No. S084996

SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RUN CHHOUN, Defendant and Appellant.	(San Bernardino County Superior Court No. FSB 858658)

SUPREME COURT
FILED

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Deputy

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of San Bernardino

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RUN PETER CHHOUN Defendant and Appellant.	No. S084996 (San Bernardino County Superior Court No. FSB 858658)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death against appellant Run Peter Chhoun. (Pen. Code, §1239.)[1] The appeal is taken from a judgment that finally disposes of all issues between the parties.

INTRODUCTION

This automatic appeal addresses appellant's conviction of five murders during a robbery in San Bernardino. The prosecution's case against appellant was based on accomplice testimony and highly unreliable sources. No forensic evidence tied him to the crime; there were no eyewitnesses. Instead, appellant's conviction was secured by the trial court's erroneous rulings allowing the prosecution to introduce irrelevant and incendiary evidence of a prior double murder in which appellant allegedly participated and appellant's gang involvement. Other evidentiary

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

and instructional errors compounded the prejudice arising from the introduction of the prior crimes and gang activity.

Having obtained a conviction based upon improper and prejudicial evidence, the state then obtained a death verdict for a person who psychiatrist William Sack observed "was born into Dante's Inferno," and spiraled downward from there. "[H]e grew up in hell for the first few years of his life. And from then on things compounded, that trauma and his family alienation, and it was this downhill accumulation of traumas and stresses from that point on." (41 RT 5370.)

Appellant's guilt verdict and death judgment must be reversed.

STATEMENT OF THE CASE

On March 11, 1996, the San Bernardino County District Attorney filed an information charging appellant Run Chhoun and four codefendants Samreth Pan, Nhung Thi Tran (hereinafter Karol Tran), Vinh Quang Tran (hereinafter Vinh Tran), and William Marcellus Evans with the following offenses alleged to have occurred on August 9, 1995: (count one) murder (§ 187) of Henry Nguyen; (count two) murder (§ 187) of Tren Yen Tran; (count three) murder (§ 187) of Doan Nguyen; (count four) murder (§ 187) of Daniel Nguyen; (count five) murder (§ 187) of David Nguyen; (count six) attempted murder (§ 664/187) of Dennis Nguyen; (count seven) first degree residential burglary (§ 459) of Henry Nguyen and Tren Yen Tran; (count eight) first degree residential robbery (§ 211) of Henry Nguyen; (count nine) first degree residential robbery (§ 211) of Tren Yen Tran; and (count ten) first degree residential robbery (§ 211) of Dennis Nguyen. Counts one through ten each alleged felony robbery and felony burglary special circumstances (§ 190.2, subd. (a)(17)) against all defendants; these counts alleged personal use of firearm enhancements (§ 12022.5, subd. (a))

against appellant and codefendant Samreth Pan only. The information also charged appellant alone in count 11 with the August 3, 1995, murder (§ 187) of Trang Vu. (2 CT 504-516.)[2]

On May 7, 1996, the trial court severed the trials of Karol Tran, Vinh Tran and Evans from that of appellant and Pan. (1 RT 35-36, 41, 48.) On May 9, 1996, the court denied the motion to sever Pan and appellant's trial. (2 CT 522; 1 PT RT 48.)[3] Appellant's motion that all trial and in limine objections by defense counsel are based on the California and United States Constitutions was granted on November 13, 1996. (3 CT 527, 672-674.) On February 26, 1999, Pan's motion to sever Count 11, the Trang Vu murder, from the joint trial with appellant was granted.[4] (3 CT 635.) Appellant's motions to exclude evidence of gang membership and evidence of Sacramento crimes allegedly committed by appellant and Pan were denied. (3 CT 668-671, 730-731, 752-754.)

Jury selection in the joint trial proceedings began on March 1, 1999, and a jury was sworn on April 8, 1999. (3 CT 636, 710-711.) Opening statements by both the prosecution and Pan were presented to the jury on

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[2]Throughout Appellant's Opening Brief the following abbreviations will be used: "CT" refers to the Clerk's Transcript on Appeal; "RT" refers to the Reporter's Transcript on Appeal; "PT RT" refers to the pretrial transcript volumes; and "Supp. CT" refers to the Supplemental Clerk's Transcript on Appeal.

[3]Appellant made several more oral motions to sever his case from Pan's. (See, e.g., 13 RT 1857; 14 RT 1948-1949; 3 CT 752, 755; 25 RT 3378; 27 RT 3610-3617.) He also raised the issue of severance in his motion for new trial. (48 RT 6264-6270.)

[4]That offense was not introduced at the penalty phase because, as the prosecutor acknowledged, the evidence in that case "f[e]ll apart." (29 RT 3831.)

May 6, 1999. (3 CT 734-735.)[5]

On May 11, 1999, the prosecution began its case-in-chief. (3 CT 752-754.) On June 7, 1999, the prosecution rested its case for guilt, subject to agreed-upon stipulations. Pan and appellant rested without putting on evidence. (27 RT 3556-3557.) Both defendants made motions for acquittal pursuant to section 1118.1. (27 RT 3556-3557.) The trial court denied appellant's motion (27 RT 3574), but granted Pan's acquittal motion (27 RT 3605). Appellant then made a motion for mistrial based on all the evidence, such as the Sacramento evidence and gang evidence, that came in primarily to prove the case against Pan. (27 RT 3610-3617.) The trial court denied the motion. (27 RT 3623.) On June 10, 1999, the parties rested in the presence of the jurors. (27 RT 3662.) That same day, the trial court instructed the jury (27 RT 3664-3683), and on June 14, the parties gave their closing arguments (28 RT 3688-3740; 3 CT 806-807). The trial court gave final instructions, and deliberations began. (28 RT 3741.)

On June 15, 1999, the jurors rendered their verdict finding appellant guilty of five counts of first degree murder, three counts of residential robbery, and one count of residential burglary; the jury found appellant not guilty of the attempted murder of Dennis Nguyen. (28 RT 3785-3788.) The jury found the gun enhancements as to the murder counts untrue. (28 RT 3789-3790.) The jury found the other enhancements and the special circumstances alleged true. (28 RT 3791-3792.)

On July 19, 1999, the prosecution and the defense presented opening statements for the penalty phase. (4 CT 1065-1066.) The prosecution rested its case-in-chief on July 28, 1999. (4 CT 1086-1087.) The defense

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[5]Defense counsel Levine reserved opening statement for appellant.

case began on August 10, 1999. (4 CT 1106.) The prosecution presented rebuttal on August 30, 1999. (4 CT 1122-1123.) On September 1, 1999, closing arguments for the penalty phase were presented, and jury deliberations began. (4 CT 1129-1130.) The jurors rendered their penalty verdict, imposing the sentence of death, on September 2, 1999. (4 CT 1131-1132.)

On January 4, 2000, the trial court denied appellant's motion for new trial as well as his motion to modify the death sentence. In the pronouncement of judgment, the court also imposed a determinate sentence of 26 years, 8 months for counts seven through ten, which was stayed pursuant to Evidence Code section 654. (4 CT 1198-1199; 5 CT 1200-1210.)

On March 30, 2000, the court filed an Amended Commitment and Judgment of Death. (1 Supp CT 97-106.)

STATEMENT OF FACTS

A. Appellant's Early Life

Appellant Run Chhoun was born in 1972, the second son of a poor couple living in Ankgor Borey in the Battambang province of Cambodia. (39 RT 5107, 45 RT 5846.) Run's father Marith Chhoun was a farmer, and the family lived in a straw-roofed hut with no walls. (36 RT 4847.)

In 1975, the Khmer Rouge took over Cambodia. (37 RT 4885-4886.) When they gained entry to the Chhouns' village, the Khmer Rouge shot and physically abused the residents. (45 RT 5858-5860.). After they discovered Marith had been in the military, the Khmer Rouge took him from the rice field, tied him by a rope with others and forced him and the other detainees to walk to a camp. Many died along the way. (45 RT 5862-5864.)

Once at the camp, the Khmer Rouge interrogated Marith and hit and kicked him. He was kept for a month with 10 to 15 people in a "long house," chained by the ankle with four others. They could only sit. They urinated, defecated and ate rice porridge chained together in one spot. (45 RT 5865-5866.)

Marith could not say how many months he was in the camps, but he was eventually released and returned to his village, where he found appellant, "all bones" with a blackened face. (45 RT 5870.) Marith lost two daughters, his parents and his wife's parents to the Khmer Rouge. (45 RT 5869-5871.)

Appellant's brother, Chhum Bili Chhoun (Bili), who was born in 1970, and is three years older than appellant, testified about growing up in Cambodia with his brother and parents. Bili explained that after the Khmer Rouge took over the country, he and appellant were taken from their home by the Khmer Rouge army. (36 RT 4845-4846.) Bili was seven or eight years old, and appellant's was only four or five. (36 RT 4851.)

When their mother Sophat saw her boys being taken by the Khmer Rouge she could not cry or show emotion or the soldiers would kill her and her family. (45 RT 5894.) At the camp, Bili and appellant had no bed or blankets. They slept on hay and had only the ripped clothes on their backs. They were fed rice-water soup, which they supplemented with anything they found growing on the ground. (36 RT 4850-4851.)

The conditions in the camp were horrendous. People starved to death without food. They became sick from the cold. There was no medicine. Instead, ill people were given coconut juice and poked with a needle. Bili and appellant saw many people die in the camp. (36 RT 4856.)

Bili and appellant missed their parents and once tried to escape, but were caught. When they returned to camp an army member hit Bili with a shovel, splitting open his head. He received no medical attention; he was left to bleed and became ill. (36 RT 4852, 4854.) To further punish the boys the army forced Bili and appellant to sit in the hot sun for six days without food and with only the water other children gave them. They were not allowed to move. (36 RT 4853-4854.)

Despite this punishment, the boys escaped a second time and made it home. Appellant was bruised and had been beaten. Marith recalled that both boys were skinny with wounds and bruises all over. Before long, the Khmer Rouge came to their farm and again took away Bili, appellant, and their father. (36 RT 4854, 4870; 45 RT 5871.) The three were in the same camp but kept apart from each other. Bili could not say how long they were in the camp as he lost track of the time. (36 RT 4855.) They finally left the camp when the Vietnamese invaded Cambodia and ousted the Khmer Rouge. (36 RT 4856.)

Sophat tearfully described her husband's and boys' return. Appellant had no "meat" on him; he was "all bones and skin." (45 RT 5895.) He had a bad fever; he was black and blue all over; and he complained that his head hurt on one side. (45 RT 5895-5896.) Appellant's family described his headaches as continuous and constant. His whole head hurt, and he lost awareness of everything except the headache. Appellant sometimes screamed and cried for hours from the effects of his headaches. (38 RT 5048.)

When he first arrived home from the camp, appellant did not talk. He banged his head against the wall and clung to his mother. (38 RT 5026.) Appellant became frightened easily, and he had a startle reaction to loud

noises. (38 RT 5048.) Appellant also had night terrors. They began after he returned to the village and became worse in the refugee camps. (38 RT 5037-5038.) Bili heard appellant say he was struggling with the evil spirits inside of him. "Like when you go to sleep, like something so big just stay on top of you. You can't breathe. You can't hear, nothing at all." (36 RT 4877.)

After the Vietnamese invasion, the Chhoun family decided to leave for Thailand in order to give Bili and appellant a new life outside of Cambodia. (36 RT 4857.) The trip to Thailand was treacherous. The family walked for two nights and three days from their rice farm to the Thai border. (36 RT 4857; 45 RT 5872.) The walk was difficult, up and down over hills. There were no trails, and it was monsoon season so that they at times walked through breast-high water. (45 RT 5872.) There were land mines, and they saw bodies blown up into pieces and body parts hanging from the trees. The children were afraid and screamed. The bodies were trail markers of a sort. (45 RT 5873.) As Marith explained, "[t]hat is the only way you can guarantee safety, because you will know there has been death prior to your arrival." (45 RT 5874.)

In 1979, when appellant was approximately seven years old, the family entered a refugee camp in Thailand. (36 RT 4859; 39 RT 5107; 45 RT 5875.) Marith explained that when they reached the camp, "[t]here was no problem except starvation, hunger and waiting for the government relief." (45 RT 5874.)

The refugee camp was surrounded by barbed wire, and the Chhouns were not allowed to leave. The camps provided some food, but not enough to stave off starvation. Appellant was always hungry, so he would leave in search for food. After he fed himself, he would bring his family what he

could. (36 RT 4860; 45 RT 5875.)

Appellant was not healthy while living in the camps. He was skinny with a distended stomach. (45 RT 5875.) He had tuberculosis and was coughing up blood. (45 RT 5876.)

In 1981, the Chhoun family was relocated to Mobile, Alabama, where they were placed in a housing project in a predominately African American neighborhood. (36 RT 4863-4864; 45 RT 5878.) Both appellant's parents worked, and during the day, the children were left unattended. (45 RT 5879-5880, 5896-5897.) Appellant was rarely at home. Marith testified that appellant slept in a dumpster "most of the time." (45 RT 5883.)

Bili and appellant were placed in school, but they spoke no English, and no one at the school spoke Cambodian. After a year in school, Bili still spoke no English and had learned nothing more than the ABC's. (36 RT 4864.) Nevertheless, both Bili and appellant were promoted to the next grade. (36 RT 4881.)

Appellant continued to be ill during the family's time in Mobile. He had fevers and complained of hunger and headaches. He sometimes cried in pain from the headaches, and he would hit his head against the wall. (45 RT 5882, 5902.) When hitting his head hurt more than his headache, he would stop. This behavior continued throughout the time they lived in Mobile. (45 RT 5883.)

In 1985, the family moved to the Stockton area, where appellant's parents' drinking became more excessive and their behavior and discipline of the children more violent. Appellant began experimenting with inhalants such as gasoline and glue. (38 RT 5069-5070, 5881.)

Just before appellant was to begin ninth grade, the Chhoun family moved to Long Beach, California, where Bili finally learned English. (36 RT 4870; 38 RT 5068-5069.) At the family home, however, only Cambodian was spoken. (36 RT 4870.)

Appellant never engaged in the school system in Long Beach. At school he met other Asians who were gang members. He was introduced to the Tiny Rascal Gang, TRG, where for the first time he felt accepted by a group. (38 RT 5070.) He began engaging in criminal activity, primarily car theft, and he eventually ended up in CYA. (38 RT 5071, 5073.) Appellant's best level of adjustment occurred while he was in the highly-structured CYA environment. (38 RT 5073-5074.)

In 1993, appellant was released from CYA, and he began a relationship with a woman named Champa Onkhamdy. (40 RT 5225; 44 RT 5723-5724; Exhb. 240.) Onkhamdy convinced appellant to leave TRG and Long Beach. (44 RT 5726.) In 1994, they moved to Portland, Oregon, hoping to start a new life, and things were going well. (40 RT 5226; 44 RT 5725, 5728-5729.) In the early summer of 1995, Onkhamdy was pregnant with appellant's baby and appellant was about to begin janitorial school when he heard that his younger brother Em had been shot. (40 RT 5226-5227; 44 RT 5732.) Onkhamdy tried to stop appellant from going to see Em in San Bernardino, fearing appellant would resume gang life, but he assured her he would return to Oregon. (44 RT 5732.)

In June 1995, appellant began the drive to San Bernardino, but he was arrested on an old traffic warrant soon after he entered California. (40 RT 5227; 44 RT 5748-5749; Exhb. 240.) The arrest sent appellant into a tailspin. Psychiatrist Dr. William Sack testified that appellant thought there was no use trying anymore. He would never make it; he would never have

a good life. Appellant was depressed, hopeless and angry at the world. (40 RT 5227.) This is the man who, once released, continued to San Bernardino to see his brother and slipped back into gang life. (40 RT 5227.)

B. Guilt Phase Evidence

1. The Elm Avenue Crimes

On the evening of August 9, 1995, four young Asian Americans committed a home invasion robbery of the Nguyen family on South Elm Avenue in San Bernardino.[6] One of the four, Karol Tran, whose mother lived near the Nguyens and knew them, targeted the family, because she had heard that they kept jewelry and cash in their home. (25 RT 3429-3431.) Joining Karol that night were Vinh Tran, William Evans and appellant Chhoun. When the four of them left Elm Avenue, five of the Nguyen family members were dead, and young Dennis Nguyen was left injured, to be discovered by concerned neighbors the next morning.

Appellant, Pan, Karol, Vihn Tran, and Evans were arrested and charged with the Nguyen murders. (2 CT 504.) The prosecution theorized that Samreth Pan, although not present at the offense, supplied a gun to be used during its commission, and that Pan and appellant were leaders of a local version of the TRG, and thus most responsible for the crimes. To prove his case against Pan and appellant, the prosecutor offered deals to the other alleged participants.

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[6]Throughout the trial, the parties referred to the San Bernardino crime as having occurred on "Elm Street." The actual location of the crime was 1657 South Elm *Avenue*. (14 RT 1907, 2005, 2050-2051, Exhb. 61.) For the sake of accuracy, the address is referred to as Elm Avenue in this brief.

a. William Evans

Evans, a member of TRG, was a defendant in the San Bernardino case and the Sacramento murders discussed extensively at this trial. (17 RT 2402.) Evans accepted a deal to testify for the prosecution against appellant and Pan in both cases. (17 RT 2402-2403.)[7] He acknowledged that he also decided to plea and testify against appellant and Pan after discovering that neither was going to help him in his case. (17 RT 2412.)

Evans testified that appellant and Pan were both "shot-callers" and "OG's" for TRG, that is, members who tell younger members what to do. (17 RT 2405, 2407.) Karol Tran took care of the females from TRG, and her house was a meeting place for the gang. (17 RT 2406, 2408.)

According to Evans, on August 9, 1995, he and appellant were at Karol's house when she suggested robbing a certain house. Evans stated that appellant became the shot-caller for the robbery, in charge of assembling the team, and he asked Evans to participate. (17 RT 2416-2418, 2447.) The robbery team included Karol, Evans, appellant and Vinh Tran. (17 RT 2418.)

On August 9, 1995, appellant drove Evans, Karol and Vinh Tran in a red Honda Civic from Karol's house to Pan's mother's house, where they met Pan and fellow TRG member Ronnie Nuon, who were outside working

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[7]Evans pled guilty to five counts of first degree murder and all other charges leveled against him. (17 RT 2408.) Evans initially pled guilty to all the charges in exchange for a prison sentence of 35 to life, but was then contacted by the prosecutor in this case and was able to get his sentence reduced to 25 years to life in exchange for testifying. (17 RT 2412-2414, 2489-2493.) In addition, the prosecutor agreed not to prosecute Evans on another murder charge pending in San Bernardino County. (17 RT 2491-2492.)

on a car. (17 RT 2419-2422.) Evans alleged that appellant had a Glock nine-millimeter pistol with him. (17 RT 2420.)

When the four arrived at Pan's house, appellant and Pan talked. (17 RT 2422.) Evans could not remember exactly what was said, but he testified that appellant asked Pan to give him a gun. (17 RT 2423.) Evans also testified that appellant asked Pan to accompany them on the robbery, but Pan refused. (17 RT 2423-2424.) Pan did, however, give them a nine-millimeter gun, which appellant handed to Evans, who in turn, handed it off to Vinh Tran after they arrived at the Elm Avenue house. (17 RT 2424-2425, 2428.) Once there, Vinh Tran and Karol approached the house. (17 RT 2425-2427.) Karol knocked on the door, and when someone answered, Vinh Tran went into the house armed with Pan's gun. Karol returned to the car. (17 RT 2427-2428.) Appellant and Evans then got out of the car and approached the house. (17 RT 2429.) Evans said he heard Vinh Tran yelling in Vietnamese, which Evans did not speak, then Evans, appellant and Vinh Tran ordered the occupants to get on the floor. (17 RT 2429-2430.) Trin Tran, her husband Henry Nguyen, and their daughter Doan were in the living room. (17 RT 2430.) Vinh Tran went to another room in the house and returned with the children Daniel, David, and Dennis Nguyen. (17 RT 2433.) Vinh Tran continued to do the talking, demanding money and jewelry from the family. (17 RT 2434, 2448.) Evans testified that appellant gave him his gun and obtained a knife, which appellant held against Dennis. At that point, Henry Nguyen gave up some money. (17RT 2434-2347.)

Daniel, the eldest Nguyen boy, told Evans that he had some money in his room. Evans followed him down the hallway, but stopped short of the bedroom when he heard a gunshot, whereupon he turned around and

returned to the living room. (17 RT 2439.) Evans stressed that he never made it to the back bedroom, where Doan and Daniel were later found dead. (17 RT 2500-2501.)

Evans alleged that when he returned to the living room he saw Henry Nguyen laying on the floor and appellant standing near him holding a gun. (17 RT 2440-2441.) Appellant told Evans to leave the house, which he did, returning to the car where Karol was waiting. (17 RT 2442.) Evans heard more gunshots while he waited. (17 RT 2442.) Evans testified that he never saw anyone get shot during the robbery, though he admitted he had told the police otherwise. (17 RT 2529.) After Evans heard the additional shots, appellant and Vinh Tran came back to the car, and they left with money and jewelry. (17 RT 2442, 2449.) The prosecution showed Evans a photograph of a necklace, and he identified it as taken from Trin Tran. (17 RT 2472-2473.) They returned to Karol's house and divvied up the stolen money and jewelry. (17 RT 2450.)

On cross-examination Evans admitted he had told different stories about the Elm Avenue crimes to different people. (17 RT 2494.) He acknowledged telling Detective Dillon that he had seen Vinh Tran shoot twice before Evans left the house. (17 RT 2495-2496.) Finally, Evans admitted that because Vinh Tran had already pled guilty and was thus out of the Elm Avenue case, it would not help Evans to allege that he saw Vinh Tran shoot. (17 RT 2509-2510.)

b. Karol Tran

Karol Tran testified that, although she was not a member of TRG, she was familiar with the gang and that its members often assembled at her home. (25 RT 3389-3390.) After the Elm Avenue incident, however, Pan made Karol a shot-caller. (25 RT 3393, 3421.)

Karol was in charge of the TRG juniors, a young female subset of the gang, and was "kind of" an O.G. for the girls. (25 RT 3422, 3427.) At the end of trial, the parties stipulated that in 1995, Karol had admitted to a police officer that she was a member of TRG. (27 RT 3662.)

Karol testified that she was made aware that she was eligible for the death penalty for her role in the San Bernardino murders and then struck a deal to plead guilty to five counts of first degree murder. (25 RT 3440.) She testified at the preliminary hearing and subsequently her exposure was reduced to five counts of second degree murder. (25 RT 3383-3384, 3446-3447.) Karol understood that if she testified for the prosecution, she would receive a lesser sentence with a chance for parole while still fairly young. (25 RT 3442-3443.) She said she knew the police and district attorney were working together and that the police wanted the convictions of Pan and appellant. (25 RT 3444-3446.) She also acknowledged that she had received visits with her family and that the police bought her meals on the way to those visits; it was her understanding that the police were helping her because she was cooperating. (25 RT 3463-3465.)

Karol testified that two weeks before the robbery, appellant spoke to her about wanting a place to rob for money to send to his girlfriend up north. Karol told him of a place where a family she knew lived and that they would have money. (25 RT 3390-3392.) The night of the robbery Karol had a conversation with appellant, Evans, Vinh Tran and a female TRG member named Kunthea Sar. (25 RT 3393.) Karol told the group she thought the Nguyen family had a $10,000 diamond ring, a luxury car and cash. (25 RT 3404, 3408.) She figured they were rich and that Vietnamese targets would not call the police, so it would be a good place to rob. (25 RT 3431, 3433-3434.) Karol helped plan the robbery and testified that they

planned to do no more than threaten the occupants. (25 RT 3415, 3485-3486.)

Karol claimed she did not want to go to the robbery out of respect for her parents. Sar volunteered to participate in Karol's stead, but she was turned down. The group reasoned that because Karol knew the occupants of the residence, she should approach the door. Accordingly, Karol went as planned. (25 RT 3394-3396, 3403-3404.) Appellant first drove Karol, Evans, and Vinh Tran in a red Civic to Pan's mother's house, where Karol saw Pan give appellant a Glock pistol, which he gave to Vinh Tran in the car. Karol then directed them to the Nguyens' Elm Avenue address. (25 RT 3395-3399, 3461.)

At the Elm Avenue home, Karol got out of the car with Vinh Tran and went up to the front door. This being August, the front door was open, and Karol could see, through the closed screen door, Henry Nguyen and two children. Vinh Tran stood off to her right side with Pan's gun. Karol knocked on the door, and Henry Nguyen shooed the two kids away and came to the door. (25 RT 3400-3403.) When Henry opened the door for Karol, Vinh Tran rushed in. As Karol ran back to the car, she saw appellant and Evans run past her and into the house. (25 RT 3402-3403.) While sitting in the car, Karol heard three sets of gunshots from inside the house. (25 RT 3404-3405.) Vinh Tran, appellant and Evans all returned to the car, and they drove back to Karol's home. (25 RT 3405-3408.)

On the way back, Karol heard appellant say that they must have had the wrong house, because the family did not have a Lexus or as much money as he had hoped. Karol also recounted that appellant said that five people were killed. (25 RT 3410-3411.) Karol did not know who actually did the shooting inside the home. (25 RT 3453.) On the drive back to her

home, she also witnessed appellant hand Vinh Tran a gun and tell him to unload it; Vinh Tran set the gun out on the sun roof. (25 RT 3408-3409, 3414.)

When the group arrived back at Karol's house, there were already other TRG members there, including Pan. Pan, appellant, Karol, Evans, and Vinh Tran gathered in Karol's room to discuss what happened. (25 RT 3410.) Karol asserted that at some point appellant said he held a knife to a little boy's throat to get "the lady" to tell him where the money was. (25 RT 3417.) Appellant divvied out the proceeds from the robbery; for her part in the crimes Karol received $500. Vinh Tran received a couple of hundred dollars and Evans received one hundred dollars. (25 RT 3412, 3416.) Sar received a small amount of cash. (26 RT 3503, 3531-3532.) Pan received nothing. (25 RT 3416.)

