn. 2 [prosecution properly conceded that defendant's correct sentence was 15 years to life rather than 25 years to life, because "except for circumstances not present in this case, section 190 provides 'every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life'"].)

The "abstract of judgment is not the judgment of conviction" but

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[92]The Apodaca murder occurred in January 1987, prior to the effective date of the three strikes law. (§ 667, subds. (b)-(i), added by Stats.1994, ch. 12, § 1, effective Mar. 7, 1994;§ 1170.12, added by initiative, Gen. Elect. (Nov. 8, 1994) [Proposition 184].)

only a digest or summary of the trial court's oral judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) It "may not add to or modify the judgment it purports to digest or summarize." (*Ibid.*)

If the abstract of judgment "fails to reflect the judgment pronounced by the court, the error is clerical and the record can be corrected at any time to make it reflect the true facts." (*People v. Rowland* (1988) 206 Cal.App.3d 119, 123.) In this case, however, the trial judge never pronounced sentence for count two, so the error is not merely clerical.

At sentencing, the court read verbatim from the the judgment prepared by the prosecution. (12 RT 3073-3080; 5 CT 1317-1321.) This judgment did not specify a base sentence for count two. Rather, it addressed only the enhancement provisions, ordering:

> that upon the death of Tommy Adrian Trujeque, the following additional, consecutive sentences hereby imposed by this Court shall be deemed to have been completed . . . As to Count II, one additional year consecutive for the use of a dangerous or deadly weapon. Additionally, 35 years consecutive for the finding by this Court after waiver of jury of the seven (7) five year priors within the meaning of Penal Code section 667(a). This to be additionally stayed pending completion of the above sentence [death].

(5 CT 1320-1321;12 RT 3077-3078.)

The sentence for count three, in contrast, was specified to be a "consecutive sentence of 25 years to life pursuant to 1170.12(a-d) and 667(b) through (i)." (12 RT 3078; 5 CT 1321.) The court said nothing further about sentencing.

The minute order for the day also repeats verbatim the written judgment prepared by the prosecution. (5 CT 1312-1313.) It further lists the disposition for each count, again omitting any base sentence for count

two:

> Count (01): Disposition: found guilty - convicted by jury
>
> . . .
>
> As to Count (02):
>
> Serve 36 years in any state prison.
> One additional year for the use of a dangerous or deadly weapon. Additionally, seven (7) five year prison terms for 35 years pursuant to 667(A) P.C. to run consecutive to the death sentence, stayed pending successful completion of the death sentence.
>
> Count (02): Disposition: found guilty - convicted by jury
>
> As to Count (03):
>
> 070 years to life imprisonment as to Count (03)
>
> 25 years to life pursuant to 1170.12(a-d) and 667(b-i) P.C.
>
> Additionally, 10 years consecutive pursuant to 12022.53(b) P.C. Additionally, seven (7) five year prison terms for 35 years pursuant to 667(a) P.C. to run consecutive to the death sentence, stayed pending successful completion of the death sentence.

(5 CT 1313-1314.)

It is well-established that "[j]udgment must be pronounced orally in the presence of the defendant, and it must reflect the court's determination of the matter before it. [Citation.] The pronouncement of judgment is a judicial act [citation], and is to be distinguished from the ministerial act of entering the judgment as pronounced in the minutes or records of the court [citation]." (*People v. Prater* (1977) 71 Cal.App.3d 695, 701, quoting *People v. Hartsell* (1973) 34 Cal.App.3d 8, 14; accord *People v. Karaman* (1992) 4 Cal.4th 335, 344, fn. 9 ["Judgment is rendered when the trial court

orally pronounces sentence"]; *In re Bateman* (1928) 94 Cal.App. 639, 641 [written words purportedly amending sentence orally pronounced formed no part of the judgment].)

The trial court here failed to pronounce judgment as to count two. Accordingly, the case must be remanded for sentencing on that count. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1044-1045; *People v. Price* (1986) 184 Cal.App.3d 1405, 1411, fn. 6.)

Similarly, the trial court did not orally pronounce appellant's custody credits, as defense counsel indicated he had not yet calculated them. (12 RT 3080.) The abstract of judgment states appellant has no credit for time served (5 CT 1327A), but the minute order from the sentencing states appellant was given total credit for 576 days in custody: 501 actual custody and 75 days good time. (5 CT 1311.) Thus, the trial court should likewise address appellant's custody credits and correct the abstract of judgment accordingly. (See *People v. Little* (1993) 19 Cal.App.4th 449, 452 [trial court has jurisdiction to resentence defendant by amending abstract of judgment to correct calculation of presentence credits].)

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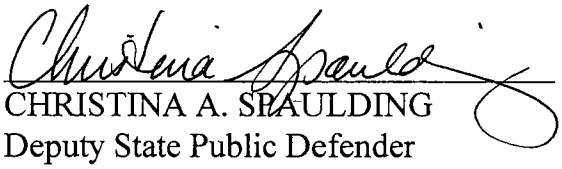
## CONCLUSION

For the foregoing reasons, appellants convictions and sentence of death must be reversed.

DATED: March 23, 2012

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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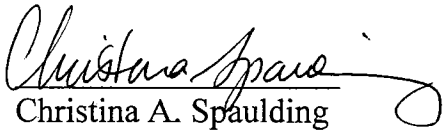
Attorneys for Appellant

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

I am the Deputy State Public Defender assigned to represent appellant, TOMMY TRUJEQUE, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 86,473 words in length.

Dated: March 23, 2012.



Christina A. Spaulding

## DECLARATION OF SERVICE

Re: People v. Tommy Adrian Trujeque No. S083594

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

**APPELLANT'S OPENING BRIEF**

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

STACY S. SCHWARTZ
Deputy Attorney General
Attorney General's Office
300 South Spring St.
Los Angeles, CA 90013

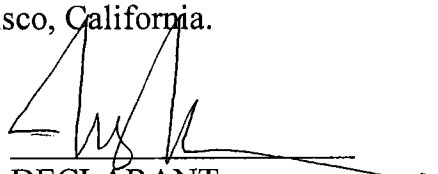
Los Angeles Superior Court
Attn: ADDIE LOVELACE
Death Penalty Coordinator
210 West Temple St., Room M-3
Los Angeles, CA 90012

SUSAN GARVEY
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

TOMMY A. TRUJEQUE
P.O. Box D-94497
San Quentin State Prison
San Quentin, CA 94974
(to be hand delivered on 03/26/12)

Each said envelope was then, on March 23, 2012, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Signed on March 23, 2012, at San Francisco, California.



DECLARANT