When the meeting in Karol's room broke up, Karol said appellant told everyone to act like nothing had happened, and appellant told Karol to make up a story about getting into a fight with a Black girl at Taco Bell if anyone asked about her demeanor. (25 RT 3418-3419.) The group left Karol's house and went to a nearby pool hall. (25 RT 3419-3420.)

c. Stipulation regarding Dennis Nguyen's Observations

The parties stipulated that San Bernardino Police Department Detective Brian Cartony, who conducted a two-hour interview with young Dennis Nguyen in the emergency room on August 10, 1995, would have testified as follows: Dennis told Cartony that there was a knock on the door, his dad answered and three men entered. One of them put a gun to his dad's head and demanded money; another man pulled Dennis's necklace off his neck, then took his mother's necklace. One of the men then shot Dennis

in the hand and they all left out the rear exit of the home. (24 RT 3234.) Dennis was unclear on whether the invaders spoke English or Vietnamese. There was no mention of any threats or torture. (24 RT 3235.)

d. Kunthea Sar

Kunthea Sar, a TRG member, knew Karol, appellant, Vinh Tran and Evans, and she was staying at Karol's house on the evening of August 9, 1995, when they all came over. (26 RT 3496-3498.) Karol ordered Sar and several other TRG members out of the living room and proceeded to have a conversation with appellant, Evans and Vinh Tran. Sar was being nosy and tried to listen in. (26 RT 3509-3510, 3520-3521, 3528-3529.) Sar denied offering to help them commit a robbery that night. (26 RT 3529-3530.) She claimed to have seen appellant with a Glock nine-millimeter handgun that night. (26 RT 3502.)

Sar felt that appellant had pressured Karol into participating in the robbery, based upon Karol's reaction upon returning. Sar said Karol said some things about not wanting to go. (26 RT 3502, 3513, 3535.) Sar also said Karol and Evans were crying. (26 RT 3500.)

Sar overheard appellant say that Vinh Tran did some of the shooting, and appellant did some as well. (26 RT 3505-3506, 3515.) Appellant also said the plan was to threaten the family for money. (26 RT 3502.) Appellant was saying that Vinh Tran was crazy – he had shot a kid. (26 RT 3501.) Later, Sar said she did not know which of the four made that statement. (26 RT 3533-3534.) She acknowledged that earlier she said that appellant said Vinh Tran shot in the house and appellant only intended to threaten people for money. (26 RT 3538.) Finally, Sar admitted she had told Detective Dillon that she figured that when the robbery crew came back to the house with money they had done something, but she heard the

details on the news, not from the people in the house that evening. (26 RT 3541-3542)

Sar saw Karol get money, and she saw Vinh Tran and Evans with money afterwards; nobody had money before they left. (26 RT 3506.) Vinh Tran and appellant each gave her $20 after they returned to the house. She knew the money she received was from the proceeds of the robbery. (26 RT 3504, 3531-3532.) Sar told Dillon that appellant tried to give her $100, but she turned it down because she thought it was wrong. (26 RT 3543-3544.)

After her testimony, the trial court ruled Sar was not an accomplice as a matter of law. (27 RT 3573-3574, 3652-3657.)

e. Yen Nguyen

Henry Nguyen's sister, Yen Nguyen, testified that her brother lived at the Elm Avenue home with his wife Tren Tran and their children, Doan, David, Daniel and Dennis Nguyen. (14 RT 1969-1972.) Yen had moved out of the Elm Avenue house just 10 days before the killings. (14 RT 1975.) On August 10, 1995, she called the home, and Dennis answered the phone, which was unusual in and of itself, and said "mommy's dead." (14 RT 1976-1977.) Yen called her former neighbors and asked them to go over and check in on the house. She went over herself an hour later. (14 RT 1977.) Yen identified a pendant pictured in Exhibit number 93 as belonging to Tren Tran. (14 RT 1978.) From living at the Elm Avenue house, Yen was familiar with the Tran family and was able to identify a picture of Karol Tran, the woman who tricked the Nguyen family into opening their door to the robbery. (14 RT 1979-1981.)

f. Marshall Ibarra[8]

Marshall Ibarra testified that he was a former member of TRG, nicknamed "Psycho," and that he was with the gang in 1995, when he was 15 or 16 years old. At the time of his testimony, he was no longer a member. (18 RT 2623-2624.) Marshall recalled that people had been killed at the Elm Avenue house, but could not remember all the details because of the passage of time. (18 RT 2625-2626.) The day after the shootings he saw Pan and Karol Tran at Karol's house; he did not recall seeing Evans, appellant or Vinh Tran there. (18 RT 2626.)

Marshall alleged that he decided to give up on "ganging" after the San Bernardino crimes. (18 RT 2627-2628.) He could not recall on the stand what Pan had told him concerning whether Pan had loaned a gun for the San Bernardino crime, or whether he had ever seen Pan or appellant with guns at some time period before the crime, but the prosecutor impeached Marshall with his preliminary hearing testimony, wherein Marshall said Pan had told him he had lent a gun for the crime to a TRG leader named Bone, and that Marshall had seen both Pan and appellant carry guns on occasions before the crime. (18 RT 2628-2631.)

Marshall testified that he could not remember, it having been so long ago, whether appellant actually told him, "I killed somebody. . . . I got five counts of murder, and I did a family," but Marshall admitted he had testified during the preliminary hearing that appellant had said as much. (18 RT 2631-2632.) Marshall also claimed that appellant had told him that he had done "some of the shooting," during the Elm Avenue crime. (18 RT 2632,

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[8]Marshall's brother Jonathan also testified so the witnesses will be referred to by their first names.

2641.) Marshall then noted, however, that with the passage of time, he could not remember or was not sure about things people said to him or he said to others about the Elm Avenue crime. (18 RT 2646-2648.) One thing he did know was that he told the truth during the preliminary hearing. (18 RT 2646.)

During that hearing Marshall testified that the only thing appellant told him was that he, appellant, was accused of the five murders. Appellant said nothing about the actual events of the August 9, 1995, crimes. (18 RT 2648.) Marshall admitted to having used drugs during the time period he gave his initial statements to law enforcement and that he might have been using alcohol, marijuana, cocaine or heroin when he talked to Detective Dillon. (18 RT 2650-2652.)

g. Jonathan Ibarra

On August 22, 1995, Jonathan Ibarra, Marshall's brother, was arrested driving Pan's car, a blue Honda Accord. (20 RT 2841-2843, 2846.) Jonathan, a member of the Seventh Street Locos gang, was arrested for violation of his felony probation. (20 RT 2856-2857.) The police told him they were looking for Pan, and Jonathan agreed to help them lure Pan to his arrest. (20 RT 2843-2844.)

Jonathan testified at trial that after he saw a report on the news about the Elm Avenue murders he asked appellant if he had done it. Jonathan could not remember whether appellant answered at all or said he had shot anyone. (20 RT 2845.) He acknowledged that at the preliminary hearing he had said appellant had said, "yeah, he did one but one guy was shot on the arm." (20 RT 2845-2846.) The prosecutor read a portion of the preliminary hearing wherein Jonathan agreed with the prosecutor's assertions that appellant had said he had committed a robbery in which five people were

killed and one got away. Jonathan agreed at trial the statements were true. (20 RT 2846-2848.) Jonathan also agreed that he had seen both appellant and Pan with nine-millimeter pistols in August of 1995. (20 RT 2849-2850.)

Jonathan further testified that the Sunday after the murders, about 15 TRG members held a meeting at Karol Tran's house about appellant and Evans' arrest in Sacramento. (20 RT 2851-2852.) Vinh Tran attended that meeting. (20 RT 2853.) Jonathan explained that, as he was not a TRG member, he was not privy to the gang meetings. (20 RT 2852, 2855.)

Jonathan feared San Bernardino Police Detective Dillon's threat that Jonathan might go to state prison for five years if he did not talk to Dillon; Jonathan believed his status as a former informant would get him killed. (20 RT 2858-2859, 2874.) He thus wanted to give Dillon what he wanted. In return, Dillon promised to talk to the district attorney, allowed Jonathan to stay the night at the police station, and let him leave the next day. (20 RT 2860-2861.) Jonathan admitted that he had made a deal with the prosecutor prior to the preliminary hearing; he did not remember what the deal was, but acknowledged that he never went to jail for either his outstanding grand theft auto felony or for a charge of sex with a minor. (20 RT 2864-2866.) When he was talking to Dillon, he was trying to stay out of jail. (20 RT 2871.)

Over defense objection, Jonathan stated that he was testifying, regardless of the subpoena, because he felt remorse over the death of the Nguyen family, and felt badly that Dennis Nguyen would grow up not knowing his family. (20 RT 2879-2881.) Jonathan carried a Bible everyday because it gave him hope, and he worked with a local preacher. (20 RT 2881-2882.) At the same time, he reiterated that he spoke to Dillon

because he feared for his life for being a gang informant. (20 RT 2888-2889.) Jonathan also stated that part of gang life is lying, and that he lied when he was a gang member. He agreed that he was a different person at trial than the person who spoke with Dillon. (20 RT 2894-2896.)

h. San Bernardino Police Officer Patrick Pritchett

Officer Patrick Pritchett of the San Bernardino Police Department was the first police officer on the scene at South Elm Avenue. (14 RT 2017-2018.) He entered the house with Sergeant Rice and saw an Asian female lying on the living room floor, apparently dead. (14 RT 2019-2020.) He then saw an Asian man and a boy, both of whom also appeared to be shot dead. (14 RT 2020.) Pritchett proceeded down the hall to a back bedroom where he discovered two other children, a boy and a girl, dead from gunshot wounds. (14 RT 2020-2021.) Finally, Pritchett and Rice walked through the house to make sure there were no other victims and then secured the house to make sure nobody came in or out. (14 RT 2021-2022.) Pritchett noticed in his sweep of the house that the female adult had what appeared to be toothpaste coming from her nose and ears, and he noticed a tube of toothpaste on the floor. (14 RT 2022.)

Pritchett discovered that Dennis Nguyen had blood on his left arm from an injury, and medical aid was called to the scene. (14 RT 2023.)

i. San Bernardino Detective Brian Cartony

Detective Cartony interviewed Dennis Nguyen at the hospital, where Dennis was being treated for a grazing bullet wound. (14 RT 2034, 2038.) Dennis initially did not want to speak, but he said something, through an interpreter, that led Cartony to schedule another interview with him. (14 RT 2038-2040.)

At that interview, within the week, Cartony extracted unspecified useful information from Dennis with the help of a psychologist, Phu Nguyen, that he passed on to detectives Kilbride and Dillon. (14 RT 2041-2043.) The jury never heard from Phu Nguyen.

j. Sacramento Sergeant Robert Risedorph

Sergeant Robert Risedorph, who in 1995, was the supervisor of the Gang Suppression Unit of the Sacramento Sheriff's Office, received information regarding possible suspects in the July 27, 1995, attempted robbery-murder that occurred in Sacramento.[9] (22 RT 3057-3058.) He was told to be on the lookout for the street names of Pan, appellant, Vinh Tran and Evans. (22 RT 3059.) On August 16, 1995, Risedorph spotted Vinh Tran in the North Highlands area of Sacramento with Evans and appellant in a brown Toyota Celica. (22 RT 3061.) Risedorph questioned the men, and appellant said they were in Sacramento to visit a female friend. Appellant said he had never been to Sacramento before. (22 RT 3062-3063.) Risedorph asked the group if he could search their car; they agreed, and Risedorph discovered a nine-millimeter bullet casing, consistent with a Glock brand pistol. (22 RT 3065-3066.) Appellant, Evans and Tran were detained and taken to the Sheriff's Department for questioning. (22 RT 3067-3068.) Risedorph conducted another search of the car once he had moved it to the narcotic gang office parking lot and discovered two live bullets in the trunk area of the car. (22 RT 3068.)

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[9]The transcript reads September 27, 1995, but it seems clear that they were referring to the July 27th incident.

k. Pan's Blue Honda Accord

On August 23, 1995, Detectives Renato Giannini and Dennis Evans and Officer Klukas of the San Bernardino Police Department went to a towing lot and searched a blue Honda Accord in which a police narcotics division tracking device had been installed to monitor Pan. (19 RT 2773-2776, 2780.) The car was registered to a woman named Terry Hale, with whom Pan was living. (19 RT 2775, 2784-2785.) The police searched the car and found in the trunk four nine-millimeter bullets and three 380 caliber bullets. (19 RT 2777, 2784-2785.)

l. San Bernardino Police Detectives David Dillon and Vincent Kilbride

Detective David Dillon was designated lead investigator of the Elm Avenue homicides, and his partner Detective Vincent Kilbride created diagrams of the crime scene. (14 RT 2045-2047.) Kilbride explained a series of diagrams he had created for the case to the jury, noting a rubber glove and a fired bullet found just outside the house, the position of the bodies of Trin Tran, Henry Nguyen and David Nguyen in the living room, the discovery of fired cartridge cases and bullet strikes, as well as a tube of toothpaste, a purse that had been rifled through, a meat cleaver, and other indications of the violence that had taken place in the living room. (14 RT 2060-2061, 2063-2069.) He also noted bloodstains along several of the walls in the house. (14 RT 2076-2079.) Kilbride pointed out the positions of the deceased Doan Nguyen and Daniel Nguyen, along with many fired nine-millimeter cartridge cases, and bullet strikes in the wall, as well as bullet holes in the mattress, in one of the back bedrooms of the Elm Avenue home. (14 RT 2079-2084.)

Dillon identified photographs of the Elm Avenue crime scene, including photographs of the victims and their various injuries. (23 RT 3144-3152.) Dillon also identified a blue Honda Accord with the license plate number 3HDR196 as belonging to Terry Hale, Pan's adoptive mother, and a brown Toyota Celica with the license plate number 1DLY701 as belonging to Em Chhoun, appellant's brother. (23 RT 3153-3154.)

On January 31, 1996, Dillon spoke with a jail informant named Mark Milazo who was in jail with appellant. (24 RT 3236.) Milazo told Dillon that appellant told him that Vinh Tran said that he hit someone in the jaw and then grabbed some toothpaste and squirted it on "her" face. (24 RT 3236.) Appellant said that Vinh Tran said "that's poison," and "tell him where the fuckin' money is or she's going to die." (24 RT 3236.)

m. Forensic Evidence

On August 10, 1995, Richard Tomboc, a San Bernardino identification technician lifted latent fingerprints from the scene. They all either matched Nguyen family members or were unmatchable. (19 RT 2794-2798, 2815-2818.) None of the fingerprints found at the scene matched appellant, Pan or Evans. (19 RT 2815, 2821, 2825.)

Karen Rice, a forensic expert, also investigated the Elm Avenue crime scene and collected the following: fired cartridge cases, a tube of toothpaste, bullets, bullet holes, blood, household items, and a cleaver. (18 RT 2657-2658, 2661-2664.) Rice did not do the actual analyses of the cartridges, but in her opinion all those found at the scene had the same general characteristics. (18 RT 2668-2670.)

William Matty, a criminalist for the San Bernardino County Sheriff's Crime Lab, reviewed an examination of the shell casings from the Elm Avenue and Sacramento crime scenes, as well as the casing found in the car

during the Sacramento arrest. (24 RT 3349, 3351-3352.) He did not do the examination himself. (24 RT 3358-3363.) Matty testified that all the shell casings from the Elm Avenue scene came from the same gun, likely a Glock nine- millimeter. (24 RT 3354-3355.) All the casings from the Sacramento scene came from the same gun, but it was a different gun than the one used in San Bernardino. (24 RT 3355.) Matty believed the shell found in the car was fired from the gun used in San Bernardino. (24 RT 3357-3358.)

Frank Sheridan, the medical examiner for San Bernardino County, conducted the autopsies of the Elm Avenue deceased. Henry Nguyen suffered two bullet wounds, both of which were fatal, as well as superficial wounds on the back of his neck, consistent with a sharp object, such as the very tip of a knife. (24 RT 3246-3254.) Trinh Tran suffered three gunshot wounds, two in the head (both of which were fatal), one in the leg; the remains of a nine-millimeter bullet was extracted from her leg. (24 RT 3265-3266.) Sheridan noted that Tran had toothpaste residue on her face, and that the toothpaste in her nose would have caused a slight burning sensation. (24 RT 3287-3288.) Doan Nguyen, Daniel Nguyen and David Nguyen all succumbed to fatal gunshot wounds as well. (24 RT 3293-3305, 3313-3315, 3319-3322.)

2. Other Crimes Evidence

In order to link Samreth Pan to the charged crimes, the prosecutor labored to show that Pan's action in providing a gun proved that he understood violence was about to occur and that he was aiding that violence. To establish that link, the prosecutor sought to present evidence of a previous home-invasion shooting committed in Sacramento, allegedly conducted by Pan, appellant, Evans and Vinh Tran, to show that Pan knew

the gun would be used in a home-invasion robbery and that it would be fired if necessary.

In addition, the prosecutor offered evidence that the four men were members of the TRG. The prosecutor proffered the testimony of a gang expert to describe the structure of Asian gangs, generally, and to explain to the jury the importance of a gun in TRG culture and the significance of one TRG member giving a gun for other members to use in a crime.

a. The Sacramento Robbery and Double Murder

Quyen Luu testified via a Cantonese translator that on July 27, 1995, she was living at 7301 Florinwood, apartment number 53, in Sacramento. On that evening, a man with a gun came into the kitchen area where she was standing. Her husband, Hung Dieu Le, was in the apartment eating dinner with a friend, Hung Ngo. (19 RT 2698-2702.) The prosecutor showed her photographs of appellant, Pan and Evans.[10] She said the photograph of appellant looked like the man with the gun because he was dark-skinned, though she later admitted she could not be sure, because she had been frightened at the time of the shooting. (19 RT 2702, 2706-2707.) She could not identify Pan or Evans. (19 RT 2702-2703.) She testified that the man who entered her apartment shot her in the leg, and she blacked out and fell. (19 RT 2703.) She heard seven to eight shots. (19 RT 2703.)

Mei Tuyet Le, daughter of Hung Dieu Le, testified that in 1995, she lived at apartment 53. Her parents ran a candy store out of the apartment. (19 RT 2709-2712.) On the evening of July 27, 1995, she was upstairs at a neighbor's apartment, apartment number 52, with her siblings. (19 RT

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[10]Photographs numbers 43, 44 and 45, were photographs of appellant, Pan and Evans, respectively. (13 RT 1769.)

2709.) She heard her sister Amie scream that someone was robbing their house; when she looked down she saw her mother and a man pushing each other. (19 RT 2714.) She had never seen the man before and could not identify him. (19 RT 2714.) Le heard a shot and saw her mother scream and fall; the neighbor pulled Le into apartment 52, and she heard five or six more shots. (19 RT 2716-2717.) After a while, Le went downstairs and found her grandfather, Ngiep Thich Le, lying on the ground in blood, and her uncle attempting to revive him. (19 RT 2717.) Le found her mother on the porch, alive, and then found her father lying on the living room floor. Her father was still alive at that point. (19 RT 2717-2718.)

Vincent Le, son of Hung Dieu Le, testified that he was outside apartment 52 on the night of July 27, 1995. (19 RT 2720-2722.) He heard his sister scream about a robbery; when he looked into apartment 53, he saw a man holding a gun push his mother. He initially stated that the man was wearing a white t-shirt and tan-colored jeans, but later "clarified" that by tan, he meant a black color. (19 RT 2721-2723, 2731.) After his mother was shot he heard three more shots, then four to five more. (19 RT 2723-2724.) Vincent was pulled back into apartment 52, then, after hearing no more shots, he went to apartment 53 where he discovered his grandfather and father both injured. (19 RT 2723-2725.) He could not identify the robber; he did not recognize photographs of appellant, Pan or Evans. (19 RT 2726.) Vincent also saw two people running away from the apartment. (19 RT 2739-2740.)

An hour before the incident Vincent had seen a skinny guy, who did not look like the robber, come to his house to buy candy in a light blue two-door Honda Accord. He saw another guy searching the trunk of that car, who appeared to be wearing the same clothing as the robber and looked like

him, though Vincent could not see that man's face. (19 RT 2725-2729.) Vincent eventually saw the car leave and noticed two other people in the back, for a total of four people in the car. (19 RT 2730.) He testified that a lot of people come from the park to buy items from the store. (19 RT 2746.)

Amie Le, daughter of Hung Dieu Le, testified that on the evening of July 27, 1995, she was sitting on the stairs outside apartment 53, when three men came up and one of them pointed a gun and gestured with his hand as if to say, "come with me." (19 RT 2757-2759.) Amie yelled at her mother to close the door, but the man with the gun walked into the apartment and Amie fled upstairs. (19 RT 2760.) She testified that the photograph of William Evans (photograph number 45), looked like one of the men in the apartment, but she could not be sure. In addition, she could not recall if the other men had guns. (19 RT 2762.)

William Evans testified extensively about the Sacramento attempted robbery, in which he admitted to participating. (17 RT 2474.) According to Evans, he, appellant, Pan, Vinh Tran and someone he could only identify as "Lazy" drove to Sacramento together and were there on July 27, 1995. (17 RT 2456.) They met with some TRG members and eventually went to a park, where Evans overheard a robbery being discussed. Bunjun Chhinkhathork and appellant were the ones primarily talking. (17 RT 2457-2458.) An apartment was chosen for the robbery, and Evans identified apartment number 53 from pictures shown by the prosecution as the apartment discussed. (17 RT 2459.) That apartment was chosen because "they had money there." (17 RT 2462.) According to Evans, appellant drove him, Pan and Vinh Tran to the apartment. (17 RT 2463, 2474.) Evans could not recall if anyone said anything in the car about possibly

killing witnesses. (17 RT 2474.) Chhinkhathork stayed in the car to act as the driver when they left, and the rest of the group followed appellant through a hole in the fence and to the apartment. (17 RT 2474-2475.) When they got to the apartment there was a woman sitting on the steps, so they passed by the apartment, but then returned. (17 RT 2476-2477.) Evans alleged that appellant tried to grab the woman and she yelled and then left. (17 RT 2477-2478.)

Evans stated that appellant then went into the apartment, and Evans heard shouting and then gunshots, at which point he ran back to the car. (17 RT 2478.) Appellant and Pan arrived at the car around the same time. (17 RT 2479.) Chhinkhathork drove them back to the park and from there, Evans, appellant, Pan, Vinh Tran and "Lazy" drove back to San Bernardino. (17 RT 2480.) According to Evans, during the drive appellant said that "some lady" had tried to grab him and someone else tried to hit him with a chair and that he (appellant) shot them both. (17 RT 2481- 2482.) The group obtained no money from the Sacramento crime. (17 RT 2539.)

Evans said he was anxious to please the prosecutor, the architect of the plea deals to which he had agreed. (17 RT 2493.) He had told many different versions of what happened in the San Bernardino and Sacramento cases. (17 RT 2493-2494, 2501.) He lied a lot and lied to get out of tight spots, and he agreed he, there on the stand, was in a tight spot. (17 RT 2495-2496.) He told the detectives in Sacramento "a lot of lies." He initially claimed Pan was the shooter in Sacramento after learning the police believed that to be the case. (17 RT 2501, 2504-2506.) After he learned that appellant would not testify on Evans' behalf at his trial, Evans began telling the police that appellant was in charge in Sacramento. (17 RT 2506-2507.)

Former Sacramento Sheriff's Department Detective Darrell Edwards interviewed appellant on August 16, 1995. (22 RT 3092.) Initially, appellant claimed he had never been to Sacramento before his arrest, and that he had not been at the Florinwood Drive apartment robbery. When being confronted with a motel receipt he had from a Sacramento hotel dated the day of the robbery, appellant admitted he had in fact been present at the robbery. (22 RT 3095, 3098, 3101-3104.)

Appellant told Edwards that he went to a park with other TRG members and discussed the robbery. He simply went along with it. Appellant was standing near the apartment door when the robbery occurred. He saw a girl on the apartment steps and told her to shut up. When he heard a woman's scream and gunfire from the robbery, appellant ran away. (22 RT 3102-3104.)

Edwards also interviewed Pan, who, after initially declaring that he had nothing to do with the Sacramento robbery, eventually admitted that he was at the robbery, and that he too left when he heard screams and gunfire. (22 RT 3119, 3123-3124.)

b. Gang Expert Testimony

Marcus Frank, a police sergeant for the city of Westminster, California, was called by the prosecution and qualified to testify as a gang expert. (16 RT 2244-2251.)[11] The trial court agreed to allow Frank to testify about Asian gangs in order to provide the jury with information regarding their particular gang structures, the division of activity among gang members in Asian gangs, the special relationship between Asian gangs

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[11]Frank was qualified after a lengthy Evidence Code section 401 hearing outside the presence of the jurors. That evidence is detailed in Argument I. D. 1., infra, at pp. 113-120.

and firearms and the use of guns by Asian gangs to intimidate parents through their children. (15 RT 2225-2226.)

Frank testified about Asian gangs generally, as he had spent no time in San Bernardino learning about the local Asian gangs, and he had no knowledge about the San Bernardino version of the TRG. (16 RT 2326-2327, 2346.)

C. Penalty Phase Evidence in Aggravation

At the penalty phase of trial the prosecution relied on the evidence it had introduced at the guilt phase regarding the Sacramento crimes. (30 RT 3973-3974.) The prosecution also introduced evidence of additional murders, other crimes and acts of violence and victim impact evidence.

1. Other Murders

The prosecution introduced evidence that between July 10, 1995, and appellant's arrest in August 1995, he committed, in addition to the Elm Avenue and Sacramento murders, murders in Spokane, San Bernardino and Pomona. The prosecution also introduced additional testimony regarding the Sacramento murders.

a. Murders of Thi Hong Nga Pham and Johnny Hagan, Jr. (Spokane, Washington, July 10, 1995)

At 7:30 a.m. on July 10, 1995, officers responded to a murder scene at an apartment at 3203 North Smith Street in Spokane, Washington. (31 RT 4074-4075.) The parties stipulated that a four and one-half-year old survivor of the offense, Joe Hagan,[12] was interviewed November 9, 1995,

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[12]The child is repeatedly referred to as Joe Hagan Jr., but it appears that he is not a junior. The confusion may be due to the fact that his father is Johnny Hagan Jr. (See Exhb. 166, Certificate of Death.)

by Spokane Police Department Detective James Peterson, and through an interpreter, Joe told Peterson that his mother opened the apartment door, while his father was sitting on the couch. Two men came in with a knife and a gun. When one of the men grabbed his mother, his dad got up to help. The other man then grabbed his dad. The men talked to Joe's parents about a robbery, then they went to the living room to get something with which to tie up his parents. One came back with a big knife. The little guy tied up Joe's mom and the big guy tied up his dad. The suspects cut his mother in the mouth area and his dad on his neck, then dropped the knife back on the counter. Joe was asked if he heard shots, and he stated that he heard the noise, but was so scared he covered his head with a pillow. He tried to wake up his dad and ran towards the door as the suspects ran out. Joe grabbed his sister, held her on couch, and they fell asleep until the next morning when he ran to get the neighbors. The intruders took jewelry off Joe and his sister before hurting their parents. Joe told Peterson that he thought he could identify the men if he saw pictures of them. (31 RT 4064-4066, 4145.)

A latent print was lifted from the door to the apartment that was later found to match appellant's fingerprint. (31 RT 4073-4077.) The latent print was found on the inside of the apartment door, on the chain latch above a dead bolt and handle. (31 RT 4080-4081.) Gaio Ly's left palm print matched a latent taken from a narrow wall by the kitchen cupboard. (31 RT 4086, 4088.)

Terri Haddix, a forensic pathologist, performed autopsies of the two victims, Thi Hong Nga Pham and Johnny Hagan Jr. (31 RT 4094-4096, 4068, 4116; Exhbs. 165-166.) Pham was 23 years old. She was shot three times, once behind the right ear at close range, a second time at the base of

the skull, and a third time, a fatal shot fired at close range, in the right upper chest. (31 RT 4098-4102, 4104-4106, 4108-4109, 4116.) Haddix also found relatively superficial incised wounds on the body that were possibly made with a knife. (31 RT 4110.) One was on the lower lip continuing to the right check area; another smaller wound was also on the lower lip. There were three incised wounds on the neck, two measured approximately five inches and the third about one-half inch. There was one final incised wound on the right side of the face and neck. (31 RT 4110-4111.) None of the wounds went into the muscle or any vital structure, but they would have been painful. (31 RT 4111.) None of these wounds was fatal. (31 RT 4113.) Haddix also found contusions and abrasions as well as ligatures on her wrist. (31 RT 4113-4115.)

Haddix found two rings that appeared to be a wedding and engagement ring in Pham's mouth. (31 RT 4116-4117.)

The victim Johnny Hagan Jr. was approximately 27 years old. (31 RT 4116.) He had three gunshot wounds. He was shot in the left ear at close range, and this wound was fatal. (31 RT 4118-4119, 4122.) He suffered a non-fatal superficial wound at the base of the neck and another wound behind the left ear, again at close range. (31 RT 4120-4121, 4123.) All the wounds were made by a large caliber bullet. (31 RT 4121.)

Hagan also received an incised wound on the front of his neck and small blunt force injury to his forehead, which may have been caused by falling to the ground after being shot. (31 RT 4123-4124, 4126.) He had ligatures around his left wrist and his neck. (31 RT 4124-4125.) The cause of death was multiple gunshot wounds. (31 RT 4125.) Both victims died within a brief period of time. (31 RT 4125-4126.)

When found, Hagan had a phone cord tied around his left wrist and

speaker wire loosely wrapped around his neck.[13] Pham's hands were tied with a phone cord. (31 RT 4140-4141.)

Shell cases from a .45 automatic were found and turned over to the Washington State Crime lab for analysis. (31 RT 4143-4144.)

On September 7, 1995, Peterson and Detective James Lungren interviewed appellant in Sacramento, where he was in custody. (31 RT 4159-4161.) Appellant told them he had been to Spokane only once and only to a friend's house on that occasion. (31 RT 4161.) Peterson showed appellant photographs of Pham and Hagan, and he said he had never seen them before. (31 RT 4162.) When confronted with the fact that law enforcement had found his fingerprint in their residence, appellant said he did not know how it had gotten there and repeatedly denied ever being at their apartment. (31 RT 4162-4163.)

Four months after the shootings, on November 9, 1995, Peterson interviewed Joe Hagan, and showed him a photo lineup. Joe spoke a little English, but there also was a Vietnamese interpreter present. (31 RT 4145-4147.) Joe identified appellant as the larger of the two men and as the one who hurt his dad. (31 RT 4148.)[14] Peterson explained that Joe said appellant was the one who had taken the knife to his dad, "but on further

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[13]Peterson initially stated that the black speaker wire was around the man's neck. (31 RT 4141.) He later testified that the black speaker wire was on the female's neck. (31 RT 4155, 4157.) Haddix, however, only testified about a neck ligature on the man. (31 RT 4115, 4125.)

[14]Peterson composed the lineup using photographs provided by the Sacramento County Sheriff's Office. (31 RT 4145.) Of the eight photographs provided and shown to Joe, one was of an African American man, five were of dark-complexioned Asian men and three were of lighter-complexioned Asian men. (31 RT 4177.)

talking," a knife and gun were one in the same "to this young boy." (31 RT 4149.) Still later, on March 21, 1996, Joe was shown another photo lineup and identified Gaio Ly as "the small one" who had a knife. (31 RT 4150-4152.)

On May 8, 1996, Peterson, Detective Don Giese, and San Bernardino Detectives Dillon and Kilbride interviewed appellant's girlfriend Onkhamdy in Seattle and obtained from her five rings and a bracelet. (31 RT 4157-4159.)

Onkhamdy testified that in July 1995, appellant, Kunthea Sar[15] and Gaio Ly[16] visited her in Portland, and she drove with them to what she believed was Ly's apartment in Spokane. (32 RT 4196-4198.) At trial she did not recall, but on May 8, 1996, Onkhamdy told Peterson and Giese that appellant and Ly left, saying they would be back. (32 RT 4198-4200.) She and Sar went to sleep, but she awoke when appellant, Ly, a man named Dennis and another unnamed man returned. Onkhamdy glanced at them and noticed a roll of twenty and hundred dollar bills and some jewelry – necklaces, bracelets and rings – on the table. Appellant offered Onkhamdy a couple of rings and necklaces and she responded, "whatever." (32 RT 4200-4202.) The men were speaking Cambodian and she could not understand what they were saying but she heard them handing out money. She then fell back to sleep. (32 RT 4203-4204.)

Onkhamdy testified that she told the investigating officers that she was nauseous from her pregnancy, but she denied telling them that she knew from their conversation that the men had committed a murder, which

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[15]Onkhamdy knew Sar as Precious and referred to her by this name.

[16]Onkhamdy knew Ly as Sandman and referred to him by this name.

made her nauseous. (32 RT 4205-4206, 4212.)

Dillon observed Peterson and Giese's interview of Onkhamdy, and he heard Onkhamdy tell Peterson that as she was laying down facing away from appellant, Ly and Dennis, she could hear them handing out money. Dillon also testified that Onkhamdy said that she heard a conversation between appellant and Ly in which some one of them mentioned a murder. (32 RT 4238-4239.) She told Peterson that hearing the conversation about a murder made her nauseous. (32 RT 4240.)

At approximately 3 or 4 a.m., a few hours after Onkhamdy had fallen asleep, appellant awakened her, and she, appellant, Ly and Sar returned to Portland in Ly's car, arriving at approximately 7 a.m. (32 RT 4212-4214.) She recalled, and told Detective Peterson when interviewed, that there was no conversation about a robbery or murder during the drive to Portland. (32 RT 4214.)

After they arrived at the apartment in Portland, Ly returned to Spokane; Sar and appellant left for the airport to return to San Bernardino. (32 RT 4214-4215.) Onkhamdy denied telling the interviewing officers that appellant had left for her the jewelry shown in People's Exhibit No. 181. (32 RT 4215-4216.)

Sar also described the events in Spokane on July 10, 1995. She testified that she ran away from home with appellant and Ly and drove to Spokane. (34 RT 4614-4615.) They stopped in Portland, Oregon to pick up Onkhamdy then drove to Ly's apartment in Spokane. At some point that night, appellant and Ly left, then returned with a large amount of money and rings, necklaces and bracelets. (34 RT 4616-4617.) Appellant asked Sar if she wanted something and she took a ring. (34 RT 4620.)

Chon Le, testifying through a Vietnamese interpreter, stated that the

Spokane victims, Johnny Hagan and Pham, were her son and daughter-in-law. (31 RT 4067-4069.) She identified People's Exhibit No. 181(e) as a ring that belonged to her son and Exhibit 181 (f) as a bracelet belonging to her grandson. (31 RT 4069-4071.) The parties stipulated that if Joe Hagen were called he would testify that he was wearing that bracelet when his parents were killed on July 10, 1995. (31 RT 4072-4073.)

Counsel also stipulated to the following:

- Just prior to the stipulation, Joe Hagan was shown a photo lineup; he remembered seeing the photographs earlier, but he could not remember which one he picked. Joe could not presently make an identification from the photo lineup. (31 RT 4062-4063.)
- Joe was also shown a photo lineup relating to Gaio Ly. Again, Joe remembered seeing the photographs, but could not remember which photo he originally picked, and he could not identify Ly from the lineup. (31 RT 4063-4064.)
- Officer Mindi Conley[17] of the Spokane Police Department would testify that on July 12, 1995, two days after the murder, she attempted to interview Joe Hagan, and in her opinion he needed the services of a Vietnamese interpreter. When she questioned Joe in English he did not respond, but he responded readily when her questions were translated into Vietnamese. (32 RT 4233-4234.)

b. Murders of Nghiep Thich Le and Hung Dieu Le (Sacramento, California, July 27, 1995)

The prosecution introduced additional testimony from medical examiner Dr. Sheridan regarding the Sacramento victims' wounds. (34 RT

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[17]The transcript reads Conley, but it appears that the parties referred to Mindi Connelly. (See 30 RT 4046-4047.)

4685.) Sheridan testified that Hung Dieu Le, age 47, died of a single gunshot wound to the chest from an "apparently distant range gunshot." (34 RT 4686.) Sheridan did not perform the autopsy of Hung Le but opined that death would have occurred "very rapidly." (34 RT 4686.)

Sheridan also did not perform the postmortem examination of Nghiep Thick Le, age 73, but reviewed the death certificate and observed the autopsy photographs. (34 RT 4686.) Sheridan testified that this individual sustained two gunshot wounds. One, into the face, was fatal. The second was a superficial wound to the left arm. (34 RT 4687-4688.)

c. Murder of Bunlort Bun (San Bernardino, California, August 6, 1995)

William Evans testified that during the evening of August 6, 1995, he, appellant, Pan, Thavy Pay, and Phirom Thack were at Karol Tran's house. (33 RT 4349-4350.) At some point they left to find and shoot a member of the Oriental Boys, or OB, a rival Asian street gang. Before driving off, appellant handed Evans a gun. They then left with appellant driving, Pan in the front passenger seat, and Evans behind Pan, with Thack and Pay to his left. (33 RT 4350-4352.) While in the Muscoy area of San Bernardino, they spotted two men they believed were OB members in a red Celica or Supra and followed them. (33 RT 4353-4355.) The driver of the red car, later identified as Bunlort Bun, let the passenger off at a house then sped off. Appellant followed him, and Pan leaned out the passenger window and started shooting; when Pan came back in, Evans leaned out and began shooting at Bun. (33 RT 4226, 4354-4355.) They took turns shooting until the red car swerved and went to the curb. Appellant pulled up beside the red car, and they saw the Bun slumped over. (33 RT 4356-4358.) Appellant told the others to make sure Bun was dead, and Evans and

Pan assured him that he was and said they had no more bullets. (33 RT 4358-4359.) Appellant gave Pan another clip, which Pan put in his gun. He got halfway out of the car and shot Bun three more times. (33 RT 4359.)

Karol Tran testified that on the night Bun was shot, appellant, Pan, Evans, Vinh Tran, Phirom Thack and Pay were all at her house. (33 RT 4350, 4459-4461.) At some point, defendant Pan, Vinh Tran, Evans and Thack left her house in Pan's blue Accord driven by appellant. When they returned, Pan said they shot up an OB. He was laughing and smiling and patting himself on the back. Appellant told Karol that while they were out driving they saw someone they thought was Bones, an OB member who had earlier shot 25 rounds at Pan's mother's house. (33 RT 4461-4462, 4464, 4471-4472, 4510-4511.) Appellant told Karol that they followed and shot him. (33 RT 4462.) Karol later clarified that Sar was the first one who said the name Bones, and that it was Pan who talked about shooting Bones. (33 RT 4473-4476.) She also admitted that in an earlier interview she had told the police that she did not know who was driving and that she had not said that appellant said anything when he returned to her house. He just had a big smile on his face. (33 RT 4500-4502.)

Appellant asked Karol to go check out the scene of the shooting, so she, Pay, Sar and Diep Tran drove to where they thought the shooting had occurred. (33 RT 4463-4464; 34 RT 4608.) They saw nothing so returned to Karol's house and told Pan. (33 RT 4464.) Both Pan and appellant told Karol to go back, so the same group left again in Karol's car. (33 RT 4464-4465.) This time they heard sirens, saw many police cars, an ambulance and broken glass. When they reported this to appellant and Pan, the news was received with cheers. (33 RT 4466; 34 RT 4609.)

Kunthea Sar testified that when appellant, Pan and Evans returned that evening, appellant said they got an OB and they were bragging about it. (34 RT 4605-4608, 4610, 4612.) She could not remember if Pan said anything but he was giggling. (34 RT 4613.) She saw appellant clean a gun after the shooting. (34 RT 4614.)

Mylay Kama was in the passenger seat of the red car Bunlort Bun was driving. (33 RT 4416-4417, 4421, 4425.) Kama was a member of the OB street gang, considered an enemy of the TRG. (33 RT 4417.) Bun, however, was not a member. (33 RT 4418.) Someone with the nickname Bones was an OB, but Bunlort was not that person. (33 RT 4428.)

Bun made many turns while driving, and Kama saw headlights from a car behind them. Shortly after Bun dropped him off, Kama heard a lot of shots being fired. (33 RT 4420-4424, 4426.)

Dr. Sheridan testified that he reviewed the death certificate for and autopsy protocol on Bunlort Bun and testified that Bun suffered five gunshot wounds, all of which were from more than three feet away and three of which were fatal. (34 RT 4680-4682.) Cause of death was gunshot wounds of the chest and abdomen. (34 RT 4685.) Sheridan speculated that the best explanation for one of the entry wounds was that Bun was sitting in the vehicle while the assailant shot down from a standing position outside the car. Another explanation posited was that the victim was shot after he had already slumped down. (34 RT 4684; see Exhbs. 120 and 121.)

d. Murder of Miguel Avina Vargas (Pomona, California, August 8, 1995)

At approximately 4 p.m. on August 8, 1995, Royen Bon was mowing his lawn in Pomona, California, when he saw someone in appellant's brown Corolla shoot at another car. (33 RT 4409-4411; photograph P-9.) A white

pickup truck then jumped the curb. Bon ducked and saw the brown car go around the corner, stop, then take off again. (33 RT 4412.) Bon saw a number of heads in the brown car. The arm of the person shooting was tan-colored, and the gun was black. (33 RT 4413.)

Diep Tran testified that on the evening of August 8, 1995, she and Sar were riding in the backseat of appellant's brown car. Appellant was driving and Pan was in the front passenger seat. (33 RT 4444-4445, 4447.) They were driving in an area of Pomona controlled by the 12th Street gang when suddenly she heard shooting. Pan told her to duck and she did, but she did manage to see a white truck. (33 RT 4445-4446, 4448, 4450; 34 RT 4593-4594.) She heard shooting from the front seat of the car, but could not tell who was shooting. (33 RT 4447-4448.) When the shooting stopped, they picked up and drove home another TRG member and then returned to Karol Tran's house. (33 RT 4448, 4450-4451.)

Karol Tran testified that when Sar returned to her house that night she said, "Oh man, we just shot up a Mexican for throwing up sign." (33 RT 4503.)

Sar testified that appellant was driving her home that evening when they shot an Hispanic man in a truck. (34 RT 4621-4622.) She explained that while they were driving they passed the white truck parked and a man holding a rifle. Appellant and Pan looked at each other, smiled and said "let's go home." They then made a U-turn and returned to the white truck. Appellant pulled out a gun, someone said "duck," and she did. She heard lots of shots being fired from inside both sides of their car. (34 RT 4623-4625.) They then picked up someone she knew only as Crow and drove to Karol's house in San Bernardino. (34 RT 4625-4626.)

Pomona Police Detective Michael Dossey testified that when he interviewed Sar in April 1966, she told him that before she ducked she saw appellant with a black handgun and that after hearing numerous shots she heard Pan say, "give me the gun." (34 RT 4642-4643.) Dossey also testified that the victim, Avina Vargas, was the passenger of the white truck. (34 RT 4584, 4586.)

Ten nine-millimeter shell casings were found at the scene. (34 RT 4587.) The truck had bullet holes on the driver's side door, back window and front windshield; the passenger side window was shattered and the passenger side had an exit bullet hole. (34 RT 4587-4588.) The suspect vehicle, a car registered to Paula Chhoun, had damage to the hood as if someone had fired out the passenger side across the hood to the left. (34 RT 4590-4591, 4593.)[18]

Dr. Sheridan reviewed the death certificate of and autopsy protocol on Avina Vargas and testified that the cause of his death was massive internal bleeding as a result of gunshot from more than three feet away that entered near the clavicle, hit the aorta, penetrated the lung and lodged between the fifth and sixth ribs. (34 RT 4675-4679.)

e. Ballistics evidence

William Matty, a firearms expert, testified regarding comparisons he made of bullet casings seized from the crime scenes at Elm Avenue,

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[18]Dossey testified that the suspect car, shown in P-9 and P-10, was the same vehicle as shown in S-20, which is the vehicle in which appellant was arrested in Sacramento and in which a bullet was found. (34 RT 4593; 17 RT 2548 [Evans], 22 RT 3065-3066 [Risedorph].) Dossey had earlier testified that the car was registered to Paula Chhoun but driven by appellant. (2 RT 283.)

Pomona, San Bernardino and Sacramento, and he concluded that two Glock guns were used in these crimes. (33 RT 4524-4528.)

- *Elm Avenue, San Bernardino*: 16 cartridge cases were seized from Elm Avenue, and two guns were used in that crime. 15 cartridges were from gun one, and only one cartridge, B-1, was from gun two. (33 RT 4528-4529.)
- *Sacramento*: One casing, K-1, was found in the car in which appellant and others were arrested. K-3 through K-7 were taken from the shooting scene. (33 RT 4529-4530.) The casing found in the car, K-1, was from gun one of the Elm Avenue crime. The cartridge casings from the scene were shot from gun two. (33 RT 4531.)
- *San Bernardino, Bun case*: 32 fired cartridge cases were recovered from the scene. Gun number one fired 18 casings, and gun two fired 14 cartridge casings. (33 RT 4532-4533.)
- *Pomona, Avina case*: All ten casings recovered were fired by gun one. (33 RT 4533-4535.)
- *Spokane*: The parties stipulated that all the fired bullets recovered from the crime scene were fired by the same .45 caliber automatic weapon. (33 RT 4543-4544.)

2. Jail Incidents Involving Violence

a. December 1988

Sheriff Deputy Kristie Marilyn Smith, employed at the main county jail in San Bernardino County, testified that she overheard appellant making a phone call in December 1998, in which he made comments about someone he referred to as both Carolyn and Karol. (32 RT 4257-4258.) Appellant mentioned that she had been in protective custody. He said that

she may have been moved out, and he needed to locate her. (32 RT 4258.) Appellant also said that he had other "red suits," referring to other county jail inmates, looking for her. Karol Tran was at that time in protective custody. (32 RT 4259-4260.) Smith also heard appellant say that without Carolyn or Karol, "they didn't have a case." If she was not around, he would be able to get off. (32 RT 4260.) Detective Dillon's report of Smith's information states that she overheard appellant say "it would probably help my case and solve my problem if she wasn't around." (32 RT 4264.)

This incident was not included in the prosecution's notice of aggravation (2 CT 552-559) and was not mentioned until the prosecutor's opening statement at the penalty phase of trial (30 RT 3999-4000). The prosecutor described it in his closing argument as an implied threat of violence (47 RT 6123), but it was not listed as a prior act or threat of violence in the court's instructions to the jurors (47 RT 6113; 4 CT 1170).

b. May 6, 1996

While housed in the San Bernardino County Jail during trial, appellant became upset with Sheriff Deputy Brice Jury who denied him a late tier time. (32 RT 4269-4270.) The conflict intensified and appellant armed himself with a six-inch long stainless steel shank, which he later voluntarily relinquished to Sergeant Daniel Braun. (32 RT 4275-4278, 4305-4306, 4331.) When appellant refused to leave his cell for court, deputies formed a cell extrication team and forcibly removed him. (32 RT 4278-4281, 4283, 4331.)

Appellant told Braun that he had a shank and another item in his cell that Braun should look for and remove. On May 8, the deputies searched appellant's cell and found a second, smaller shank and a braided cord that

could be used to choke someone. (32 RT 4276-4277, 4319-4320, 4333.)

The jurors were instructed that the possession of shanks and a choke cord could be considered as aggravation under section 190.3, subdivision b. (47 RT 6113; 4 CT 1170.)

D. Defense Penalty Phase Evidence in Mitigation

Appellant introduced extensive evidence of his tragic early childhood in Cambodia and his family's abrupt relocation to the ill-prepared community of Mobile, Alabama, as described above. (See pp. 5-11.) In addition, the defense played for the jurors the movie "Situation Zero," which described the clustering on the Thailand border of Cambodian refugees escaping warfare inside their decimated country. The film focused on a family supported by the United Nations and guarded by the Khmer People's Liberation Front. The film shows that the world outside the camp brought death, through bullets or starvation. Life inside the camp, though, brought the dependency on outside relief agencies, eroding the Cambodians' historically rooted sense of independence. (See Exhb. 221.)

The defense also introduced the testimony of Cambodian natives who worked with refugees and mental health experts who testified about the effects of appellant's early trauma on his psychological development; appellant's family members; and correctional consultant James Esten.

1. Mental Health Testimony

Charleson Kanly testified about conditions in Cambodia during the time of the Khmer Rouge through his own experiences, as well as the environment in Mobile, Alabama when the Chhouns arrived there in 1981. (36 RT 4864.) Kanly was born in Cambodia and lived there through May 1975. (36 RT 4781.) He was an officer in the Cambodian Army and lived with his wife and three children when the Khmer Rouge entered Phnom

Penh in 1975. (36 RT 4782-4784.) After the Khmer Rouge took over, he was forced to conceal his identify as a Cambodian Army soldier and his education for fear of being killed. (36 RT 4784-4785.)

At gunpoint, the Khmer Rouge forced Kanly and others to walk for two months to a location in the country. (36 RT 4786-4787.) The Khmer Rouge provided the prisoners with no food. Kanly ate only what he found growing or discarded by others. (36 RT 4788.)

Once they reached their destination, Kanly was told to build a house, which was no better than a dog house. (36 RT 4787-4788.) Anyone attempting to leave the boundaries of the Khmer Rouge camp was shot. (36 RT 4789.) The children did not understand, and Kanly saw more than 100 children killed as they attempted to find food outside the camp. (36 RT 4789-4790.)

The first of the six camps in which he was imprisoned originally held 800,000 to 900,000 prisoners. Within six months, only 24,000 remained alive. Those survivors were moved to another camp. (36 RT 4792.)

At the camps, husbands were separated from wives, and children over three taken from their mothers. (36 RT 4793.) If a mother talked to her child, the child would be beaten or killed. (36 RT 4808.) If camp rules were disobeyed, the offender would be beaten to death with a stick. They were not shot, because ammunition was too expensive. (36 RT 4794.)

The prisoners were allowed to eat only what the guards provided them, which was one can of rice, which was made into a rice soup, and a piece of salt for 15 to 20 prisoners. (36 RT 4795-4796.) They were given one cup of rice soup twice a day. (36 RT 4797.) In order to survive, the prisoners would kill and eat raw things such as butterflies, mice,

grasshoppers, that they found in the rice paddies. If they were caught doing so, they were killed. (36 RT 4796-4797.)

Kanly was held in the camps from March 1976, to October 1979, approximately three and one-half years. (36 RT 4797-4798.) During that time, he did not think of his family or escape. He thought only to "obey . . . the soldier" and look for something to fill up his stomach. (36 RT 4798-4799.) Kanly said that the prisoners were forbidden to talk to each other while working and could be killed for doing so. At the same time, they were often too tired to speak. "You feel like half of your mind only missing, you know, because no food is why you are tired; and therefore, you have to work quietly. Thousands and thousands working but no voice, no voice." (36 RT 4799-4800.)

Within six months, Kanly's initial working group of 60 men was reduced to five or six. Groups were then joined together to make a new group of 50 to 60 men, which was again decimated within two to four months. He was regrouped in this way several times. (36 RT 4800.)

The prisoners worked seven days a week, from 3:00 a.m. until 10 p.m., with a 20 minute lunch break at noon and another break for dinner at 5:00 or 6:00 p.m. Sick people were given a rest, but no food, water or medicine. (36 RT 4800-4801.)

While the prisoners were in the camp, they were not allowed to move, under threat of death. If he had to urinate at night, he used his rice bowl, then cleaned it out and ate from it. (36 RT 4802.) Children who cried at night disappeared. (*Ibid.*)

In October 1979, the Vietnamese took over and the guards fled to the jungle, allowing the prisoners in the camps to escape. (36 RT 4802-4803.) Kanly went to the nearest town, Pursat, where he found his wife and

discovered she had been imprisoned in a camp near him. (36 RT 4807.) Kanly never saw his children again. (36 RT 4809.)

Kanly did not want to return to the capital so he and his pregnant wife walked to the Thai border, a journey of three months. (36 RT 4809-4811.) Once they crossed the border, they were confined in a Thai camp ringed in barbed wire and guarded by Thai soldiers. (36 RT 4813, 4820.) The refugees were not supposed to leave the camp, but sometimes they did to obtain food. If caught, the Thai soldiers shot them. (36 RT 4821-4822.) Kanly saw the guards kill refugees; he knew that they killed children and raped women in the camps. (36 RT 4822-4824.)

Kanly had reviewed a number of movies about the Khmer Rouge, including "The Killing Fields" and "Situation Zero," and believed that the actual situation was much worse than depicted in those films. They showed only a small fraction of what happened. (36 RT 4821-4822.)

Kanly was in the Thai camps from December 1979 until July 1980, and then approved for relocation to the United States. He arrived in Mobile, Alabama in March 1981, where he was one of only two Cambodian families. (36 RT 4825-4827.) The local schools made no provisions for Cambodian children. (36 RT 4827-4828.) Cambodian children who came to Mobile were placed in school according to their age. As a result, some children who knew no English were placed in the sixth or seventh grade. (36 RT 4829-4830.)

In 1984, Catholic Social Services asked him to help with Cambodian refugees coming to the area, a job he still held at the time of his testimony. (36 RT 4828.) Through this work, Kanly became acquainted with the Chhouns. (36 RT 4829.)

After coming to Mobile, both Mr. and Mrs. Chhoun worked at a seafood facility approximately 25 miles from Mobile. (36 RT 4831.) Work started at 3 or 4 a.m., and was at least a 35 to 40 minute drive away. The workers returned home at 5 or 6 in the evening. (36 RT 4832.)

When Kanly first arrived in Mobile there were no Cambodian speaking teachers or translators in the schools. (36 RT 4780-4781.) At the time the Chhoun children attended school in Mobile, they still had no teachers who spoke Cambodian. (36 RT 4833.) All of the Cambodian families in Mobile were former residents of the Thai camps, and the children were accustomed to foraging for food in the garbage. (36 RT 4833.) The children did not do well in class because of the language difficulty and the indoctrination of the Khmer Rouge not to listen to their elders. (36 RT 4834.)

David Seak Kong, a translator for the defense, also testified about life under the Khmer Rouge through his experiences in Cambodia and Thai refugee camps. Kong was born in Phnom Penh, Cambodia in 1972 or 1973, a few years before the Khmer Rouge took over on April 17, 1975. (37 RT 4883-4885, 4918.) After April 17, the Kongs, along with the rest of the population, were herded out of Phnom Penh into the jungle. (37 RT 4885.) The family was taken to a camp, and Kong was separated from his mother and forced to live with his sister and brother-in-law. (37 RT 4886.)

Kong was quite young but he recalled an overriding sensation of fear and mistrust. He learned to keep his mouth shut. (37 RT 4888.) Even his young playmates could be spies for the Khmer Rouge. (37 RT 4888.)

When he was about six, Kong was taken away from his sister and placed in a youth camp of five to ten year olds, where he was forced to work in the fields. (37 RT 4889, 4893.) If a prisoner could not work, he

would be beaten, tortured or denied rations. (37 RT 4892-4893.) If he ran away from camp, he would be killed or tortured. (37 RT 4891, 4893.) The young children were separated from their family so they could be indoctrinated that their parents were no longer their family, the State was. (37 RT 4893.)

At the camp Kong was fed rice porridge and pulp soup made of native Cambodian plants. (37 RT 4890.) Three of Kong's siblings died from starvation and disease in the jungle camps. (37 RT 4892.)

At one point, Kong's mother visited him at the camp. She found him "huddled in a mass with other young children," and wearing nothing but ripped shorts, "like Tarzan with his loin cloth." (37 RT 4894.) Kong's mother took him with her back to her camp, where she was forced to work from dawn until late at night. (37 RT 4896-4897.)

After the Vietnamese overthrew the Khmer Rouge in 1979, the survivors of the Kong family – Kong, his mother, brother, sister and brother-in-law – reunited and made their way to the Thai border. (37 RT 4897-4898.) The Kongs followed a trail of people to Thailand. Along the way they faced bandits and buried land mines. "[W]hen we followed each other in the line, usually you would here a boom up ahead and that was just a signal that someone up front of the line had stepped on a land mine." (37 RT 4898.) When the refugees heard the explosion they panicked and ran in all directions in a stampede. (37 RT 4899.)

Kong was seven on the family's trek to Thailand. His mother had earlier been injured by mortar and was crippled by shrapnel so they had to carry her. (37 RT 4900.) They were forced to forge rivers and had little to eat. (37 RT 4900-4901.) They finally reached Phum Thmei, which means

"new camp," which was on the border between Thailand and Cambodia. (37 RT 4901.)

In late 1979 or early 1980, the family moved to another camp, which was administered by the United Nations and one of the three camps portrayed in the movie "Situation Zero." (37 RT 4906.) Kong viewed the film and believed it to be accurate, but believed the actual experience could never be captured on film. In the camp they were "mired in poverty and fear and mistrust." They were "stuck in misery." (37 RT 4907.) The refugees felt hopelessness, despair and anger – "something that cannot be conveyed on film." (37 RT 4907.)

Kong explained that approximately 95 percent of Cambodia was Buddhist, but a lot of the families in the camps were spiritually broken. The Khmer Rouge forbade any spiritual practices. Citizens could not pray to their ancestors or perform ceremonial rights. (37 RT 4907-4908.) Kong's generation did not grow up in a peaceful Cambodia and thus did not grow up with that same respect for elders and ancestors. (37 RT 4909.)

Kong came to the United states in 1982, when he was nine. (37 RT 4909, 4911.) He was sponsored by the Y.M.C.A. and set up with an apartment and work in Houston, Texas. (37 RT 4913.)

Kong had read, researched and written on the subject of the adjustment of young Cambodian immigrants. (37 RT 4911.) He believed that the adjustment was more difficult for young men his age than women because women were more traditionally bound by the Cambodian cultural norms. (37 RT 4911-4912.) Young men of his generation, on the other hand, had no real identity or, if they did, it was not strong. (37 RT 4912.) He and his generation did not know a peaceful Cambodia and its traditions, and then they were thrown into the American culture and forced to adapt to

it. (37 RT 4912.)

William Foreman, a psychologist, testified that he was a marriage, family and child counselor and a traumatologist, a certified trauma specialist and responder. (37 RT 4925.) After extensive voir dire, the court qualified Foreman as an expert in the area of trauma. (37 RT 4967.)

The defense hired Foreman to provide a forensic assessment of appellant with regard to his early trauma and its relationship to his adult behavior. (37 RT 4967.)[19] Foreman examined appellant to develop a history of the trauma to which he had been exposed during his developmental life. (37 RT 4975-4976.)

In order to make an assessment, Foreman reviewed defense investigator David Sandburg's report on appellant, which included appellant's CYA, school, and juvenile court records. Foreman also reviewed appellant's PET scan report, and he reviewed the literature regarding Cambodian culture, refugees and religion. (37 RT 4968-4970, 4972.) Foreman interviewed appellant for a total of approximately 15 hours, and he also interviewed Seak Kong, appellant's parents and brother Bili Chhoun, appellant's girlfriend Onkhamdy, and Vinh Tran. (37 RT 4970-4971.)[20] Foreman found no evidence that appellant or anyone else he interviewed was malingering. (37 RT 4993, 4998-4999.)

Foreman did not conduct psychological testing of appellant because he did not believe appellant possessed the necessary reading and language

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[19]Foreman later explained he was hired to prepare an "Evaluation of the Impact of Psychological Trauma on Criminal Defendant's Mental Health and State of Mind." (42 RT 5454.)

[20]Foreman explained that he sought corroboration of the statements of all he interviewed. (37 RT 4978-4979, 4991.)

skills required to obtain an accurate assessment. (37 RT 4974-4976.)

Foreman prepared a timeline that organized the traumatic events of appellant's life in a chronological sequence, corresponding the trauma with appellant's developmental stage. (37 RT 4985; Exhb. 226.) Foreman opined that appellant suffered a degree of trauma for which the DSM IV does not even have a category. The most salient feature of the trauma was the inability of his parents to intervene and be a mediating factor, particularly at appellant's young age. (38 RT 5031.) The parents were unable to insulate their child from the full impact of the trauma. Another important aspect was the malnutrition appellant suffered. (38 RT 5031.)

Foreman testified consistent with other witnesses about appellant's early life in Cambodia and the Thai refugee camps and the family's relocation to Mobile and then California. (37 RT 5000-5074.) He confirmed that both appellant and his father had tuberculosis while at the refugee camp in Thailand, and were quarantined for a period of time. (38 RT 5049-5050.) Foreman added that when appellant was four or five, he almost drowned in a body of water near his village. Appellant's mother said that when appellant was pulled from the water he "was so blue he was black." (38 RT 5030.) After the incident, appellant was again delirious and seemed disconnected and confused. When Sophat tried to comfort appellant, the Khmer Rouge threatened them both. (38 RT 5030.)

Foreman further added that in Mobile, all three Chhoun boys were diagnosed as educably retarded and they attended special education classes. (38 RT 5068.) Marith and Sophat beat their children for infractions throughout their childhood. Appellant said they beat him "[u]ntil I bleed." (38 RT 5065.) The parents also drank heavily during appellant's childhood and his mother became violent toward his father. (38 RT 5065.)

Based on his interviews, research and review of materials, Foreman diagnosed appellant with Reactive Detachment Disorder and Post Traumatic Stress Disorder, both of which were important to understanding the effects of trauma appellant suffered under the Khmer Rouge and his subsequent social and personal behavior. (38 RT 5075-5076.) Foreman's primary diagnosis was Post Traumatic Stress Disorder, chronic type, meaning it had persisted for most of appellant's life. (42 RT 5392.) Foreman also concluded that appellant had poly-substance abuse dependency, primarily alcohol, beer, and marijuana. (42 RT 5392.)

Foreman deferred making an Axis II diagnosis[21], but noted that appellant may have an Antisocial Personality Disorder "by shear [*sic*] degree of criminal behavior." (42 RT 5399.) He explained that an antisocial diagnosis is based on observed behavior, so that actions of someone who "is trying to survive, who is in danger," may appear antisocial. (42 RT 5399, 5402.) Stealing food because one is starving "might be situational rather than a pattern of their personality." (42 RT 5402.) Accordingly, Foreman cautioned that any qualifying behavior by appellant must not be "part of a protected survival strategy." (42 RT 5401.)

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[21]There are five axes included in the multi-axial classification system of the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, (4th ed. 1994), or DSM–IV. Personality disorders are reported in Axis II.

Foreman opined that appellant may,

> not have fully made a transition from "The Killing Fields" of Cambodia as a child, who failed to reattach to his parents or remain disconnected from his larger social environment, thus he was not afforded an opportunity to mitigate or unlearn the Khmer Rouge indoctrination.

(42 RT 5403.)

Appellant's behavior may not have been antisocial because he was never truly socialized into our culture and society "in a way he was able to internalize our values." (42 RT 5403.) Foreman believed that appellant had operated in a survival strategy and his sense of the world never shifted from Cambodia to Alabama to California. (42 RT 5404.) Foreman thus concluded that an antisocial personality diagnosis should not be made. (*Ibid.*)

Foreman conducted some examinations to assess appellant's ability at abstract reasoning and his reactions to emotional-laden questions. Although Foreman concluded that appellant appeared fairly intelligent and logical, he could not hold something in his mind in abstract thought. (42 RT 5410-5413.) Foreman also observed that appellant did not know how to label his own feelings. Appellant explained that he got "confused between frustration, anger, and stress." (42 RT 5413.) He felt he was "different" and did not belong, which made him uncomfortable, even among his friends. (42 RT 5414.)

When asked about his ability to consider options during a crime, appellant responded, "just do what you do to survive." (42 RT 5417.) Foreman took that to mean appellant's attention was only focused on being successful in the immediate environment, the immediate circumstances. (42 RT 5442.)

Foreman discussed the Elm Avenue crimes with appellant, and appellant told him that they committed the crimes because Karol needed money for rent and knew of a house where they could get the money. (42 RT 5442-5443.) Appellant told Foreman that he had no feelings when committing a crime but afterwards felt pain. He was not able to react to the Elm Avenue killings until he had left the scene. When he saw pictures of the dead children, he cried. (42 RT 5443.) This reaction is consistent with appellant's inability to emote because of PTSD. Appellant remained "distraught the children were killed," and said he "almost cried when he looked at the pictures . . . in court." (42 RT 5444.) Looking at the photographs reminded appellant of his own childhood experiences in Cambodia. (42 RT 5444.) Appellant told Foreman that "the Khmer Rouge tried to make me like them." (42 RT 5444.) Appellant also said "I don't know if there was any connection, but the things I learned, experienced as a kid are still there." (42 RT 5444.) Foreman opined that much of appellant's criminal and gang related behavior was a reenactment of his early childhood experience. Appellant did not quite make the connection, but could see that his criminal behavior was similar to how the Khmer Rouge acted. (42 RT 5444-5445.)

Foreman corroborated appellant's statements about the Elm Avenue killings with Vinh Tran, who Foreman interviewed in prison. (42 RT 5445.) Appellant's description of being in an altered state of thinking at the time of the offenses helped confirm Foreman's diagnosis of PTSD. Vinh Tran corroborated that, saying appellant acted oddly. (42 RT 5447.) He looked very strange and was not connecting with anyone else in the house. (42 RT 5448.) Appellant told Foreman he was disconnected and in a kind

of daze in the car as they left the scene. Foreman described appellant as dissociating. (42 RT 5448-5449.)

Appellant felt remorse and guilt about the death of the children. Appellant's affect when he discussed children surprised Foreman. He broke through his otherwise "still and impenetrable" face and spoke of how he wanted to have children. (42 RT 5450.) Appellant's normal signs of emotion regarding children helped Foreman rule out a diagnosis of psychopathy. (42 RT 5450-5451.)

Dr. Paul Leung, a psychiatrist at the Oregon Health Sciences University at the University of Oregon Medical School, was Director of the school's Indochinese Psychiatric Program. (39 RT 5081-5082, 5084-5085.) He was an expert in cross-cultural psychiatry and care for mentally ill ethnic minorities. (39 RT 5086.) Dr. Leung described the difficulty in using Western-developed diagnostic tools with patients of different cultures, since the tools use a norm derived from a Western population. (39 RT 5090.) Leung testified that he does "not rely on the American standardized tools to test my non-American, non-mainstream culture patient." (39 RT 5090-5091.) He was very familiar with the Minnesota Multi-Phasic Personality Inventory (MMPI) and testified that he would not use it with his patients of different cultures. (39 RT 5091-5092.) In his clinical experience, tests like the MMPI, designed in English for Western subjects, have less validity as a diagnostic tool for his Asian patients. (39 RT 5094-5095.)

Most of Leung's patients at the International Indochinese Psychiatric Program came to the United States as refugees and war victims. (39 RT 5107.) A significant portion of the patients were Cambodian and a majority of them were diagnosed with long-term depression, and 90 percent were

diagnosed with PTSD as a result of war-related losses and trauma. (39 RT 5108.)

Leung was hired to evaluate appellant. To do so, he interviewed appellant two times, met with members of appellant's family, reviewed documents, reviewed Foreman's evaluation, the psychiatric evaluations of Dr. Busick and Lisa Child, and the medical reports of Dr. Wu regarding the PET scan he conducted. He met with Sack and had a telephone conversation with Foreman. (39 RT 5105-5106.)

Leung testified that by the age of two, appellant was living in a country at war and suffered some degree of malnutrition. (39 RT 5112.) At one point, appellant was hidden in a crudely built tunnel for eight days with no food or water. (39 RT 5112, 5115-5116.) Malnutrition causes delayed brain development, retarding one's ability to learn and exposure to war causes long-existing anxiety. (39 RT 5114.) In Leung's opinion, the malnutrition appellant suffered as a very young child could have caused brain damage that impaired specific functions of his brain later in his life, such as his ability to learn a new skill or a new language, which would prevent him from adapting to a different environment. (39 RT 5114-5115.) Often children from war-torn countries "simply cannot learn," regardless of the resources devoted to them. (39 RT 5115.)

Leung also opined that appellant's confinement in the tunnel under his village instilled permanent damage and caused him to be insecure, have a fear of dying and be uncertain about the future. That one experience alone qualified as a traumatic experience for purposes of a PTSD diagnosis. (39 RT 5116.)

While in the work camp, appellant was beaten and starved. (39 RT 5123.) Based on appellant's behavior when he returned from the camp, his

mother feared he had suffered a head injury. (39 RT 5124-5125.) Leung testified that head trauma at an early age can result in learning disabilities, poor impulse control, severe temper outbursts or disability to handle emotional stimulations, long term depressions and long-term anxiety disorder. (39 RT 5125.)

Leung prepared a report of his work with appellant in which he concluded that appellant met several, but not all, criteria for a diagnosis of PTSD. (39 RT 5145.) Specifically, appellant could not articulate his traumatic experience sufficiently to satisfy the first criteria of personal reporting of a traumatic or life-threatening situation. (39 RT 5145.) Appellant's experience was certainly traumatic, but his description of it was not adequate for a diagnosis. (39 RT 5145-5146.) Leung opined that this amnesic life experience was probably a defense mechanism. Appellant's experiences may have been too horrifying and painful to remember, so he buried them in his unconsciousness. (39 RT 5146.) A person may suffer from PTSD but not meet the diagnostic requirements of the DSM. (39 RT 5146.) If appellant were Leung's patient, he would keep that diagnosis in mind when treating him. (39 RT 5153-5154.)

As a psychiatrist, Leung saw in his adult patients the product of those diagnosed with Reactive Attachment Disorder as a child. (39 RT 5150.) Such a patient would have difficulty dealing with authority figures. He would have consistent difficulties at work because he could not deal with supervision. He also would see the world as rejecting him, unable to give him a chance or forgive him. (39 RT 5151.) He might also have difficulty with his self-image, unable to see himself as worthwhile or to plan for the future. He is unable to see beyond the immediate future. (39 RT 3951.)

Leung believed appellant's experiences and behavior were consistent with PTSD. (39 RT 5153.) From appellant's learning disabilities, cognitive deficits, impulse control problem, headache history and PET scan results showing abnormal brain activities, Leung would suspect early childhood brain injuries. (39 RT 5154.) Leung posited that appellant's brain abnormality could have been caused by blunt injuries he received in the camps, his drowning or malnourishment. (39 RT 5155.) If treating appellant, he would consult with a child psychiatrist regarding possible Reactive Attachment Disorder. (39 RT 5154.)

Dr. Sack, the child and adolescent psychiatrist, testified that between 1980 and 1983, several thousand Cambodian families were placed in Oregon from Thai refugee camps. (40 RT 5160, 5164-5165.) During a 1983 study, Sack participated in the interviews of 46 of the 52 Cambodian refugee students at a Portland high school. (40 RT 5165.) The children were followed over the next 12 years. (40 RT 5168.) The children, ages 15 to 17 when first interviewed, were interviewed four different times over the next 12 years and were last interviewed at ages 27 to 29.[22] A professional paper regarding the children was about to be published at the time of Dr. Sack's testimony.[23] (40 RT 5168.)

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[22]The study included a control group of six Cambodian refugee children who had left the country before Pol Pot came into power. (40 RT 5187.)

[23]At the time of his testimony, Sack had over 50 cited publications, 12 to 15 in the area of Cambodian literature. (40 RT 5168, 41 RT 5290-5291, 5294, 5299, 5301, 5304-5305, 5305-5306.)

The researchers diagnosed about half of the 46 children interviewed with PTSD and depression.[24] (40 RT 5169-5170.) Sack and his associates then applied for and received a grant from the federal government to conduct epidemiologic studies in Salt Lake City, Utah, and Portland, Oregon, to ascertain the prevalence of PTSD and depression in Cambodian refugee children. (40 RT 5170-5171.) They diagnosed PTSD in approximately 25 percent of these children. Forty to 50 percent of their parents, however, were diagnosed with PTSD. (40 RT 5171.) The study concluded that a child of a parent with PTSD was predisposed to have it as well. (40 RT 5186.) When neither parent had a PTSD diagnosis, 12.9 percent of their children received a PTSD diagnosis. When one parent had it, the adolescent prevalency rate increased to 23 percent, and when both parents had it, the rate increased to 41 percent. (41 RT 5305.)[25]

During the researchers followup, they found that the diagnosis of PTSD for the children dropped from 48 percent in 1987, to 38 percent in 1990, and that there was a steady but not significant drop in PTSD symptoms over the six-year period. (41 RT 5292.) They did note, however, that PTSD tends to remain chronic, with its symptoms waxing and waning

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[24]Sack explained that the children were diagnosed with D.S.M. IIIR, which did not include the requirement under D.S.M. IV that the disturbance "causes clinical significant distress or impairment in social, occupational, or other important areas of functioning." (40 RT 5184, quoting from D.S.M. IV.)

[25]Dr. Sack observed that the Cambodian refugee population in Long Beach was different from those in Portland and Salt Lake City. The Cambodians in the Long Beach area lived in a very low income multi-ethnic neighborhood with Hispanics, other Asians and African Americans, and there was a lot of tension between the ethnic communities and a lot more gang activity. (41 RT 5351.)

over time, but becoming less frequent and less intense. (41 RT 5293.) The drop in depression diagnoses was more substantial, from 41 percent diagnosed as depressed in 1987, to six percent in 1990. (41 RT 5292.) The researchers found that those who had spent more time in the United States reported lower rates of PTSD symptoms and diagnoses. (41 RT 5292.)

Appellant's defense team hired Sack to give some insight into appellant and his experiences during his developmental stages. Sack familiarized himself with appellant's history by reading his social history, watching an interview with appellant's parents, speaking with Foreman and reading his report and interviewing appellant for approximately five hours. (40 RT 5197-5198.) From all this material, Sack learned that appellant suffered greatly during the Pol Pot regime. He witnessed atrocities; he was forced to watch ritual public executions; and he suffered severe malnutrition. (40 RT 5178, 5199.) Appellant also suffered separation from his parents during preschool years. As a result he was not able to form and continue form a strong attachment to his family. (40 RT 5199.) Sack thought it particularly cruel that he was separated from his parents, but they were nearby. He needed them, but they did not – could not – respond, leaving him feeling that his parents did not care about him. (40 RT 5201.)

Sack interpreted appellant's later survival methods and coping mechanisms as signs of poor attachment to family and a sign of pathology. (40 RT 5209.) Poor attachment is a harbinger of future problems because children are socialized in relationship to a family. They learn values and develop internal values. Appellant, because of his early deprivation and poor attachment, was not able to find an internal value system that made sense to him as he got older. (40 RT 5209-5210.) Individuals rely on social experience to form their place in society, and they are put at increased risk

for adulthood problems if they are deprived of that experience. (40 RT 5210.)

Sack described development as a series of stages, and if one does not do well at one stage, he will start the next stage at a disadvantage that increases exponentially with each stage. (40 RT 5211.) Sack explained that appellant was struggling from Stage One, which included his time in Cambodia and the refugee camps, which set up a barrier to Stage Two, his time in Alabama, and Stage Two set him up for an even worse Stage Three, which is early adolescence, putting appellant at a higher risk for not being able to assimilate appropriates values. (40 RT 5222-5223.)

Appellant's next significant stage of development occurred when he was 19 or 20. He had been released from CYA and hoped to settle down in a relationship with Onkhamdy. (40 RT 5225-5226.) Onkhamdy was there to help change appellant's life and they moved to Portland, where Onkhamdy became pregnant. (40 RT 5226.) This was a hopeful time in appellant's life. (40 RT 5227.) Then, in the summer of 1995, while driving to see his brother in California, he was arrested on an old traffic violation. With that, appellant's "world caved in." He told Sack "It is no use anymore; I'll never make it; I'll never be able to make a good life for myself; I've given up." (40 RT 5226.) In these weeks before the criminal activity began, appellant did not care what happened to him. He felt despair and the sense that life was meaningless. Sack described it as hopelessness based on depression. (40 RT 5237.)

Sack testified that those diagnosed with PTSD try to avoid re-experiencing their prior trauma so they avoid places or activities that might make such memories appear. They are often tense, hypervigilant people who are always on guard. Appellant told Sack that at night, he always

thought something bad would happen or something would jump out of the dark. (40 RT 5228.) Appellant described traumatic memories of explosions and of whizzing and flashing things in the night. (40 RT 5230.)

Other symptoms of PTSD, which appellant shared, include restricted affect, a feeling of detachment or estrangement from others and a sense of a foreshortened future. Appellant at times experienced no feelings. He was numb. (40 RT 5229.)

Sack distinguished between single blow trauma, such as a rape or car accident, and chronic trauma, which at least one study has shown is the worst form of trauma in terms of damage to the individual. (40 RT 5231-5232.) Appellant suffered both types of trauma. His single blow trauma included such things as confinement in a tunnel under enemy shelling without food or water; capture and imprisonment at age six; witnessing of staged executions; and the arduous trek to Thailand. He also suffered relentless three-year chronic war trauma. Sack believed that the experience of being separated from his parents at such a young age was as traumatic as the other forms of trauma he experienced. (40 RT 5231-5234.)

Sack testified regarding the symptoms of PTSD and concluded that if the rules were bent a little so that appellant's parents could report his early traumas and symptoms, appellant qualified for a diagnosis of PTSD. (40 RT 5234-5236.) Regarding malingering, Sack believed appellant was forthright during his interview with him and was impressed with his straightforward responses. Appellant did not seem to be tailoring his answers or attempting to amplify or embellish his early experiences. (40 RT 5239-5241.)[26]

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[26]Sack's diagnosis and conclusion that appellant was not malingering were given convergent validity by Leung's and Foreman's separate and independent similar conclusions. (41 RT 5348.)

This was the first time Sack had made a diagnosis of Reactive Attachment Disorder for a Cambodian. (40 RT 5242-5243.) Sack believed it was an important diagnosis because appellant was cut off from normal family ties. Instead, he was raised with a disregard for his basic physical and emotional needs of comfort, stimulation and affection. The diagnosis explains why appellant went off on his own and never came back to the family. The diagnosis best describes appellant's subsequent developmental difficulties and behavior. (40 RT 5243, 5246.)

A common symptom of Reactive Attachment Disorder is the child's inability to acquire internalized value standards. (40 RT 5244-5245.) Delinquents and children in correctional institutions often have poor attachment starting before age three or four. (40 RT 5245.) No one thing caused appellant's criminal behavior, but it set the stage for that possibility and "nobody came to his rescue during his childhood or early adolescence." (40 RT 5246.)

Sack also diagnosed appellant with alcohol, marijuana and cocaine abuse and dependence, conduct disorder and chronic depression. (40 RT 5247.) He described appellant as functionally impaired and as having a major mental illness. (40 RT 5261.)

Sack acknowledged that Dennis Nguyen certainly experienced a traumatic event when he witnesses his parents' shootings, and it was possible he suffered throughout his life from that loss. (41 RT 5320-5323.) He explained that those who cared for Dennis after the murders and what type of support he received would be enormous factors in determining his emotional outcome. (41 RT 5366.) Who supports the victim is an "enormously important factor in [] rehabilitation from a trauma." (41 RT 5371.) Sack wanted to impress on the jurors that it was not only appellant's

trauma, but also his lack of family, social and educational support that attributed to his downfall. (41 RT 5366.)

Dr. Joseph Chong-Sang Wu, the Clinical Director for the University of California Irvine College of Medicine Brain Imaging Center and an Associate Professor of Psychiatry at the school's College of Medicine, testified that in June 1999, he performed a Positron Emission Tomography (PET) Scan on appellant to assess his brain function. (43 RT 5582-5583, 5600-5601.) The results of appellant's scan showed a "pattern of metabolic abnormality in several different areas." (43 RT 5602.) Wu concluded that appellant's brain showed patterns of abnormality consistent with diagnoses of brain trauma and PTSD. (43 RT 5607.) These brain abnormalities can also be found in individuals who had a history of hypoxia or anoxia, that is, decreased or complete lack of oxygen from something like partial drowning, such as happened to appellant. (44 RT 5678.)

Appellant's frontal lobe brain pattern was a reversal of the normal pattern, as is commonly seen in trauma brain injury cases. (43 RT 5602-5603.) Those, like appellant, with decreased frontal lobe functioning have some impairment in their ability to think properly and react emotionally properly. They have cognitive or emotional problems. (43 RT 5615.) They "oftentimes have problems in passivity, poor judgment [and] inability to regulate aggressive impulses appropriately." (43 RT 5615.) Wu described the frontal lobe as the "brakes in the human system." One of its functions is to "put a brake on inappropriate impulses." (43 RT 5616.)

Another abnormality Wu found in appellant's PET Scan was a lack of symmetry between the right and left parietal lobe, with the right side having lower activity than the left. (43 RT 5604-5605.) This abnormality

has been reported in PTSD patients exposed to some form of trauma. (43 RT 5616-5618; 44 RT 5676.)

Wu also testified about a third abnormality: the lower portion of appellant's frontal lobe showed abnormal activity, also consistent with that found in patients suffering from PTSD. (43 RT 5607-5608, 5619.)

Wu noted that appellant's medical records showed a history of traumatic brain injury, and appellant's pattern of abnormalities were consistent with such head injury. It is also possible that the abnormalities were caused by childhood malnutrition. (43 RT 5621-5623.)

2. Testimony of Appellant's Family Members

In addition to testifying about appellant's childhood, discussed above, at pp. 5-9, appellant's parents and older brother Bili asked the jurors to show appellant mercy. (45 RT 5903 [Sophat], 5884 [Bili].) Appellant's father asked the jurors to spare his son's life. "He has suffered so much already." (45 RT 5884.)

The defense also introduced the testimony of appellant's siblings Phalla and Phally Chhoun and his girlfriend Onkhamdy. Phalla, appellant's younger sister, said that there was a communication problem within her family. She agreed with her sister's statement that the family was dysfunctional. (44 RT 5708-5709, 5715-5716.) Phalla told the jurors, "I love my brother. And he's a good brother to me. He always been there for me. No matter what I will always love him. So please give some mercy to him. . . . Let God be the judge for his life, please." (44 RT 5722.)

Phally told the jurors that appellant was very kind and loving and she hoped they could find it in their heart to not give him the death penalty. (44 RT 5761.)

Champa Onkhamdy testified that her and appellant's life in Oregon was fine. They both worked. She attended school. (44 RT 5729.)

When appellant was arrested, Onkhamdy was pregnant. At the time of trial, appellant and Onkhamdy's son Run Peter Chhoun, Jr. was three years old. (44 RT 5733.) She showed the jurors a first birthday card appellant made for Run, Jr. and a two-page letter. The letter included the following:

> So Son, from me to you, sorry for all the years we can't share together. Not that I want to leave you and your mom and your mother out there alone together. Things happen that we can't sometime understand. You don't know when you grow a little older. Forgive me. I have tried my best. Only you and your mom can make me happy, 'cause you are my love and my life. [¶] Well, let's not make this day the worst day of your life. I just want to send you my love and wish you happy birthday. Respect your mother and be good, because I love you. Please keep in touch. Your father.

(44 RT 5733-5735. Exhb. 263.)

Appellant also sent cards with similar sentiments for Run, Jr.'s second and third birthdays. (44 RT 5735. Exhb. 264, 265.) He drew cards for Onkhamdy's Mother's Day and her 21st birthday. (44 RT 5735.) Appellant wrote Onkhamdy letters and she read the jurors a portion of one of them:

> I promise to give you the best of myself and ask of you no more than you can give. I promise to respect you and ask you personally to realize that your interests, desires, and needs are as no less than my own.

(44 RT 5736.)

Onkhamdy recalled that appellant would give money to a homeless person, even though he did not have enough for himself, explaining he knew what it was like to be hungry. (44 RT 5737.)

Onkhamdy told the jurors that appellant would always be someone special to her and asked the jurors to leave the decision of whether appellant should die to God. (44 RT 5739, 5753.)

3. Prison Conditions If Appellant Were Sentenced to Life Without the Possibility of Parole

James Esten, a former correctional counselor, Program Administrator, Administrator of Training and Inmate Appeals Investigator for the California Department of Corrections, testified as an expert on inmate classification and adjustment issues. (43 RT 5510-5515.) He had reviewed material about appellant and interviewed him two times. Esten testified that based upon appellant's county jail record, he would be placed in a Security Housing Unit (SHU) at Pelican Bay. Given a sentence of life without possibility of parole, appellant would be sent to a Level 4 prison, and, given his county jail record, he would immediately be considered for a SHU. (43 RT 5538-5539.) Esten stated that appellant's shortest time in SHU would be four years, but he estimated that appellant would do six years of SHU time. (43 RT 5541-5542.) Appellant would never be released and he would never serve time in anything less than a Level 4 institution. (43 RT 5544.)[27]

Esten closed by narrating a video of the security house unit at Pelican Bay State Prison. (43 RT 5556-5557, 5566-5570.)

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[27]Esten later clarified that it was possible for an inmate sentenced to life without possibility of parole to move from a Level 4 to a Level 3 institution, but it was a complicated process that happened infrequently. (43 RT 5558.)

E. Prosecution's Rebuttal

Jesse Venegas was a San Bernardino County Sheriff Deputy assigned to the West Valley Detention Center where appellant was housed during trial. (46 RT 5905-5906.) During a search of appellant's high security cell she found a homemade handcuff key wrapped in cellophane and affixed to the bottom of a desk in the cell. (46 RT 5907-5909.) Venegas tested the key and it opened a pair of handcuffs. (46 RT 5909-5910.)

Before the prosecution called Dr. Craig Rath, the parties stipulated that appellant refused psychological examination and testing by Rath upon the advice of his counsel. (46 RT 5919.) Rath then took the stand and testified that he was a clinical psychologist in private practice. (46 RT 5919.) In preparation to testify in this case he reviewed the transcript of the defense penalty phase, discovery regarding appellant's crimes, appellant's two taped interviews with Spokane police officers in Sacramento, statements of witnesses and appellant's social history. He also reviewed Em Chhoun's psychological evaluation. (46 RT 5931-5932.)

Rath also stated he was one of a panel of doctors who evaluate people who want to be licensed as a psychologist in California, and as such, felt able to pass judgment on whether or not a person was qualified to render clinical psychological opinions. (46 RT 5924-5925.)

Rath had reviewed Foreman's testimony in this case and disparaged his qualifications, education and findings. (46 RT 5925-5730.) Rath described Foreman's opinion, shared by Sack and Leung, that typical clinical testing would not be successful with appellant because of cultural differences, as "silly at best. Inaccurate and silly." (46 RT 5930.)

Rath also rejected Wu's view that appellant's PET Scan revealed brain damage. Rath's opinion was based on his conversation with Dr. Conte, who administered brain scans at the University of Southern California. (46 RT 5943.) Conte was unavailable to testify, but told Dr. Rath that appellant's PET scan was normal. (46 RT 5943.) Rath testified that he saw no evidence that appellant had any brain damage. (46 RT 5956.)

Rath concluded that it was "debatable" whether reactive detachment disorder was an appropriate diagnosis in appellant's case. (46 RT 5962.) Rath believed appellant qualified for conduct disorder. (46 RT 5963-5964.) (46 RT 6029-6060.) Rath shared the view of the defense witnesses that appellant may suffer from PTSD, an anxiety disorder, but he could not be sure from viewing the materials. (46 RT 5972, 6038.) He questioned that diagnosis and believed appellant's behavior instead indicated psychopathy or antisocial personality. (46 RT 5977.)

ARGUMENT

GUILT PHASE

I.

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE DETERMINATION OF GUILT BY PERMITTING THE PROSECUTION TO INTRODUCE IRRELEVANT AND INFLAMMATORY EVIDENCE OF PRIOR MURDERS AND GANG INVOLVEMENT

Appellant was severely prejudiced by the erroneous admission of other crime and gang membership evidence that was not relevant to prove intent, identity, motive, or any legitimate issue authorized by Evidence Code section 1101, subdivision (b). As a result of the court's ruling, the prosecution introduced at the guilt phase evidence of a double murder in Sacramento and appellant's membership in the Tiny Rascals Gang (TRG), which allowed the jurors to make forbidden propensity inferences when considering whether appellant was guilty of the offenses with which he was charged.

The erroneous admission of the other crime and gang evidence injected extraordinarily inflammatory evidence of no or minimal probative value into this case and violated not only state law but also appellant's state and federal constitutional rights to a fair trial and a reliable jury determination that he was guilty of a capital offense. (U.S. Const., Amends. 8 & 14; Calif. Const., art. I, § 15; see, e.g., *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1382-1383 [erroneous admission of propensity evidence violated defendant's due process right to fair trial]; *People v. Partida* (2005) 37 Cal.4th 428, 436-438 [erroneous admission of gang evidence may violate defendant's due process right to fair trial].) The judgment must be reversed.

A. Introduction

This Court has long and consistently recognized that "[t]he admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314, disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260; accord, *People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Smallwood* (1986) 42 Cal.3d 415, 428; *People v. Alcala* (1984) 36 Cal.3d 604, 631; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 448-450 & fn. 5.) The admission of such evidence "creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 317; *Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 448-450 & fn. 5.) Of course, "[a] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (*United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044; see also *People v. Garceau* (1993) 6 Cal.4th 140, 186 [use of propensity evidence may dilute presumption of innocence].)

Admission of this evidence produces an "over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts." (1 Wigmore, Evidence, § 194, p. 650.) It breeds a "tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses . . . ." (*Ibid.*) Moreover, "the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor." (Note, *Procedural Protections of the Criminal Defendant - A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding*

Evidence of Propensity to Commit Crime (1964) 78 Harv.L.Rev. 426, 436; see *People v. Thompson, supra*, 27 Cal.3d at p. 317; *People v. Foster* (2010) 50 Cal.4th 1301, 1331; *People v. Fuiava* (2012) 53 Cal.4th 622, 667.)

These concerns are reflected in Evidence Code section 1101, which provides that character evidence is inadmissible when offered to prove a defendant's "conduct on a specified occasion," with the exception of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as intent, plan, absence of mistake or accident, or lack of reasonable belief that a victim consented to an unlawful sexual act) other than his or her disposition to commit such an act. (*Id.* subds. (a), (b).)[28]

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[28]Section 1101(a) codifies a rule of evidentiary exclusion that is at least three centuries old in the common law. (*People v. Alcala, supra*, 36 Cal.3d at pp. 630–631; 1 Wigmore, Evidence (3d ed. 1940) § 194, pp. 646–647; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 913.) "The ban on propensity evidence dates back to English cases of the seventeenth century." (*United States v. Castillo* (10th Cir.1998) 140 F.3d 874, 881.) Early American courts retained the rule, and it has been enforced throughout our nation's history. (*McKinney v. Rees, supra,* 993 F.2d at pp. 1380-1381; *United States v. Castillo, supra*, at p. 881; see, e.g., *Boyd v. United States* (1892) 142 U.S. 450, 458 [admission of defendants' prior crimes was prejudicial error].) Today, "[c]ourts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." (*Michelson v. United States* (1948) 335 U.S. 469, 475, fn. omitted; see also *People v. Ewoldt, supra*, 7 Cal.4th at p. 392; *McKinney v. Rees, supra*, at p. 1381 & fn. 2 [listing the 37 states where the rule has been codified and asserting the rule persists in the common law precedents of the 12 other states and the Dist. of Columbia].)

Even when the evidence has some bearing on a disputed, material issue, its admissibility is not guaranteed. Given the extremely inflammatory nature of other crimes evidence, its admission under section Evidence Code section 1101, subdivision (b), is sharply circumscribed. It is to be received with "extreme caution" (*People v. Haston* (1968) 69 Cal.2d 233, 244) and only when its probative value is *substantial* and *necessary* to prove a *disputed* issue. While a plea of not guilty technically places all elements in issue, an element must genuinely be in dispute in order to be proved with other crimes evidence. (See, e.g., *People v. Balcom* (1994) 7 Cal.4th 414, 426; *People v. Ewoldt, supra*, 7 Cal.4th at p. 406; *People v. Bonin* (1989) 47 Cal.3d 808, 848-849; *People v. Alcala, supra*, 36 Cal.3d at pp. 631-632; *People v. Thompson, supra*, 27 Cal.3d at pp. 315, 318, & fn. 20.) As this Court has recognized, "[i]f an accused has not 'actually placed that [ultimate fact] in issue,' evidence of uncharged offenses may not be admitted to prove it. The fact that an accused has pleaded not guilty is not sufficient to place the elements of the crimes charged against him 'in issue.'" (*People v. Williams* (1988) 44 Cal.3d 883, 905, internal citations omitted.)

Moreover, to be admissible, such evidence "'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404) under which "the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Harrison* (2005) 35 Cal.4th 208, 239; accord, *People v. Alcala, supra*, 36 Cal.3d at pp. 631-632.)

Rulings under Evidence Code sections 1101 and 352 are reviewed for an abuse of discretion. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1130.) But this Court has also instructed that "[t]he evidence should be received with extreme caution, and if its connection with the crime charged is not *clearly* perceived, the doubt should be resolved in favor of the accused." (*People v. Guerrero* (1976) 16 Cal.3d 719, 724, italics added [internal quotes and citations omitted].) Moreover, "[t]he discretion of a trial judge . . . is subject to the limitations of legal principles governing the subject of its action . . . ." (*People v. Dean* (2009) 174 Cal.App.4th 186, 193.)

Here, evidence of the Sacramento double murder and gang involvement was essential to the prosecution's case against appellant's codefendant Pan. Pan was not present at Elm Avenue when the murders occurred. He allegedly provided a gun used in those murders, but his prior participation in the Sacramento home invasion robbery and murders and his membership in the TRG provided the only evidence that Pan had the knowledge and intent needed to link him to the charged crimes. As the prosecutor explained early in the proceedings, because Pan was arguing he was not a major participant because he only supplied the weapon,

> it seems to me that I have the obligation to present two other types of evidence, which otherwise I might not have to do, to show that he's more than just a simple aider and abettor in a minor way. I have to show that he's the gang leader . . . [¶] [a]nd I also have to show that he was aware, at least, if not a participant in, some of these other murders which immediately preceded the Elm Street case. . . .

(1 PT RT 45.)

This was not the case with appellant. Alleged accomplices testified that appellant instigated, was present at and committed the charged crimes.

If these witnesses were believed, appellant was guilty. If they were discredited and uncorroborated, the Sacramento and gang evidence added nothing but prohibited propensity evidence.

The trial court seemed to recognize this fact until it became clear that a joint trial could not proceed if the Sacramento case and gang testimony, needed to convict Pan, were inadmissible against appellant. At that point, the court's finding against appellant was assured. What occurred was not the careful analysis envisioned by this Court, but a search for rationale to support a preordained conclusion of admissibility.

Given this Court's warning that doubts about admitting other crimes evidence must be resolved in favor of the accused, the trial court abused its discretion in this case by resolving its doubts in favor of the prosecution and allowing the admission of the Sacramento crime and gang membership. This is particularly true because the Eighth Amendment imparts a "heightened need for reliability" in all phases of the trial. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340, internal quotes omitted; accord *Beck v. Alabama* (1980) 447 U.S. 625, 638 [guilt phase verdicts in capital cases require heightened reliability]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [the qualitative difference between death and the other penalties calls for a greater degree of reliability when the death sentence is imposed].)

B. The Trial Erred in Admitting Evidence of the Sacramento Double Murder

1. Facts and Procedural History

Appellant was initially charged with codefendants William Evans, Samreth Pan, Karol Tran and Vinh Tran in an 11-count information filed on March 11, 1996. (2 CT 504-516.) On May 7, 1996, the trial court severed

the trials of Karol Tran, Vinh Tran and Evans from that of appellant and Pan. (1 RT 35-36, 41, 48.)

On October 10, 1998, the prosecution filed a notice of intent to present evidence of the Sacramento murders during the guilt phase of trial. (2 CT 552.) On March 8, 1999, appellant filed a Motion to Exclude Evidence of Uncharged Acts. (Supp A-1 CT 146.)

At a hearing on March 10, 1999, the prosecutor argued that the Sacramento case was "sufficiently similar to the charged offense in San Bernardino . . . that the Sacramento evidence demonstrates circumstantially that the defendants committed the charged offenses pursuant to the same design or plan they used in committing Sacramento." (5 RT 576.) He continued, the "knowledge elements, the intent elements, that's what I'm submitting this material for." (5 RT 577.) Defense counsel countered that the motive for robbery is the same in every case – to take property by force for financial or economic gain. (5 RT 578.) Appellant's identity was not at issue, and there was no common scheme or plan. (5 RT 579.) The prosecutor simply reiterated that motive, knowledge and intent remained issues. Then, in a tacit admission of the true and only basis for admissibility of the evidence, he stated: "[t]his evidence is clearly important to help establish that [motive, knowledge and intent] and to give the jury the full truth of what could have been **in Mr. Pan's mind**." (5 RT 586, bold added.)

The trial court analyzed the two crimes and the law concerning Evidence Code sections 1101 and 352 and concluded that the Sacramento evidence was relevant to prove premeditation, surmising, presumably, that one prepared to kill if necessary is one who has premeditated and deliberated a killing. (5 RT 592.) Regarding appellant, the court stated:

> if he was actively involved in the Sacramento case, knew that things go wrong and was willing to kill if they did, when he went into the Elm Street home, he was prepared to carry out the same kind of conduct if it became necessary.

(5 RT 593.)

The court also found some evidence of common scheme and design in the two offenses. They showed "a similarity in method of operation," selectivity of victims, selectivity of property looked for and taken, and selectivity of location. (5 RT 593.)

The court also observed,

> It would be, in my position, very prejudicial – in my thought – very prejudicial to allow it when it had no relevancy to one defendant at all and its relevancy, if any, was as to the other defendant. But when relevancy exists as to both defendants, perhaps not on the same issues or same elements, then I don't see that much prejudice because of the fact that the jury may have to be selective under the Court's admonitions and instructions.

(5 RT 596.)

The court concluded that the Sacramento evidence was provisionally admissible, but only after a hearing at which the prosecutor was able to prove the Sacramento case by a preponderance of the evidence. (5 RT 598-599, 601.) Such a hearing, pursuant to Evidence Code section 402, was held on April 21, 1999, and at that time the court clarified that it had made no preliminary ruling on admissibility, other than that the Sacramento incident could fit within some of the factors allowing admission under Evidence Code section 1101, subdivision (b). (12 RT 1612-1613, 1617.)

During the hearing, the prosecution introduced the testimony of Bunjun Chhinkhathork who had participated in and pled guilty to the

Sacramento murders. (12 RT 1618-1619.) Chhinkhathork testified that on July 27, 1995, he, Pan, appellant and Evans were all involved in the Sacramento shootings. (12 RT 1619-1620, 1624, 1628-1635.) He thought that appellant had a nine-millimeter black Glock handgun, and he had previously told a detective that appellant shot the victims. (12 RT 1636, 1644.)

The prosecution also introduced the testimony of Evans, who asserted that he, Chhinkhathork, appellant and Pan participated in the Sacramento attempted robbery. He further testified that appellant had a nine-millimeter Glock and admitted to Evans that he shot two people. (13 RT 1694, 1696, 1705-1714.)

The victims and witnesses of the Sacramento offense testified in a manner consistent with their trial testimony described above, at pp. 28-31. Not one of them could identify appellant as the shooter that evening. (See 13 RT 1765-1768, 1770-1771, 1780, 13 RT 1782-1786, 1800, 1805,1808-1809, 1821-1826, 1830-1831, 1833-1834.)

Following the testimony of these witnesses the prosecutor stated his belief that the Sacramento evidence was admissible on the "issues of intent, and knowledge, and so forth, all the various thing that 1101 talks about, with respect to what happened when Mr. Pan handed to Mr. Chhoun the gun, when Mr. Chhoun told Mr. Pan that he and others were going to commit a home invasion on Elm Street." (13 RT 1839.) He went on for another page describing the relevance of the incident to Pan's knowledge. (13 RT 1839-1840.)

The prosecutor's argument regarding the relevance of the Sacramento case against appellant, however, was far weaker. The prosecutor made the disingenuous argument that the Sacramento evidence

was admissible to show what appellant intended to do with the gun at Elm Avenue. (13 RT 1840.) In describing what sounds like propensity evidence, the prosecutor stated:

> In a previous home invasion robbery in Sacramento, [appellant] used a gun and killed people. And he might well have intended the same thing based upon the Sacramento scenario; the common scheme, common plan, common design that he used up there: If they don't give up the money, we'll kill them; if they don't give up the jewelry, we'll kill them.

(13 RT 1840-1841.)

Appellant initially argued that at least two prosecution witnesses would testify as to their participation in the Elm Avenue offense with appellant. (13 RT 1843-1844.) These witnesses also would testify as to motive and intent and would either prove the case, if believed, or not, if rejected. (13 RT 1844-1845.) In addition, the only similarities between Sacramento and Elm Avenue were that both offenses were home invasion robberies involving firearms and Asian victims. These similarities were not enough to permit introduction of the evidence under Evidence Code section 1101, subdivision (b). (13 RT 1845.) Counsel also argued that the evidence was cumulative and therefore should be excluded under Evidence Code section 352. (13 RT 1847.)

The trial court expressed its concern that if section 1111 regarding corroboration of accomplice testimony applied to evidence introduced under Evidence Code section 1101, subdivision (b), it doubted whether the prosecution had proved the Sacramento offense by a preponderance of the evidence. (13 RT 1852.) The court also was concerned that the jurors would use the Sacramento evidence impermissibly to corroborate the accomplices testifying about the Elm Avenue offense. It recognized that

the prosecutor did not intend to use Sacramento as corroboration, but it was the court's concern "that the jury might take that in their own minds as corroboration of what they're hearing the witnesses say regarding the Elm Street killings to implicate these two defendants, if in fact the jury believes that the two defendants were implicated in the Sacramento killings." (13 RT 1854.)

The court then expressed its third concern that the evidence might be admissible as to Pan, but not as to appellant. The court observed that the evidence put appellant in Sacramento four or five days before "committing another horrendous home invasion robbery." (13 RT 1855.) It asked, "is there sufficient proof before me to convince me that this evidence is also admissible against Mr. Chhoun so that I'm not in fact allowing the jury to hear something that really isn't applicable to Mr. Chhoun but yet could be used by the jury to involve him?" (*Ibid.*)

The prosecutor countered that the Sacramento evidence was relevant against appellant "because it bears on his intent and his knowledge of what could happen, his intent to do that which he did before. He committed a home invasion robbery before with the understanding that if they don't give up the money and the jewelry, kill one, kill 'em all." (13 RT 1856.) The prosecutor admitted that there was ambiguity in the record as to who said "kill one, kill 'em all," and there was, in fact, no evidence that anyone was seeking jewelry in Sacramento. (*Ibid.*)

Both the court and prosecutor agreed that the Sacramento evidence was not admissible to show identity. (13 RT 1856.) "So the issue then is," stated the court, "is it admissible to show some other factor which is set forth in 1101 (b)." (13 RT 1856.)

The court observed that the prosecution had a "fairly strong case" against appellant if the jurors believed the prosecution evidence, therefore:

> there's no really need to have the Sacramento case except it just adds on to the fact that now the jury knows that this guy is a very bad man. And it's, as [defense counsel] says, cumulative. I think it's more perhaps damaging than merely cumulative because of the nature of what happened in Sacramento, if there is sufficient evidence that you apparently do have to establish all these other factors in the Elm Street case absent Sacramento.

(13 RT 1857.)

At that point, defense counsel argued that the appropriate remedy was to exclude the Sacramento evidence as to both defendants or to sever the defendants. (13 RT 1857.) The prosecutor submitted that he would agree to a severance if the court was considering excluding the Sacramento evidence at a joint trial. (13 RT 1858.)

The court then ruled, first, that section 1111 did not apply to accomplice testimony used to prove a prior offense under Evidence Code section 1101, subdivision (b). (13 RT 1859.)[29] It went on to find "some" independent corroboration and thus ruled that the Sacramento offense had been proven by a preponderance of the evidence and was admissible if it complied with the requirements of Evidence Code section 1101, subdivision

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[29]Later, however, in response to the argument that the lengthy presentation of Sacramento evidence had become cumulative, the court observed: "If you are asking that I exclude all of the statements of Mr. Pan regarding his participation in the Sacramento case, because it is cumulative and part of 1101(b) evidence and we have far exceeded the limitations of allowability [*sic*] of that evidence, to an extent you are right. However, I am confronted with the fact that [the prosecutor], and I think, [defense counsel] have asserted with some strength that a co-participant's testimony has to be corroborated even in 1101(b) instances." (21 RT 3015.)

(b). (13 RT 1860.) It easily concluded that the evidence was admissible as to Pan, under Evidence Code section 1101, subdivision (b). (13 RT 1860-1861.)

The court then addressed the admissibility of the evidence against appellant, which it described as a "more troublesome and closer" issue. (13 RT 1861.) Facing the possibility of a severance of defendants, however, the court concluded that the Sacramento evidence was admissible against appellant. It found that the Sacramento evidence indicated that appellant entered the premises for the purpose of robbing and "that he did not hesitate to kill individuals when he felt it to be necessary." (13 RT 1862.) "And the jury could clearly find, I believe, that this evidence substantiates a theory of premeditation and actual malice aforethought before the killings were done." (*Ibid.*) The court stated that the co-participants of the Elm Avenue case had not necessarily given appellant the necessary state of mind at the time of the killings, "but it is an independent factor which, in my opinion, can be derived from the Sacramento evidence." (13 RT 1862-1863.) The court conceded that the evidence was not as strong against appellant, but it might help the jurors decide what happened at Elm Avenue "as to the state of mind of the killer." (13 RT 1863.)

The court also recognized that the Sacramento evidence might be cumulative. "But . . . I have no idea what the evidence is eventually going to show. And at this point, not knowing that, I believe it is something that is properly added to the prosecution's case. [¶] So the Court finds that a severance is not necessary." (13 RT 1863.)

On May 11, 1995, defense counsel renewed appellant's motion to exclude the Sacramento evidence based on the fact that in its ruling on the matter, the court had mistakenly believed that shell casings found at the

Sacramento scene matched those recovered for Elm Avenue. (14 RT 1948-1949.) The court explained that its comments about the guns was "an aside." (15 RT 2232.) The major factor was the value the Sacramento evidence would be to the jurors,

> in evaluating the state of mind of the shooter in the Elm Street killings. Considering the fact that there was some evidence of a robbery/burglary having been committed and the circumstances which might be suggested as to how that came about, the bottom line is the Court will not change its previous ruling regarding the admissibility of this evidence.

(15 RT 2232-2233.)

On June 9, 1995, after the court had granted Pan's motion under 1118.1 and entered a judgment of acquittal as to Pan, appellant's counsel made a motion for mistrial based on the erroneous admission of the Sacramento evidence as legally irrelevant, cumulative and prejudicial under Evidence Code section 352. (27 RT 3610-3617.)

The prosecutor argued that there was no reason to change the court's ruling. The evidence was relevant to the issues of appellant's premeditation, malice and state of mind. It showed that appellant was "perfectly willing to kill if somebody puts any resistance up." (27 RT 3618-3619.)

The court ruled that the admissibility of the Sacramento evidence against appellant had not changed with the absence of Pan. (27 RT 3620.) It acknowledged the potential "dangerousness" of the evidence, but stated it would give a limiting instruction, stating, "I admit the weakness sometimes of those tools, but they are still there, still authorized, and still what we have to use." (27 RT 3620.)

The court then reiterated its bases for allowing the evidence: it tended to show (1) appellant went to the Elm Avenue house with motive of a home invasion robbery; (2) appellant would kill if necessary, which would establish "a degree of premeditation;" and (3) a common scheme for the obtaining of money when it was needed." (27 RT 3621-3622.)

It explained:

> I think a major element factor in Elm Street is the establishment of intent to kill and establishment of actual or implied malice, and I don't think that the two, that the felony murder rule and the establishment of malice and premeditation, are necessarily mutually exclusive.
>
> I think the jury can find it under either theory.
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> I think the Sacramento evidence showing what happened there and the circumstances under which the killing took place could well assist the jury in deciding whether Mr. Chhoun, if they feel he did the killing, clearly had the intent to kill, if necessary.

(27 RT 3621-3622.)

Before the testimony of each witness who discussed the Sacramento case and before closing arguments, the court gave the following, or a variation of the following, admonition:

> The law permits under certain circumstances that evidence of similar criminal acts to those charged in this case may be presented to the jury. This evidence concerns an uncharged crime in this trial that occurred in the city of Sacramento on July 27, 1995. That crime involved a home invasion robbery-murder. This evidence was admitted for the limited purpose as evidence of the Elm Street crimes of premeditation and malice aforethought as required in the crime of first degree murder, the necessary intent as required in the crimes of murder, robbery and burglary. It may be used as evidence of a common scheme, motive or knowledge. You will be completely instructed as to the elements of all crimes charged in the Elm Street incident.

> Before you may consider this evidence for any purpose, you must be satisfied by a preponderance of the evidence that the Sacramento crimes took place and that the defendants were participants in committing them.
>
> You are not to consider any of this limited evidence as proof of a propensity of the defendants to commit the crimes charged in the Elm Street offenses. You are reminded that you may not find either or both of the defendants guilty of the Elm Street crimes solely on this evidence but must determine the truth of those charges beyond a reasonable doubt. And you may consider the evidence of the Sacramento crimes only for the limited purpose for which it is being admitted.
>
> Further, you may not and you are not to consider this evidence of the Sacramento offenses as corroboration of the testimony of any co-participant that may have testified in this trial concerning the Elm Street killings.

(17 RT 2455-2456; see also 19 RT 2697-2698, 22 RT 3056-3057; 27 RT 3677-3678 [following dismissal of the case against Pan, the court modified the instruction to refer to only one defendant].)

Appellant's counsel stated, that such compartmentalization was a "feat . . . beyond the psychological power of any human being I've ever met." (17 RT 2453.)

Before closing arguments, the court also instructed:

> Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial.
>
> This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining that it tends to show a characteristic method, plan, or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offenses in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged;

The existence of the intent which is a necessary element of the crime charged;

A motive for the commission of the crime charged;

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case.

(27 RT 3678-3679.)

2. Evidence of the Sacramento Shootings Was Inadmissible to Prove Mental State, Common Plan or Scheme or Motive

"Evidence of an uncharged offense is usually sought to be admitted as 'evidence that, if found to be true, proves a fact from which an inference of another fact may be drawn.'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 315, internal citation omitted; *People v. Williams*, *supra*, 44 Cal.3d at p. 905.) As with other types of circumstantial evidence, its admissibility depends primarily upon three factors: "(1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 315, italics in original.) Moreover, the relevance of other crimes evidence depends on its degree of similarity to the charged offense. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 401-402.) Increasing levels of similarity between the charged and uncharged conduct are necessary to show intent, common scheme or plan, or identity, respectively. (*Id.* at p. 402.)

Here, the court and prosecutor posited various theories of relevance of the Sacramento case. Among the most consistent theories of admissibility submitted were Sacramento's relevance to prove (1) knowledge and intent, which the trial court incorrectly believed included

premeditation and deliberation; (2) common scheme, plan or design; and (3) motive. None of these theories tended to prove a relevant, material, or disputed fact of the Elm Avenue murders.

a. The Sacramento Evidence Was Inadmissible to Prove Appellant's Mental State

"Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense." (*People v. Ewoldt, supra*, 7 Cal.4th Cal.4th at p. 394, fn. 2, italics in original.) While "[i]t has been observed that when evidence of an uncharged offense is introduced to prove intent, the prosecution need not show the same quantum of 'similarity' as when uncharged conduct is used to prove identity" (*People v. Robbins* (1988) 45 Cal.3d 867, 880), even where other crime evidence is introduced to show intent, the two crimes must still be substantially similar. (*People v. Delgado* (1992) 10 Cal.App.4th 1837, 1844-1845.)

Evidence that the defendant committed the same crime on a different occasion is not alone sufficient to prove intent. (*People v. Balcom* (1994) 7 Cal.4th 414, 422-423.) Moreover, the fact that the defendant has engaged in similar conduct to that charged is not, by itself, enough to warrant introduction of evidence of the prior conduct. For example, in *People v. Kronemyer* (1987) 189 Cal.App.3d 314, the defendant was charged with perjury and grand theft resulting from acts he committed while he was the attorney and conservator for an elderly man. (*Id.* at p. 324.) The trial court admitted evidence that the defendant had previously cashed the victim's tax refund checks. The Court of Appeal ruled that the prior acts of embezzlement against the same victim were admitted in error. The prosecution could not avoid the limitations of Evidence Code section 1101

by merely asserting an admissible purpose for the evidence. (*Id.* at pp. 346-348; see *People v. Poon* (1981) 125 Cal.App.3d 55, 70.) "The evidentiary value of uncharged offense evidence cannot be deemed substantial unless it logically tends to prove Kronemyer's specific intent to steal in the present charges." (*Kronemyer, supra,* at p. 347.) The court concluded that even though the manner in which Kronemyer obtained the property in the uncharged embezzlements appeared substantially similar to the charged offenses (*id.* at pp. 347-348), the uncharged acts did not establish an intent to steal merely by describing the prior physical acts committed. (*Id.* at p. 348.)

In this case, the intent to kill of whoever shot Henry Nguyen twice, once in the head at close range (24 RT 3248-3251), was hardly an issue.[30] Indeed, this Court has recognized that firing simply at close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." (*People v. Perez* (2010) 50 Cal.4th 222, 230.) Moreover, to the extent that intent could have been an issue, the Sacramento murders were not sufficiently similar to justify the admission of those murders to prove the state of mind of the killer. The victims in Sacramento were a Chinese family who ran a store out of their apartment, selling cigarettes, candy and sodas. (See 13 RT 1811, 19 RT 2712.) According to prosecution witness Evans, the premises were targeted because of the money generated from the store. (17 RT 2462-2463, 2474.) In that instance, the shooter stormed up the stairs to the apartment, scared a child and allowed her to flee. He shot

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[30]As the prosecutor stated during his closing argument, "does it mean intentional killing when you put a gun to the back of someone's head and blow their teeth out? Of course, it does." (28 RT 3691-3692.)

Luu in the leg when she tried to stop him from entering the apartment, and two others after one of them tried to hit him with a chair. The shooter took nothing.[31] The crime happened quickly, publicly and recklessly. It is not clear that the shooter intended to kill any of the victims. All three were shot from a distance, and Luu was only hit in the leg. (19 RT 2703.)[32] She and other witnesses lived to tell the tale. The victims in Sacramento were not shot in order to obtain money. They were shot in response to their resistance and in the shooter's attempt to escape. (17 RT 2478, 2481-2482.)

The San Bernardino offense is similar in that it was a home invasion robbery, but the details differ vastly. There, the victims were members of a Vietnamese family living in a private residence. The robbery was based on information from Karol Tran, and the participants used planned deception to gain entry to the house. Once inside, they took the time to gather the occupants, ordered them to hand over money and jewelry, and shot all the family members at close range. (See 17 RT 2416-2418, 2447-2448, 2425-2427, 2434.)[33] The reasons for the murders are not clear, but the Sacramento evidence of a shooting in response to unanticipated resistence

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[31]Money was still in the dish holding proceeds of the candy sales. (22 RT 3084.)

[32]One victim was in between the kitchen and living room and the other was in the living room. (22 RT 3085-3086.) Dieu Li died from an "apparently distant range gunshot." (34 RT 4685-4686.) Nghiep Thich Le was shot in the arm and in the face, again at a distant range. (34 RT 4686-4689.)

[33]In his argument to the jurors, the prosecutor himself contrasted the facts of case with those of Sacramento: "we don't have a situation here where there is random shots fired all through the Elm Street house, do we? We have selected shots. . . ." (28 RT 3692.)

does not shed light on the point blank shootings in San Bernardino.

The trial court posited the novel theory that the Sacramento spontaneous murders were admissible to show a sort of conditional premeditation and deliberation. That is, the Sacramento murders are evidence that appellant premeditated the murder of any future home invasion robbery victims who put up resistance. The court explained that appellant was "well aware in his mind that if necessary he would kill as he found it necessary, and that this would then establish a degree of premeditation when the killing was done on Elm." (27 RT 3621-3622.) This theory is logically and legally unsound.

One cannot premeditate and deliberate *before* even intending to kill. Bringing weapons to a robbery may have been evidence of the perpetrators' reckless indifference to human life, but there was no evidence that anyone harbored express malice prior to entering the residence. As the prosecution's own expert testified, in gang-related home invasion robberies there ordinarily is *not* a preplanned intent to kill any of the victims. (15 RT 2121-2122.) "Generally speaking, in committing a home invasion robbery, the purpose is to go in and obtain whatever money or jewelry or items of value that the gang believes are inside there. If it becomes necessary to harm family members to achieve that goal, then that is seen as simply a tool of attaining that particular goal. [¶] [Q.] So the primary original intent may not include an intent to kill, but it could develop into that, depending on how the crime goes down? [¶] [A.] That's correct." (15 RT 2122-2123.)[34]

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[34]In addition, Karol Tran testified that the plan was only to threaten, not kill, the occupants of the Elm Avenue residence. (25 RT 3415.)

This Court has never ruled that there can be a conditional intent-to-kill murder, let alone a conditional premeditated and deliberate murder. For good reason. When other crimes evidence is admitted to show a future conditional intent, it proves only propensity to commit criminal acts, an entirely prohibited use of such evidence. Here the prosecutor would have the jurors find that appellant premeditated the Elm Avenue murders because he was willing to kill if necessary as evidenced by his prior killing during a robbery. One cannot have a free-floating conditional premeditation that is anything but propensity evidence.

In *People v. Ewoldt*, this Court stated that "[e]vidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' [Citation.]" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2, italics in original.) In the present case, however, if the jury found that defendant committed the act alleged, there could be no reasonable dispute that he harbored the requisite criminal intent. (*Id.* at p. 406.) Appellant's accomplices testified that they and appellant entered the Nguyen residence with the intent to rob and shot five people. If the jurors accepted these witnesses, appellant committed first degree murder. If the jurors rejected these witnesses, there was no evidence that appellant was even at the Elm Avenue residence. These wholly divergent accounts create no middle ground from which the jury could conclude that appellant committed the proscribed act of intentionally shooting someone at close range, but lacked criminal intent for some reason. (Cf., *People v. Williams* (1992) 4 Cal.4th 354, 362 [wholly divergent accounts as to consent to sexual intercourse create no middle ground from which defendant could

argue he reasonably misinterpreted victim's conduct].)

On the evidence presented, the primary issue for the jurors to determine was whether appellant participated in the Elm Avenue robbery and murders. No reasonable juror considering this evidence could have concluded that appellant committed the acts alleged by the prosecution witnesses, but lacked the requisite intent to steal or kill.

b. The Sacramento Evidence Was Inadmissible to Show Common Design or Scheme

Appellant has argued that there is insufficient similarity to prove intent; a fortiori, there is insufficient similarity to prove common plan or scheme. Even if we assume, however, that the two events were similar *and* that appellant was acting pursuant to a common plan when he committed the San Bernardino offenses, that plan, itself, is not an end to be proved. The prosecution may introduce evidence of such plan only if it is relevant to some element of the crimes charged. The examples that section 1101, subdivision (b) recites as facts that may be relevant for some reason apart from criminal disposition are, with the exception of intent and identity, not normally ultimate facts at issue in a criminal trial. (*People v. Thompson*, *supra*, 27 Cal.3d at p. 315, fn. 13.) They are intermediate facts, admitted because they are relevant to an ultimate issue other than criminal propensity. (*Id.* at p. 315, fn. 14.)

The majority in *Ewoldt* held that "evidence of a common design or plan is admissible only to establish that the defendant engaged in the conduct alleged to constitute the charged offense, *not to prove other matters, such as the defendant's intent or identity as to the charged offense*." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 406, italics added; see also *id.* at p. 394 ["[e]vidence of a common design or plan . . . is not used to

prove the defendant's intent or identity but rather to prove that the defendant engaged in the conduct alleged to constitute the charged offense"]; 1A Wigmore, Evidence (Tillers rev. ed. 1983) § 102, p. 1666 ["The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done"].) Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, "[i]n proving design, the act is still undetermined. . . ." (2 Wigmore, *supra,* (Chadbourn rev. ed. 1979) § 300, p. 238.)

Here, the act was not "undetermined." There was no question but that a home invasion robbery and five murders were committed. The Sacramento offense was not needed to prove those acts. Indeed, as this Court recognized in *Ewoldt,*

> in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible.

(*People v. Ewoldt, supra,* 7 Cal.4th at p. 406.)

The sum and substance of the trial court's and prosecution's reasoning for admission of the Sacramento case was that the offense proves that appellant commits robberies and murders. That is simply another way of saying that appellant is a person of bad character who is predisposed to commit crimes. That theory of admissibility is prohibited by Evidence

Code section 1101, subdivision (a).

c. The Sacramento Evidence Was Inadmissible to Prove Motive

Justice Jefferson has explained that "when the commission of a criminal act (the crime for which defendant is on trial) is a disputed issue, evidence of motive may become relevant to that issue." (Jefferson, Cal. Evidence Benchbook (1978) Special Problems Related to Relevancy, § 21.4, p. 218; see also *People v. Pic'l* (1981) 114 Cal.App.3d 824, 855–856, disapproved on another ground in *People v. Kimble* (1988) 44 Cal.3d 480, 498.)

Motive was not a disputed issue in this case. This Court's reasoning in *People v. Bigelow* (1984) 37 Cal.3d 731, is instructive. There this Court ruled that the trial court erred in allowing the prosecution to introduce evidence of previous thefts and burglaries in the defendant's trial for murder, robbery and kidnapping. (*Id.* at pp. 747-748.) The Attorney General had argued that the evidence of other crimes was relevant because it proved Bigelow's motive in the charged robbery, kidnaping and murder. This Court observed that the defendant's motive – his desire to take the victim's property – "was not seriously contested." (*Id.* at p. 748.)

> [T]here was no question but that, whoever shot [the victim], the robbery, kidnaping and murder were done as part of a plan to steal [the victim's] car. Indeed, the motive for robbery is generally one of acquiring the victim's property, and proof that Bigelow previously committed theft or robbery for this purpose adds little to the case.

(37 Cal.3d at p. 748.)

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Here, too, the motive of whoever committed the home invasion robbery was clear; the Sacramento evidence added nothing of legitimate value.[35]

3. The Other Crimes Evidence Was More Prejudicial than Probative

Even if this Court concludes that the Sacramento evidence was relevant for some valid purpose, the evidence should have been excluded under Evidence Code section 352. As this Court has recognized, "Our conclusion that section 1101 does not require exclusion of the evidence of defendant's uncharged misconduct, because that evidence is relevant to prove a relevant fact other than defendant's criminal disposition, does not end our inquiry. Evidence of uncharged offenses is so prejudicial that its admission requires extremely careful analysis. Since substantial prejudicial effect [is] inherent in [such] evidence, uncharged offenses are admissible only if they have *substantial* probative value. [¶] . . . . We thus proceed to examine whether the probative value of the evidence of defendant's uncharged offenses is *substantially* outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404, internal quotes and citations omitted, italics added.)

Evidence is probative if it is material, relevant and necessary. "'[H]ow much probative value proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of

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[35]As the prosecution expert testified, "For the most part, the crime of the home invasion robbery, as far as the Asian street gang is concerned, is a crime for economic gain." (15 RT 2119.)

materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 318, fn. 20, citation omitted.)

Given the panoply of other evidence connecting appellant to the San Bernardino case, the legitimate value of the Sacramento offense is elusive. This is highlighted by the prosecutor's closing argument, where he essentially told the jurors to ignore premeditation and deliberation – the very reason he had argued that the Sacramento evidence should be admitted. If his argument does not belie any justification for admission of the Sacramento evidence, it at the very least underscores its lack of probative value. The prosecutor told the jurors that they could find first degree murder on a theory of felony murder or "intentional, premeditated, deliberate murder." (28 RT 3691.) He cautioned, however, that finding premeditation and deliberation was "[t]o be quite frank with you, . . . is the harder way of doing it, more complicated. It can be more difficult in some ways." (*Ibid.*) He thus urged them to find felony murder, which "[d]oesn't require all of this other stuff about premeditation." (28 RT 3692-3693.) He concluded, "those two simple ways of finding your first two steps, I would recommend, because they are so clear and so obvious. You don't have a lot of room for concern or dispute about them. A little easier than using a first degree premeditated, intentional killing." (28 RT 3694.) He pointed out that there was plenty of evidence to find intent and premeditation, without even mentioning the Sacramento case:

> You have all sorts of evidence from which you can reach that. The nature of the killings, the way the children and adults were shot. That clearly demonstrates intentional, premeditated killing.

(28 RT 3691.)

He told the jurors they could spend "a whole lot of time trying to figure that out," but asked, "does it mean intentional killing when you put a gun to the back of someone's head and blow their teeth out? Of course it does." (28 RT 3691-3692.) He cautioned that premeditation is a more difficult concept, but argued that there were no random shots fired throughout the Elm Avenue house. The selected shots of the various victims alone, demonstrated intentional killing. (28 RT 3692.) He argued that the defendants went to the Elm Avenue location with the intention of entering the house to commit a robbery. "So that is easy, right? So now we have a quick decision. Burglary. Not going to take a lot of deliberation." (28 RT 3693.)

The prosecutor at one point stated, "I am not going to bore you with talking about the intent to kill, because I think we certainly have intent to kill given the nature of the wounds we've seen here and so on and so forth." (28 RT 3699-3700.)

Later, when discussing the attempted murder charge and the need to find express malice, the prosecutor again urged the jurors to rely on a theory of felony murder. "[T]hings can sometimes be confusing, so if they are – if they are real clear, great. If they are not, think about what I suggested. You might want to try just using the felony murder rule. It's a lot easier." (28 RT 3697.)

The lack of materiality of the Sacramento evidence can also be seen in the prosecutor's utter failure even to mention the incident in his closing argument until he began discussing the possibility that the jurors might conclude that appellant was not the actual killer of any of the Elm Avenue victims. The prosecutor told the jurors that they did not have to decide that appellant was the actual shooter, but just that he was "a major participant,"

which, he argued, the evidence clearly showed.

> [H]e is the one that orchestrated the robbery and so on and so forth and, certainly, acted with reckless indifference to human life. [¶] How do we know that? Again, you don't go to somebody's house in the dark of night with guns unless you are acting with major reckless indifference to human life. [¶] Our homes are sacred places of safety. We honor the "A man's home is his castle" tradition. And you don't go into somebody's house with a gun without being a major participant acting with reckless indifference to human life and so on, "when that defendant knows or is aware that his acts involve a grave risk of death to a human being," and so on. [¶] *That is one of the reasons we gave you the Sacramento case.*

(28 RT 3701, italics added.)

After essentially conceding that the Sacramento evidence was not needed to prove that appellant acting with reckless indifference to human life, he told the jurors that it was introduced to prove just that.

Even the trial court recognized the limited probative value of the Sacramento evidence. It initially noted that the admissibility of the Sacramento evidence against appellant was "more troublesome and closer" than its admissibility against Pan. (13 RT 1861.) The court wondered whether there was sufficient proof before it that the Sacramento evidence was admissible against appellant, "so that I'm not in fact allowing the jury to hear something that really isn't applicable to Mr. Chhoun but yet could be used by the jury to involve him." (13 RT 1855.) It observed that the prosecution had a "fairly strong case" against appellant and that "there's no really need to have the Sacramento case except it just adds on to the fact that now the jury knows that this guy is a very bad man." (13 RT 1857.)

The court also found the evidence to be cumulative *and* highly prejudicial.

> And it's . . . cumulative. I think it's more perhaps damaging than merely cumulative because of the nature of what happened in Sacramento, if there is sufficient evidence that you apparently do have to establish all these other factors in the Elm Street case absent Sacramento.

(13 RT 1857.)

Even in ruling that the evidence was admissible the court conceded that "the evidence is not as strong to Mr. Chhoun as it is to Mr. Pan in these various factors, but I think it is there." (13 RT 1863.)[36]

In response to an objection that the Sacramento evidence was cumulative,[37] the court acknowledged counsel's concern, stating that if he were asking that the court exclude the Sacramento evidence because it is "cumulative and part of 1101(b) evidence and we have far exceeded the limitations of allowability [*sic*] of that evidence, to an extent you are right." (21 RT 3015.)[38]

The court later again noted that the Sacramento evidence might be cumulative, but dismissed this concern by observing, "I have no idea what

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[36]The fact the other crimes evidence did not involve premeditated acts also made it less probative. As the panel observed in *United States v. San Martin* (5th Cir.1974) 505 F.2d 918, 923, "evidence of prior crimes involving intent of the moment are hardly ever probative of later acts involving similarly split-second intent" because "such prior crimes have less to do with the type of specific intent that may arise later . . . than they do with the defendant's overall disposition or character. . . ."

[37]The objection was made by codefendant Pan's attorney; appellant's counsel joined in that objection. (21 RT 3014-3015.)

[38]Despite its earlier ruling that an accomplice's testimony need not be corroborated to prove a prior offense under Evidence Code section 1101, subdivision (b), the court reasoned that the prosecution was entitled to introduce cumulative evidence of the Sacramento crimes in order to corroborate the accomplice's testimony. (21 RT 3015.)

the evidence is eventually going to show." (13 RT 1863.) The evidence showed that, despite objections,[39] 16 witnesses, numerous days and 230 pages of the prosecution's case dealt with the Sacramento case.[40] As the court acknowledged, they were "certainly in the Sacramento case up to our hips in alligators." (21 RT 3015.)

This case presents a virtually identical situation to that described in *Ewoldt*, where this Court stated:

> [T]he evidence of defendant's uncharged misconduct in the present case is inadmissible for the purpose of proving defendant's intent as to the charges of committing lewd acts. Evidence of intent is relevant to establish that, assuming the defendant committed the alleged conduct, he or she harbored the requisite intent. In testifying regarding the charges of lewd conduct, Jennifer stated that defendant repeatedly molested her, fondling her breasts and genitals and forcing her to touch his penis. *If defendant engaged in this conduct, his intent in doing so could not reasonably be disputed.* (Citations.) *As to these charges, the prejudicial effect of admitting evidence of similar uncharged acts, therefore, would outweigh the probative value of such evidence to prove intent.*

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[39]See, e.g., 16 RT 2280; 19 RT 2750-2751; 20 RT 2909-2911; 21 RT 3015; 22 RT 3081, 3082; 25 RT 3374; 27 RT 3616.

[40]The following witnesses testified about the Sacramento case in front of the jury: William Matty (24 RT 3349 *et seq.*), C. J. Evans (17 RT 2401 *et seq.*), Quyen Luu (19 RT 2699 *et seq.*), Mei Tuyet Le (19 RT 2709 *et seq.*), Vincent Le (19 RT 2720 *et seq.*), Amie Le (19 RT 2757 *et seq.*), Marcus Frank (15 RT 2106 *et seq.*), Dung Hoang (18 RT 2575 *et seq.*), Davit Vang (18 RT 2583 *et seq.*), Sergeant Risedorph (22 RT 3054 *et seq.*), Detective Cooper (22 RT 3074 *et seq.*), Detective Edwards (22 RT 3027 *et seq.*), Detective Dillon (23 RT; 3183 *et seq.*), Dr. Sheridan (24 RT 3326 *et seq.*) and Karol Tran (25 RT 3422 *et seq.*); a videotaped interview of Ronnie Nuon was played for them (26 RT 3494-3495.). Still others testified during pretrial hearings.

(*People v. Ewoldt, supra*, 7 Cal.4th at p. 406, italics added.)

Later, in considering whether the evidence would be admissible to prove common plan or scheme, the Court stated in words that are equally applicable to this case:

> [A]ssuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value.

(*People v. Ewoldt, supra*, 7 Cal.4th at p. 406.)

A similar situation was present in *People v. Balcom, supra*, where this Court observed that other crimes evidence was relevant to show intent, but concluded that it was cumulative: "But, because the victim's testimony that defendant placed a gun to her head, if believed, constitutes compelling evidence of defendant's intent, evidence of defendant's uncharged similar offenses would be merely cumulative on this issue. [Citation.] Accordingly, we conclude that the limited probative value of the evidence of uncharged offenses, to prove intent, is outweighed by the substantial prejudicial effect of such evidence." (*People v. Balcom, supra*, 7 Cal.4th at p. 423.) Similarly, the reviewing court in *People v. Leon* (2008) 161 Cal.App.4th 149, 169, observed, "Although the trial court could have reasonably concluded that evidence of Leon's 1999 commission of a robbery with other gang members was relevant to establish that Sidro was a criminal gang and that Leon was a gang member, in light of the other overwhelming evidence establishing both of these facts, the trial court abused its discretion in admitting evidence concerning the uncharged offense evidence."

In ruling upon the admissibility of evidence of uncharged acts the trial court must determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 406.)

In ruling on a section 352 objection "a trial court need not expressly weigh prejudice against probative value, or even expressly state that it has done so." (*People v. Paniagua* (2012) 209 Cal.App.4th 499, 518.) It is required, however, that the record demonstrate that "the trial court understood and fulfilled its responsibilities under section 352." (*Ibid.*) This means that "[t]he weighing process under section 352 depends upon the court's consideration of the unique facts and issues of each case. . . ." The record must show that the court exercised "its discretion in an informed manner." (*Ibid.*)

In overruling appellant's Evidence Code section 352 objection in this case, the trial court did not properly weigh the negligible probative value of the evidence against its prejudicial impact. The court gave lip service to a weighing process, citing a list of similarities between the two offenses and possible grounds for introduction of the Sacramento evidence at the San Bernardino trial. (See 5 RT 587 *et seq.*) But it did not truly weigh the probative value of the evidence *for which it was offered* against the prejudicial effect of that evidence. The court, in fact, made a case for excluding the evidence: the court questioned why the Sacramento evidence was necessary given the strength of the evidence against appellant, and it acknowledged that the evidence was cumulative. The court also recognized how prejudicial the other crimes evidence was. It stated that introduction of the other crime evidence put appellant in Sacramento "committing another horrendous home invasion robbery" just days before the charged offense.

(13 RT 1855.) The evidence revealed to the jurors that appellant was "a very bad man." (13 RT 1857.) The Sacramento evidence was also time-consuming (16 witnesses and 230 pages of testimony) and confused the issues.

Despite this nearly textbook case for exclusion of the other crimes evidence, the court allowed the prosecution to utilize highly prejudicial evidence of limited, if not no, probative value. The court erred.

C. In the Alternative, the Court Erred When, After Ruling That the Sacramento Evidence Was Admissible, it Refused to Sever Appellant's Trial from That of His Codefendant Pan

Once the court ruled it would not exclude the Sacramento evidence from Pan and appellant's joint trial, severance of appellant and Pan's trial was the proper remedy. Denial of appellant's repeated motions to sever was an abuse of discretion and deprived appellant of a fair trial, an impartial jury, and a reliable guilt and sentencing determination, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

1. Facts and Procedural History

Appellant moved to sever his trial from Pan's before, during and after the guilt phase of the trial. On May 3, 1999, counsel for appellant made an oral motion to sever his trial from that of Pan. (3 CT 731.) The prosecutor objected to severance, and the court denied the motion. (1 PT RT 35-36, 41.) On May 3, 1999, during argument regarding the admissibility of the Sacramento case under Evidence Code section 1101, subdivision (b), the trial court questioned whether the Sacramento evidence, although admissible under section 1101, subdivision (b) against Pan, was also admissible against appellant. At that point, appellant again asked the

court either to exclude the Sacramento evidence as to both defendant's or sever the defendants. (*Ibid.*) After the prosecutor stated that if the court ruled that the Sacramento evidence was inadmissible against appellant, he would agree to sever appellant and Pan's trials (13 RT 1858) the court found that the evidence admissible against appellant. (13 RT 1861-1862.)

On May 11, 1995, defense counsel renewed appellant's motion to exclude the Sacramento evidence or sever appellant and Pan's trials. (14 RT 1948-1949; 3 CT 752, 755.) The court again denied the motion. (15 RT 2232-2233.)

Once again, on June 1, 1999, appellant renewed his motion to sever trials should certain evidence be introduced against Pan alone. (25 RT 3378.) The court responded, "There's an old saying, 'If the horse is dead, get off of it.' And I think you better review that saying, Mr. Duncan, about severance and all the rest of it." (25 RT 3378-3379.)

Finally, on June 9, 1995, after the court had granted Pan's motion under 1118.1, appellant moved for mistrial based on the erroneous admission of the Sacramento evidence or, in the alternative, the denial of appellant's motion to sever. (27 RT 3610-3617.) The motion was denied, after the prosecutor discounted appellant's argument as "this same dead horse." (27 RT 3623, 3619.)

In his motion for new trial, appellant again raised the issue of severance and the erroneous introduction of the Sacramento evidence. (48 RT 6264-6270.) That motion was denied. (48 RT 6284.)

As argued more thoroughly above, evidence of the Sacramento crime was patently inadmissible against appellant. It was not relevant to any disputed issue in the Elm Avenue case: the obvious motive of the home invasion was to obtain money and valuables and whoever shot the victims

at point-blank range did so with the intent to kill. Introduction of the Sacramento evidence was also time-consuming, cumulative and more prejudicial than probative. When the court ruled that the Sacramento evidence was admissible, it then should have severed appellant's case from Pan's. Its failure to do so was error.

2. The Trial Court Abused its Discretion by Denying Severance in this Capital Trial Where a Higher Degree of Scrutiny Is Mandated

Section 1098 codifies a preference for joint trials of jointly charged codefendants, and under this statute, a decision concerning severance of codefendants' trials is generally a matter within the trial court's discretion. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.) Nevertheless, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452; accord, *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 939.)

In a capital case the trial court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a non-capital case. (*Williams v. Superior Court, supra*, 36 Cal.3d at p. 454; *People v. Keenan* (1988) 46 Cal.3d 478, 500.) As this Court later explained in *People v. Smallwood* (1986) 42 Cal.3d 415, 425:

> No longer may a . . . court merely recite a public policy favoring joinder or presume judicial economy to justify denial of severance. "Put simply, the joinder laws must never be used to deny a criminal defendant's fundamental right to due process and a fair trial." (*Williams, supra*, 36 Cal.3d at p. 448.)

Whether denial of a motion to sever the trial of a defendant from that of a codefendant constitutes an abuse of discretion must be decided on the

facts as they appear at the time of the hearing on the motion rather than on what subsequently develops. (*People v. Turner*, *supra*, 37 Cal.3d at p. 312.) Importantly, however, even if a motion to sever was properly denied at the time it was made, reversal is required if the effect of joinder deprived the defendant of a fair trial or due process of law. (See, e.g., *People v. Souza* (2012) 54 Cal.4th 90, 109; *People v. Mendoza* (2000) 24 Cal.4th 130, 162.) As the court explained in *People v. Grant* (2003) 113 Cal.App.4th 579, 587, "the defendant must demonstrate a reasonable probability that the joinder affected the jury's verdicts."

The essential consideration in determining whether defendants who are jointly charged should be separately tried is whether "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States* (1993) 506 U.S. 534, 539, cited in *People v. Cummings*, *supra*, 4 Cal.4th at pp. 1286-1287; *United States v. Aulicino* (2d Cir. 1995) 44 F.3d 1102, 1116; *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082 ["The touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict"].)

In light of these principles and under both federal and California law, it is clear that the court's refusal to sever the trials in this case was prejudicial error. The jurors heard evidence that appellant committed a double murder during a home invasion robbery just days before the charged murder of five people during another home invasion robbery. It showed nothing more than propensity, that is, that appellant was in Sacramento four or five days before the charged offenses "committing another horrendous home invasion robbery." (13 RT 1855.) Even the trial court recognized

that it was prejudicial, unnecessary and cumulative. (13 RT 1857.)

Moreover, during trial the prosecutor introduced through Detective Edwards, the statements both Pan and appellant made regarding their involvement in the Sacramento offense. Prior to calling Edwards to testify, the prosecutor explained that he had redacted from the statements of each defendant, his assertion that the other defendant was the actual shooter at the apartment. (21 RT 3005-3006.) The prosecutor explained, "I would not put on that portion of Chhoun's statement to Edwards that Chhoun blames Pan for the shooting and that Chhoun says Pan went inside the residence to do the shooting and so on and so forth." (21 RT 3006.) Defense counsel expressed concern that the prosecutor would be introducing all of the inculpatory statements of appellant, but redacting the exculpatory material. (21 RT 3008.) When the court indicated its inclination to accept the prosecutor's redaction of appellant's statement that Pan was the shooter defense counsel posed the question, "If Mr. Pan wasn't here and my client were on trial by himself, and that officer on the stand, I would be entitled to bring that out through him, would I not?" (21 RT 3010.) The court's dismissive comment was more evasion than response:

> I am not going to answer that question, because I can see some reasons why you cannot be. I can understand your premise that, well, you are entitled to have the whole statement in, but there are some limitations that – in any case, that is not the issue, and I don't really have to be confronted with that.

(21 RT 3010.)

The prejudice stemming from this evidence was manifest and deprived appellant of specific trial rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments, and article I, section 15 of the

California Constitution at the joint trial that occurred over his objections. The joinder also prevented a reliable determination of guilt and penalty, and resulted in gross unfairness at both phases of the trial. Appellant's conviction and death judgment be reversed.

D. The Trial Erred in Admitting Evidence of Appellant's Gang Membership

Gang membership evidence is well-recognized as being extraordinarily prejudicial and inflammatory. (See, e.g. *People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Cox* (1991) 53 Cal.3d 618, 660; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-194; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 344.) As one Court of Appeal has observed: "It is fair to say that when the word 'gang' is used in Los Angeles County, one does not have visions of the characters from 'Our Little Gang' series. The word gang . . . connotes opprobrious implications. . . . [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal.App.3d 470, 479; see also *People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) Indeed, the United States Supreme Court has determined that the submission of gang affiliation evidence in a criminal proceeding may be constitutional error when such evidence is irrelevant to the issues at hand. (See *Dawson v. Delaware* (1992) 503 U.S. 159, 165 [defendant's First Amendment rights were violated by the admission of gang evidence in sentencing proceedings where the evidence proved nothing more than his abstract beliefs].)

Like other violent crimes evidence, gang membership carries a grave risk that the jury will view appellant as more likely to have committed the violent offenses charged against him because of his membership in the

gang. (*People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-905; accord, *People v. Avitia*, *supra*, 127 Cal.App.4th at p. 194; *People v. Bojorquez*, *supra*, 104 Cal.App.4th at p. 344.) It breeds an equal tendency to condemn, not because the defendant is guilty of the present charge, but because the jury fears he will commit a similar crime in the *future* or, conversely, because it believes that the gang member defendant likely committed previous crimes for which he has escaped unpunished. (See, e.g., *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230 [despite absence of "formal convictions," it is "reasonable to infer" prior criminality from gang membership]; *People v. Thompson*, *supra*, 27 Cal.3d at p. 317 [prior criminality breeds tendency to condemn because defendant has previously escaped punishment]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 624 [gang involvement suggests future criminality]; *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1501 [same]; *Simmons v. South Carolina* (1994) 512 U.S. 154, 163 [evidence relating to defendant's future criminality irrelevant and inadmissible in trial on guilt or innocence because "jury is not free to convict a defendant simply because he poses a future danger"].)

Here, the trial court considered the admissibility of the gang evidence under the prism of Evidence Code 1101, and concluded that the prosecutor could introduce irrelevant but profoundly prejudicial evidence of appellant's gang membership and expert testimony regarding inflammatory practices of Asian gangs, in general. The court erred; the guilt verdict and death judgment must be reversed.

1. Facts and Procedural History

On January 4, 1999, appellant orally joined in codefendant Pan's motion to exclude references to defendant's alleged gang involvement. (2 CT 579; 1 RT 42, 49.) The prosecutor had earlier filed a response to the

motion acknowledging that no gang enhancement had been filed, but arguing that the gang evidence was relevant to motive, intent and identity; to show criminal conspiracy; to show the effect of intimidation of a witness; and to show bias. (Supp A-1 CT 56-57, 59.) He at no time, however, explained how any of these theories was relevant to the case against appellant.

On March 15, 1999, the court filed a Ruling on Motion to Exclude Evidence of Gang Membership, in which it stated that evidence of gang membership could be relevant "to prove conspiracy among the gang members, including Pan, to commit this robbery-burglary and if necessary to kill the victims." (3 CT 668.) It went on:

> This uncharged conspiracy, if proven, would tend to establish Pan's involvement in the crime, showing his knowledge and intent in furnishing the gun, and it would be of some value to the prosecution in establishing the necessary specific intent by both defendants to commit the robbery and burglary which resulted in the murders and which then may tend to prove motive.

(3 CT 668.)[41]

The court noted that the gang evidence should be "minimal," and only "to the extent necessary to prove and explain the relationship between the defendants, the conduct of the defendant Pan, and the intent and motive of both defendants. This limitation may limit gang evidence to only a

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[41]After the order was filed, counsel for appellant observed that the court in one instance "indicated it might not be relevant in Chhoun's case but may be in Pan's case. But then in another instance it possibly could be relevant to both, and I think we need that groundwork set up ahead of time." (12 RT 1597.) The court replied that it would have to hear what the evidence was before ruling "whether it's relevant to one, the other or both or neither." (*Ibid.*)

showing of the gang, the membership of the defendants, and the activity surrounding the commission of this crime charged." (3 CT 669.) The court also found the evidence admissible under Evidence Code section 352.[42] "[W]hile direct evidence of gang relationship and activity would be damaging to the defendants, undue prejudice is not synonymous with damaging. The nature of the killings here is of such magnitude that limited evidence of gang association will be almost inconsequential in the final analysis." (3 CT 669.) The court concluded that the gang evidence would be admitted "subject to additional hearings and rulings as required." (3 CT 669.)

Such an additional hearing on the issue was held on May 12, 1999. (15 RT 2096; 3 CT 755.)[43] At that time, the court elaborated on its earlier ruling:

> What I intended to say, if I didn't clearly say it by that, is I think this evidence is admissible to show that because of a gang relationship to these two defendants, that that gang relationship could result in one gang member carrying out one aspect of this crime, another gang member carrying out another aspect of the crime. [¶] And in this situation, Mr. Chhoun being the alleged shooter, Mr. Pan being the alleged furnisher of the gun, that the evidence could consist of somebody testifying that gangs, in the relationship that they have, work together . . . their modus operandi, if I may use that term, is perhaps for a common understanding as to the activity of the gang membership; that one member of the gang may carry out a certain function; that another member could

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[42]The court wrote Evidence Code section 351 in its ruling, but clearly was referring to section 352.

[43]On that same day, counsel for Pan filed a second Motion to Exclude Gang Evidence. (Supp A-2 CT 199.)

do something else, and the whole thing being a purpose to accomplish an end.

(15 RT 2101-2102.)

Appellant argued that the court's rationale for admission of the gang evidence bolstered his argument that his and Pan's trials should be severed. "That stuff is not relevant to him as an actual participant in the crime." (15 RT 2103.) Without denying that this was the case, the court stated: "The fact that something may not be relevant to one defendant does not necessarily mean that it's prejudicial to the other one when the other one is accused of the actual taking of the weapon and carrying it off someplace and killing people. So that argument is not terribly impressive." (*Ibid.*)[44]

The court explained that ". . . the meaning of this minute order was that [the prosecutor] can put on evidence, from somebody who is properly qualified, what is a street gang? What is the organization of a street gang? What are the different functions of street gangs? Do street gangs operate in a way that there may be different activities carried out by different members of that gang, all intending to accomplish one goal? And that's as clear as I know how to make it." (15 RT 2105.) In short, the evidence was relevant to show Pan's involvement and culpability for the crimes.

The court then proceeded with the hearing under Evidence Code section 402, at which Westminster Police Sergeant Marcus Frank testified

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[44]Of course, at the same time, the court observed, "I dare say I can bring – we could bring an average individual off the street and begin to query him as to just what is the intimate organization and conduct of a street gang and they couldn't tell you much more than 'hey, street gangs are a bunch of hoodlums who run the streets and do crimes.'" (15 RT 2105.) And, in fact, a number of potential jurors expressed concern about, experience with and hatred for gang members. (See, e.g. 8 RT 1040-1041, 1084; 9 RT 1288-1289; 10 RT 1299; 11 RT 1437.)

to determine the extent and relevance of the gang evidence the prosecutor intended to present. At the close of testimony trial counsel objected to the evidence under Evidence Code sections 1101, subdivision (a) and 352. (15 RT 2164-2165.) He argued that Frank's testimony simply was irrelevant against appellant. (15 RT 2163.) Accomplices would testify against appellant and they would be believed or not.

> [T]he only thing that gang evidence . . . would add to that is that it is evidence of uncharged misconduct, whose only logical connection to Mr. Chhoun with regard to this crime is to show that he is a bad person, a gang member who does these horrible things and is involved in a kind of organization that does these horrible things that the officer testified about this morning.

(15 RT 2164.)

The prosecutor countered the evidence was admissible against both defendants, "because this, particularly the area about the meaning and significance of handing over a gun, is tremendously unique to this expert's understanding and the jury needs to learn about it." (15 RT 2165.) He continued, "It applies to both Mr. Pan and to Mr. Chhoun, because it bears on the issues of knowledge of what the gun is going to be used for. Intent, premeditation, and so on, common scheme. All the things we talked about." (15 RT 2166.)

The court ruled that Frank was qualified to testify as a gang expert and able to testify about Asian gangs and their organization, positions of authority in the gangs and primary victims of Asian gangs. (15 RT 2224-2226.) The court also ruled that Frank could testify "as to the practice of the Asian gang members in the use of a gun to intimidate parents to force

their compliance by the use of children." (*Id.* at p. 2226.) [45] The court concluded:

> The jury can listen to what I have allowed or will allow in and form their own conclusions as to the meaning of these things in relation to the facts presented in this case as to the various participations [*sic*] of the defendants, whatever that may be.

(15 RT 2227.)

Prior to Frank's testimony, defense counsel argued and the prosecutor agreed that the jurors should be admonished that the gang evidence was introduced for a limited purpose. (15 RT 2239.) The parties agreed to the following admonition, which the court read:

> Ladies and gentlemen, you're going to hear some testimony now from this particular witness. This witness, I understand, is being called for a specific purpose and a very limited purpose. The law allows that some evidence occasionally may be admitted for limited purposes only, and you will be admonished to consider this evidence only for those limited purposes. This is such evidence. You're going to hear testimony concerning activities which at first may sound strange to you and not relevant to the case, but at some subsequent time I will admonish you and explain to you why the evidence is relevant, if it is, and why it has been admitted and the limited purpose for which you may consider it.

(16 RT 2245.)

Frank testified before the jurors that Asian gangs share common characteristics. (16 RT 2358-2359.) In contrast to "Occidental gangs," Asian gangs, in Frank's view, were more loose-knit organizations with fluid leadership roles, and they were much more likely to engage in sophisticated

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[45]The court ruled that testimony concerning witness intimidation by Asian gangs would not be allowed unless admissible evidence indicated that a witness had been intimidated. (15 RT 2227.)

crimes that involve a "great deal of planning and preparation." (16 RT 2260-2261, 2268.) Frank stated that one of the sophisticated crimes that Asian gangs engaged in was home invasion robberies. (16 RT 2269-2270, 2302-2303.)

Frank said that Asian gangs treat guns differently than do Occidental gangs. For Asian gangs, the gun is seen as very important, the "lifeblood" of the gang, and thus gang members generally only have access to or carry guns when they need that tool to accomplish specific crimes. Asian gangs used guns for crimes involving face-to-face conflict, such as home invasions. (16 RT 2272-2273.) They used a gun as a tool to intimidate their victims and overcome any resistance. (16 RT 2273.) Murders during such invasions, however, are rare. (16 RT 2273.) Asian gangs gain compliance of their victims by threatening or assaulting children or elderly residents. (16 RT 2274-2275.) He then recited three specific examples of such threats and assaults, *none* of which were alleged to have been committed or even known about by appellant: (1) gang members dangling a two-year-old boy out a second-story window by his ankles; (2) gang members repeatedly dunking the head of a one-year-old boy into a toilet; and (3) gang members pouring boiling water on a "79-year-old grandmother." (16 RT 2274-2276.)

Frank stated that Asian gangs select Asian victims because they know such victims keep money and jewelry in the home and adorn their children with jewelry. (16 RT 2287.) He further stated that Asian gangs select Asian victims because they know how such victims will react and how to intimidate them into not reporting crimes. (16 RT 2269.)

At the close of evidence and before closing arguments, the court read preliminary instructions to the jurors, including the following:

> Evidence has also been introduced that the defendants are members of the Tiny Rascals Gang. Such evidence, if believed, was not received and may not be considered by you to prove that they are persons of bad character or that they have a disposition to commit crimes.

(27 RT 3679; 3 CT 847.)

No additional instruction regarding gang testimony was given.

2. Expert Testimony Regarding Asian Gangs and Appellant's Gang Membership Was Irrelevant and Inadmissible for Any Legitimate Purpose

Gang evidence is character evidence, and its admissibility is subject to the same restrictive rules that govern the admission of character evidence generally. (See Evid. Code §1101, subd. (a).) As the Court in *People v. Avitia*, *supra*, 127 Cal.App.4th at p. 192, succinctly stated, "gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial then probative, and is not cumulative." In *Avitia*, the court concluded that evidence that gang graffiti was found in the defendant's bedroom should not have been admitted in the defendant's trial on a charge of grossly negligent discharge of a firearm, when no gang enhancement was alleged and there was no evidence the charged crime was related to any gang activity. (*Id.* at pp. 192-195.)

Given the highly inflammatory impact of gang testimony, this Court has condemned the introduction of such evidence if it is only *tangentially* relevant to the charged offenses. (*People v. Cox*, *supra*, 53 Cal.3d at p. 660.) In cases not involving gang enhancements, this Court has held that evidence of gang membership should not be admitted if its probative value is minimal. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) The trial court must "carefully scrutinize such evidence before admitting it." (*People*

v. Williams, *supra*, 16 Cal.4th at p. 193, and authorities cited therein; accord, *People v. Kennedy* (2005) 36 Cal.4th 595, 624, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Carter* (2003) 30 Cal.4th 1116, 1194; *People v. Gurule* (2002) 28 Cal.4th 557, 653; *People v. Cardenas, supra*, 31 Cal.3d at pp. 904-905; see also *People v. Thompson*, *supra*, 27 Cal.3d at p. 314 [admissibility of other crimes or misconduct under Evidence section 1101 must be "scrutinized with great care"].)

In carefully scrutinizing the admissibility of such evidence over objection, the court must first determine that it is actually relevant to an issue in dispute. (See Evid. Code, § 350 [only relevant evidence admissible]; *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [constitutional guarantee to fair trial requires "that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence"].) The mere fact of gang membership, without more, does not tend to prove any of the issues identified in Evidence Code section 1101, including motive. (See, e.g., *People v. Avitia*, *supra*, 127 Cal.App.4th at pp. 193-194; *People v. Perez*, *supra*, 114 Cal.App.3d at p. 477; *In re Wing Y.* (1977) 67 Cal.App.3d 69, 79.)

In this case, no gang enhancement pursuant to section 186.22 was charged, and the court observed that the Nguyen murders were "not apparently gang related," so admission of gang membership did not tend to prove any disputed fact regarding the substantive crimes charged. (3 RT 348.)[46] The court, in fact, intimated its understanding that the gang

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[46]The court elaborated that the Nguyens "were not gang members; there was no revenge of a gang; there was no drive-by shootings; there was no going out looking for opposing gang members." Consequently, it ruled

evidence was *not* relevant to appellant's case, observing that the fact that "something may not be relevant to one defendant does not necessarily mean that it's prejudicial to the other one." (15 RT 2103.)[47]

The court and prosecutor's attempts to identify some relevance of appellant's gang involvement to this case fell short. The prosecutor employed a shotgun approach, asserting, without explaining why, the gang evidence bore "on the issues of knowledge of what the gun [was] going to be used for. Intent, premeditation, and so on, common scheme. All the things we talked about." (15 RT 2166.) Knowledge, intent, premeditation and common scheme were not issues in the case against appellant. Appellant allegedly participated in an armed home invasion robbery to obtain money and jewelry. Gang membership and expert testimony on Asian gangs did not have any "tendency in reason" to prove a disputed fact. (See *United States v. Jobson* (6th Cir. 1996) 102 F.3d 214, 220 [knowledge was "scarcely an issue," given that the defendant was observed carrying the gun in his hand until abandoning it moments before his arrest].)

The trial court in its minute order acknowledged that the gang relationship and activity "at first analysis, seemingly has no relevance to" any element of the crimes charged, but explained that it could be relevant to prove the case against Pan. (3 CT 668.) As to appellant, however, the court stated only that "it would be of *some value* to the prosecution in

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that two gang-related murders could not be joined with this case. (3 RT 349-350.)

[47]The court stated that the gang evidence would not necessarily be prejudicial to appellant since he was the one accused of taking Pan's gun and killing people with it, ignoring the fact that, given the inherently prejudicial nature of gang involvement, such evidence may have improperly influenced the jurors' assessment of appellant's guilt.

establishing the necessary specific intent by both defendants to commit the robbery and burglary which resulted in the murders and which then may tend to prove motive." (*Ibid.*, italics added.) Again, appellant was charged with personally killing someone at point blank range during the commission of a robbery. Neither specific intent nor motive was at issue. Generally, courts "have admitted [gang] ... evidence when the very reason for the crime, usually murder, is gang related." (*People v. Sanchez* (1997) 58 Cal. App.4th 1435, 1449.) The motive for the crime here, financial gain, was apparent – and not gang related. Moreover, even if the motive *were* also gang related, motive is only relevant if it tends to add something to the case. Here, it did not tend to show that a home invasion robbery and murders were committed; it did not tend to prove that appellant participated in those offenses; and it did not tend to prove the mental state accompanying those offenses. Indeed, instead of gang involvement tending to prove the offense, the prosecutor tried to use the offense to prove gang involvement – for no reason other than to prejudice the case against appellant. This is the definition of tangential and minimal evidentiary value, and the evidence should have been excluded.

3. The Expert Gang Testimony Presented in this Case, Even If Admissible for Some Legitimate Purpose, Was Overbroad, Inflammatory and Prejudicial

No gang special circumstance or gang enhancement was charged in this case, and there was no dispute that the Nguyens were murdered during a home invasion conducted for the purpose of obtaining money and valuables. As a result, none of the testimony of the gang expert, who had no knowledge about the San Bernardino TRG gang and thus testified about Asian gangs generally, helped the jurors in assessing appellant's guilt of the crimes charged. However, even if this Court were to conclude that

evidence of appellant's gang membership and evidence concerning gang behavior were relevant to the issues of motive and intent, the prosecution presented additional inflammatory gang evidence that had no bearing on the underlying charges.

As part of his lengthy testimony about Asian street gangs generally, Frank described several instances of Asian gang members (not identified as TRG members or Californians) torturing children and elderly people at unidentified locations. The prosecutor began by asking Frank if there was, "some relationship to the use of intimidation in committing some of these home invasion robberies involving threats to children." (16 RT 2274.) Over defense objection that such information was irrelevant, Frank responded that in the cases he has investigated, Asian gang members have told him, "universally,"[48] that,

> the first way you try and gain compliance with the victim who is not coming forward with where money and jewelry is hidden is to go after the children in front of the parents. That . . . usually gets the victims to admit where the money or the jewelry in the house may be hidden. The younger the child they see, the more coercive they feel that can be with the parents. And so it's not at all uncommon to start with either the very youngest or the very oldest member of the household. And when I say the oldest, instances where grandparents have been assaulted in front of their children in order to get the victims to come forward with where money and jewelry may be hidden.

(16 RT 2274.)

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[48]Frank testified that he has investigated over 1700 Asian gang cases. (16 RT 2246.)

The prosecutor then asked Frank to relate specific examples of such assaults on children and the elderly in the service of intimidating victims, and Frank obliged:

> [FRANK]: We've had a two-year-old hung out by his ankles out of a second story window.
> [DEFENSE COUNSEL]: Your Honor, I am going to object to that and move to strike. It is irrelevant to this case.
> THE COURT: Overruled.
> [DEFENSE COUNSEL]: Your Honor, I'm going to ask to approach the sidebar.
> THE COURT: The motion to strike is denied. No. Move on, Mr. Whitney.
> [FRANK]: We've had another case where a one-year-old child was picked up and his head repeatedly dunked in the toilet.
> [DEFENSE COUNSEL]: Objection, irrelevant. Move to strike.
> THE COURT: The motion is denied. Overrule the objection.
> [FRANK]: Another instance is where we had a pan of boiling water on the stove that was poured over a 79-year-old grandmother.
> [DEFENSE COUNSEL]: Objection, irrelevant. Move to strike. Move for mistrial.
> THE COURT: The objection is denied. The motion's denied. And stop slamming your pencil on your table, Mr. Duncan, or you and I are going to go in chambers.

(16 RT 2274-2275.)

The trial court and counsel did go to chambers, where appellant's attorney objected to Frank's testimony "regarding crimes and so forth that he observed or heard about other gangs doing to other people in other situations," as irrelevant and improper character evidence. (16 RT 2277-2278.) The prosecutor argued that the three examples of torture he elicited were consistent with the trial court's ruling after Frank's Evidence Code section 402 hearing that Frank could testify to "the practice of the Asian

gang members in the use of a gun to intimidate parents to force their compliance by the use of children." (15 RT 2226.) Appellant also argued that the examples were compound, and any more would be prejudicial. The trial court ruled that the examples were sufficient and asked the prosecutor to move on. (16 RT 2280-2281.)

The prosecutor moved on by asking Frank to discuss more generally Asian gangs' use of violence against children to ensure compliance of their parents during a home invasion. "If [Asian gang members] are not satisfied with what goes on, then you may have a situation where a non-fatal shot may be fired that wounds one of the family members, a child, or whoever, to try and gain further compliance." (16 RT 2286.)

Clearly, just because *some* gang evidence is admissible at a trial does not mean any and all available evidence regarding gang culture and prior acts by any Asian gang is relevant and admissible. Prosecutors do not have a "right to over-prove their case or put on all the evidence that they have." (*People v. Williams* (2009) 170 Cal.App.4th 587, 610.) In other words, there can be such a thing as too much gang evidence. Given the indisputable prejudicial impact of gang evidence to a defendant's right to a fair trial, the trial court should assure that just enough, but no more, gang testimony is admitted than is relevant to prove the point in question. This is, in essence, the crux of an Evidence Code section 352 analysis: "just enough, but no more" is the tipping point beyond which prejudice outweighs probity.

In this case, the court ruled that gang evidence could be relevant to prove a conspiracy to commit the burglary and murders that would establish Pan's involvement, and would help establish "the necessary specific intent by both defendants to commit the robbery and burglary which resulted in

the murders and which then may tend to prove motive." (3 CT 668.) The court went on to hold that "the gang evidence should be minimal and only to the extent necessary to prove and explain the relationship between the defendants, the conduct of the defendant Pan, and the intent and motive of both defendants." (3 CT 669.) Thus, the ostensible theory of relevance of the torture examples appears to be that they shed some light on appellant's intent or motive in this case. They do not.

People v. Albarran, supra, 149 Cal.App.4th 214, is instructive. There, the defendant, a member of a gang, was charged with several gang enhancements and the trial court ruled that gang testimony was relevant to the issues of motive and intent.[49] The appellate court held that even if the gang evidence presented was generally relevant to motive and intent (and there, like here, it was not), "other extremely inflammatory gang evidence was admitted, which had no connection to the[] [charged] crimes." (*Id.* at p. 227.) This evidence included crimes committed by gang members other than the defendant, evidence that was "irrelevant to the underlying charges and obviously prejudicial." (*Id.* at pp. 227-228.)

Here, ample non-propensity evidence was presented to prove the very simple motive for the burglary: to steal money and valuables.

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[49] It should be noted that when a gang enhancement is charged, the prosecution, in attempting to prove the enhancement true, is permitted to establish a "pattern of criminal gang activity" as defined in section 186.22, subdivision (e); to do so, the prosecution may present expert testimony on criminal street gangs that is not relevant to the underlying crime. (*People v. Hernandez, supra,* 33 Cal.4th at pp. 1047-1048.) Such testimony may include crimes committed by other members of the gang. But no gang enhancement was charged here; that theory of admissibility is inapplicable. Here, any expert testimony was necessarily for the purpose of proving the crimes charged.

Accomplices Evans and Karol Tran testified to that motive and the supposedly independent witness Kunthea Sar confirmed as much. None of that testimony involved graphic examples of the torture of children. In addition, the torture examples were offered to describe an Asian gang method of obtaining valuables in a burglary. They were not offered to explain murder. Frank testified that murders during home invasions by Asian gangs were not common, and guns were used simply to intimidate. (16 RT 2273-2274.) The torture of unknown children by unknown assailants in other cases certainly did not provide anything useful regarding appellant's intent to commit the burglary or robbery in this case above and beyond what the jury could readily glean from testimony that appellant entered the Elm Avenue residence with a gun and demanded money.

One might conceivably argue that the examples illustrate that Asian gang members use violence against children or the elderly during home-invasion robberies, and that since, here, there was evidence a child victim sustained a gunshot wound to the arm at some point during a home invasion (though there was no evidence presented that the wound was intended as torture or sustained in an effort to force the Nguyens to comply with demands for money)[50] it is more likely that Asian gang members committed this home invasion. But that Asian gang members were responsible for the murders was not in dispute. The gang expert testimony was admitted only for motive or intent, not for identity.

In short, Frank's testimony that he had investigated cases where Asian gang members dangled a child out of a window or scalded a

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[50]In addition, accomplice Evans testified that Henry Nguyen was shot *before* Dennis, suggesting Dennis was not shot in order to force anyone to comply with the intruders' demands. (17 RT 2440-2441.)

grandmother did not support any reasonable inference that would prove a disputed fact in this case, but rather allowed "unreasonable inferences to be made by the trier of fact that the defendant was guilty of the offense charged on the theory of 'guilt by association.'" (*People v. Perez*, *supra*, 114 Cal.App.3d at p. 477 [reversible error to admit expert gang testimony to show that appellant and codefendant were members of the same gang where appellant had already been identified as one of the perpetrators by an eyewitness].)

4. The Gang Evidence Was More Prejudicial than Probative

Even if this Court were to find that the gang evidence was by some measure relevant to the charged offenses, the trial court certainly erred by admitting the evidence over appellant's objection that its minimal probative value was substantially outweighed by its prejudicial effect. (Evid. Code, § 352.) This Court has repeatedly cautioned that gang evidence is, by its nature, highly inflammatory and must never be admitted where its probative value is minimal or merely cumulative of other evidence. (*People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-907; *People v. Cox*, *supra*, 53 Cal.3d at p. 660.) Improperly admitted evidence about gangs can be "catastrophically prejudicial." (*In re Wing Y.*, *supra*, 67 Cal.App.3d at p. 76.) The prejudicial effect of the gang evidence presented in this case was extremely disproportionate to its, at best, minimal probative value.

The ostensible probative value of appellant's gang membership was to show his knowledge of what the gun he brought to an armed robbery would be used for; his motive in committing a home invasion robbery; and his intent to kill when he allegedly shot Mr. Nguyen at point blank range. To categorize the value of this evidence as minimal is an overstatement.

When the negligible legitimate value of the gang evidence is weighed against the catastrophic prejudice of its admission, the trial court's error in denying the in limine motion to exclude the gang evidence is apparent.

As explained more fully above, Frank did not merely testify as to the organization and operation of Asian street gangs. He also gave highly inflammatory testimony regarding torture that had nothing to do with TRG, appellant or this case. (15 RT 2275.)

Frank also described Asian gangs and their members in a manner designed to inflame, frighten and prejudice the jurors:

> A gang has face. An individual in a gang has face. It is incumbent in the Asian gang subculture to continually try to build up one's face, build up one's reputation, build up one's image within the gang culture. Within the Asian gang subculture, that's most often accomplished by being the largest, the badest [*sic*], the meanest, being the most sophisticated, having access to the most sophisticated weapons, being the best planner.

(15 RT 2255.)

He testified that Asian gangs "roam virtually at will" across North America and that "[u]nfortunately, California has become pretty much the training ground for not only for the Southeast Asian gang members, but now we're currently finding also, for the Chinese and Korean street gang members." (15 RT 2256.)

Frank's testimony carries the type of "reverberating clang" disapproved of by the Court in *United States v. Merriweather* (6th Cir. 1996) 78 F.3d 1070, 1077.) He gave the type of testimony that jurors cannot disregard and the emotional bias thereby evoked against appellant is precisely the kind of prejudice that Evidence Code section 352 is designed to avoid. (See, e.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 134 [the

prejudice referred to in Evidence Code section 352 is evidence "that uniquely tends to evoke an emotional bias against a party as an individual"].) The prejudicial value of the testimony far outweighed its minimal probative value, and the evidence should not have been admitted.

E. The Prejudice of the Prior Crime and Gang Evidence Was Not Minimized by the Limiting Instructions Given

As the United States Supreme Court has recognized, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." (*Bruton v. United States*, *supra*, 391 U.S. at p. 135.) "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440, 453 (conc. opn. of Jackson, J., citation omitted.)

This Court, and even the trial court below, have similarly recognized that sometimes an admonition cannot adequately protect a defendant's rights. (See *People v. Aranda* (1965) 63 Cal.2d 518, 525-530; *People v. Hill* (1998) 17 Cal.4th 800, 845-846 ["It has been truly said: 'You can't unring a bell'" (citation omitted)]; 27 RT 3620 ["I admit the weakness sometimes of those tools [limiting instructions], but they are still there, still authorized, and still what we have to use"].) Here, no limiting instruction could unring the prejudicial bell of appellant's gang involvement and commission of two prior murders days before the charged multiple murder in San Bernardino.

Moreover, even if the magnitude of the risk that the jurors would use the gang evidence for an improper purpose could have been reduced by a

proper limiting instruction, no such instruction was given in this case. The trial court twice admonished the jurors about that for which the gang evidence could *not* be used. Before Frank's testimony the court instructed the jurors that the witness would testify "concerning activities which at first may sound strange to you and not relevant to the case, *but at some subsequent time I will admonish you and explain to you why the evidence is relevant, if it is, and why it has been admitted and the limited purpose for which you may consider it.*" (15 RT 2245, italics added.) Before closing arguments the court instructed the jurors, "Evidence has also been introduced that the defendants are members of the Tiny Rascals Gang. Such evidence, if believed, was not received and may not be considered by you to prove that they are persons of bad character or that they have a disposition to commit crimes." (27 RT 3679.)

The court, however, never informed the jurors that the evidence could not be used to conclude that appellant committed the crimes charged, and it never informed the jurors of that for which the evidence *could be used.* Despite its earlier assurance to the jurors, the court neither explained why the evidence was relevant nor its limited purpose. The only other instruction it gave on the gang testimony told the jurors that appellant's membership in the TRG could not be considered to prove he was a "person of bad character" or had "a disposition to commit crimes." (27 RT 3679.) Left without guidance as to the relevance of the gang testimony, the jurors were left to assume it relevant as to whatever they determined, save that appellant was a person of bad character or criminal disposition.

A virtually identical, but slightly less egregious, situation was presented in *United States v. Jobson, supra,* 102 F.3d at p. 222, where the reviewing court concluded that the trial court's instructions, which did not

identify the legitimate purposes for which the admitted gang evidence could be considered, were "inadequate to safeguard against the impermissible use of gang evidence."

The trial court in *United States v. Jobson* had instructed the jurors that other crimes evidence could not be considered "as evidence that the defendant committed the crime that he is on trial for now," but only in deciding "the purposes stated to you." (102 F.3d at p. 222.) The panel found the instruction inadequate:

> While the instructions indicate that the jury should consider the evidence only "for the purposes stated to you," the court never told the jury what these purposes were. In addition, no limiting instructions were given at the time the gang evidence was admitted. This is not a case, moreover, where the jurors would necessarily be aware of the other acts to which the court was referring so that the error could be found to be harmless. It is not enough for a district court to instruct jurors not to consider [other crimes] evidence as "evidence that the defendant committed the crime that he is on trial for now." The district court must expressly indicate the *precise purpose* for the other acts evidence. In this case, the District Court was obliged to instruct the jurors that they could consider the evidence of defendant's gang membership only to establish his opportunity to possess the firearm. Given the court's failure to provide an effective limiting instruction, the jurors "could not have had the vaguest notion of the limited proper purpose for which they might have considered the evidence." We must assume, then, that the jury improperly considered the gang evidence on the direct issue of defendant's guilt, which is a clear violation of Rule 404(b).

(*United States v. Jobson*, *supra*, 102 F.3d at 222, italics in original; internal citations omitted.)

The trial court here also failed to explain the precise purpose for which the gang evidence was admitted, and given that there was no

legitimate basis for its admission, we must assume that the jurors "improperly considered the gang evidence on the direct issue of defendant's guilt."

F. The Erroneous Admission of Prior Murders and Gang Evidence Was Prejudicial, Violated Appellant's State and Federal Constitutional Rights to Due Process, a Fair Trial, and Reliable Determinations of Guilt and Penalty and Requires That the Judgment Be Reversed

Where prior crimes or gang membership is, in fact, irrelevant to any legitimate issue in the case, the irrelevance itself creates tremendous prejudice because the "only inference the jury" can draw from it is that the defendant has a bad character and criminal disposition. (*McKinney v. Rees, supra*, 993 F.2d at pp. 1382-1383; see also *People v. Cardenas, supra*, 31 Cal.3d at pp. 904-905 [where gang evidence irrelevant to legitimate issue, irrelevance creates a "real danger" that the jury will infer criminal disposition from it]; *People v. Perez, supra*, 114 Cal.App.3d at p. 477 [where gang membership irrelevant, admission allows unreasonable inferences of guilt by association and criminal disposition].) Indeed, the prejudicial effect of such an impermissible inference may be so great as to deprive the defendant of his right to a fair trial. (*McKinney v. Rees, supra*, at pp. 1384-1385; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920 ["if there are no permissible inferences the jury may draw" from the other misconduct evidence, its admission can violate due process]; *Lesko v. Owens* (3d Cir. 1989) 881 F.2d 44, 52 [due process violation arises from admission of other crimes evidence with probative value that is "conspicuously outweighed by its inflammatory content"]; see also *People v. Partida, supra*, 37 Cal.4th at pp. 436-438 [erroneous admission of gang evidence may render trial fundamentally unfair in violation of due process];

People v. Albarran, supra, 149 Cal.App.4th at p. 232 ["admission of [gang] evidence has violated federal due process and rendered the defendant's trial fundamentally unfair"]; *People v. Valentine* (1986) 42 Cal.3d 170, 177 [admission of irrelevant other crimes evidence may violate due process]; *Bruton v. United States, supra,* 391 U.S. at p. 131, fn. 6 [constitutional guarantee to fair trial requires "that a jury only consider relevant and competent evidence bearing on the issue of guilt or innocence"]; *Brinegar v. United States* (1949) 338 U.S. 160, 173-174 [rule against propensity evidence is historically grounded in fairness and one consistent with proof beyond reasonable doubt].)

Here, the other crimes evidence was of the most prejudicial kind: murders,[51] membership in a violent street gang, and testimony regarding torture of the young and elderly. In addition, evidence was introduced not just of the Sacramento crimes but also the tragic impact the killings had on the victims' family. Hoa Dieu Le described seeing his father on the ground covered in blood and bleeding from his mouth. (13 RT 1777, 1780.) Meituyet Le testified that she heard a shot and saw her mother drop to the

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[51]Empirical evidence establishes that jurors are most likely to misuse a prior conviction admitted for impeachment as propensity evidence when the defendant is on trial for the same offense. (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, 38 [discussing study showing conviction rate was 75 percent for defendants impeached with prior conviction for the same offense and 60 percent when impeached with a prior conviction for perjury].) The risk of misuse was expressly recognized by this Court in *People v. Beagle* (1972) 6 Cal.3d 441, 453, which cautioned that "[w]here multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.'"

ground screaming. She saw her grandfather lying in a pool of blood and her uncle cradling his head. (13 RT 1797-1798.) She described running to reach her father and her neighbors trying to stop her. "I was screaming and then kicking them away and screaming for my dad." (13 RT 1798-1799.) Amie Le tearfully testified that she screamed to her mother to shut the door and then ran to a friend's apartment, taking two young children with her. (13 RT 1823, 1825-1826.) She explained that the friend was afraid so would not open the door for Le's brother. "[M]e and my sister were begging her to let my brother in, because they were going to shoot my brother." (13 RT 1827.)

In addition to the emotion-packed testimony of the victims' family members, presentation of the Sacramento evidence resulted in the jury's exposure to victim-witness advocates, which further enhanced the prejudicial impact of the other crimes evidence.[52] (See Arg. III, *infra*, regarding victim-impact witnesses.) Moreover, each of these pieces of evidence corroborated and supported each other, compounding the prejudicial effect of the error exponentially. The evidence can fairly be "classified as overkill." (*People v. Albarran, supra*, 149 Cal.App.4th at p. 228.)

The jurors' ability to compartmentalize this evidence was put to the test by the defense presented. As even defense counsel acknowledged during closing argument, it would not take the jury "much longer than 10

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[52]Prior to witness Mei Tuyet Le's testimony the witness advocate sat behind her and the court admonished the jury that the advocate's presence was allowed for moral support, that the individual was not to attempt to influence or confer with the testimony, but simply be there for the assurance the advocate provided to the witness. (19 RT 2708.)

seconds," to determine it was more likely than not appellant had something to do with the crime. (28 RT 3721.) The prosecutor echoed that sentiment. "Nobody has, apparently, disputed that [appellant] was involved in this robbery, this burglary and that people died. Nobody's disputing that." (28 RT 3735.) Instead, the defense asked the jurors to find, not that appellant was not guilty of the charged offenses, but that the prosecution's evidence was insufficiently corroborated accomplice testimony. Under any circumstance, this is a tremendously difficult and nuanced distinction to ask of jurors. That is, although the accused might be guilty, the jurors should acquit him because the prosecution has not met a burden, a defense that the jurors might well view as a "legal technicality." Here, the jurors' ability properly to parse and evaluate the legitimate evidence was all but impossible given the evidence of other murders, gang involvement, the need for witness advocates and inflammatory testimony regarding widespread gang activity and gang members' use of torture.

Moreover, as this was a trial dominated by accomplice testimony, the prosecution witnesses were severely compromised. The primary witnesses, Evans and Karol Tran, were TRG members who participated in the robbery and murders and made deals to testify against appellant in exchange for lighter sentences. The few non-accomplice witnesses fell into two categories, the trivial (for example, Lilah Garcia discovered the aftermath, but had no information about the crimes; David Alvarado heard gunshots and later saw a red car, but did not connect the car to the shooting), and the unreliable (such as the Ibarra brothers, both of whom were gang members

and dismissed by the prosecutor in his opening statement[53]; Milazo, a jailhouse informant; and Kunthea Sar, a TRG partisan present for the formation of the robbery team who profited from robbery proceeds). The one exception was the "gang expert" Marcus Frank.

As an independent Asian gang expert untainted by either criminality or clearly self-serving motives, Frank was the prosecution's star non-accomplice witness. His testimony took an entire day of trial. In other words, the prosecution understood just how important and necessary Frank's testimony was to secure guilty verdicts. And that is what makes his graphic and inflammatory statements so prejudicial.

Prejudice in this context does not mean that the evidence was damaging to appellant's case in that it tended to prove guilt; it means that the evidence uniquely tended to evoke an emotional bias against the defendant. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) To state that the examples of Asian gang members torturing children and grandmothers as part of standard operating procedure in home invasion robberies such as the one at issue "tends to evoke an emotional bias against the defendant," an Asian gang member, belabors the obvious. The jurors, having heard that Asian gang members tortured a one-year-old child by repeatedly dunking

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[53]The prosecutor told the jurors:

> There will be some statements made by both Jonathan and Marshall Ibarra, which quite frankly, I have a lot of problems with. [¶] For example, both of them say, I think, that Pan admitted doing the shootings at Elm Street and so on. And we just don't believe that is true. We think that what I told you earlier is what the evidence will show. [¶] So we think he has it mixed up.

(14 RT 1919.)

his head in a toilet, would tend to look unfavorably at appellant, an Asian gang member.

Frank's discussion of these outrageous incidents demonized appellant by associating him with the actions of unknown individuals who shared an incredibly broad category with him: "Asian gang member." Informing the jury that three of the thousands of Asian gang members active in the United States[54] committed heinous acts of torture shed no light on appellant's intent or motive in this case, but it was excellent fuel for inflaming the jury's attitudes toward Asian gang members as a class, and for assigning criminal propensity to a member of that class – appellant.

Frank's "expert" testimony was nothing more than inadmissible character evidence; the relation of the assaults tarred appellant with a brush of criminal disposition and propensity which is impossible to defend against. (Evid. Code, § 1101, subd. (a).) There was no connection between the stories about Asian gang members torturing children and the elderly and the circumstances of this case. However, because the evidence linked appellant to the horrific crimes of other Asian gang members, it likely led the jurors to believe that appellant had the propensity to commit the kind of crimes for which he was on trial simply because of his association with the gang – an inference bolstered by the other extensive propensity evidence offered as to Asian gangs generally, and TRG specifically (including the Sacramento evidence). This propensity evidence was inherently prejudicial.

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[54] The 1996 National Youth Gang Survey found there were over 846,000 gang members in the United States at that time, of which five percent, over 42,000 members, were Asian. (<http://www.ojjdp.gov/pubs/96natyouthgangsrvy/surv.html> as of November 25, 2013.)

(*People v. Thompson*, *supra*, 27 Cal.3d at pp. 317-318.)

The improper admission of this bad-character evidence further violated appellant's constitutionally-protected liberty interest in the correct application of state law. (U.S. Const., 5th and 14th Amends.; see *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1385-1386 [rule against the use of character evidence is "rooted in fundamental fairness and due process concerns."] And because the gang evidence was irrelevant to any issues at guilt and otherwise inadmissible at the penalty trial, the evidence renders appellant's death sentence unreliable, in violation of his Eighth Amendment rights. (*Beck v. Alabama, supra,* 447 U.S. at p. 638.)

Furthermore, even in the absence of federal constitutional error, reversal is required on state grounds under the *Watson* standard of prejudice. (See, e.g., *People v. Malone* (1988) 47 Cal.3d 1, 22, applying prejudice standard established in *People v. Watson* (1956) 46 Cal.2d 818, to character evidence error.) Under the *Watson* standard, reversal is required if it is "reasonably probable" that the result at trial would have been different. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) A reasonable probability "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, citation omitted; *In re Willon* (1996) 47 Cal.App.4th 1080, 1097-1098.) Here, under either the federal or state standard, reversal is required.

II.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO USE VICTIM WITNESS ADVOCATES IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS

The prosecution's use of un-vetted and unnecessary victim witness advocates violated appellant's constitutional rights, eroded the presumption of innocence and impermissibly encroached on his confrontation clause and due process clause rights. Over defense objection, the prosecution used victim witness advocates to accompany or support certain prosecution witnesses while they testified. The prosecutor failed to give notice of this tactic; the trial court failed to hold hearings, failed to question the witnesses themselves as to their desire to have support persons, failed to determine the necessity of the victim witness advocates, let alone their identity, and failed to admonish the advocates as required. Permitting the witness advocates to remain in the courtroom during crucial testimony without any showing of need violated both the statute and appellant's rights to due process and confrontation. (U.S. Const. Amends. 6 & 14; § 868.5; *Maryland v. Craig* (1990) 497 U.S. 836, 855-856; *People v. Adams* (1993) 19 Cal.App.4th 412, 444, as modified.)

A. The Trial Court Accepted the Presence of Witness Advocates at Trial Without Any Individualized Showing of Need

Two witnesses who testified at a hearing outside the presence of the jurors regarding the Sacramento offense, Mei Tuyet Le and Amie Le, were accompanied by victim witness advocates supplied by the District Attorneys' office. (13 RT 1801, 1836.) No discussion with the court regarding the need for such witnesses appeared to take place prior to the testimony. Defense counsel remarked at the end of Amie Le's testimony

that the record should reflect she was accompanied by a witness advocate supplied by the prosecutor, to which the trial court responded, "She was. At least some lady was with her." (13 RT 1836.)

During the guilt phase trial before the jurors, the prosecution witness Lilah Garcia was likewise accompanied by a victim witness advocate. The advocate was a member of the District Attorney's office and was wearing a badge indicating her allegiance. (14 RT 1989.) Garcia was accompanied to the witness stand by the victim witness advocate who then stood by Garcia's right shoulder between the witness and the first juror. (14 RT 1988-1993.)

Appellant objected to the presence of the victim witness advocate, and an in chambers conference was held outside the presence of the jury. Appellant argued that the district attorney failed to make an application to the court before the witness took the stand. (14 RT 1988.) The prosecutor stated that the witness was afraid and had asked for someone to be with her. The trial court did not ask Garcia if she wanted an advocate, and, if so, why, but rather stated that the witness advocate could not interfere with the witness, had to remove her badge, was not to consult with the witness during testimony, and that the jurors were not to know who she was.

> I have no idea who this lady is. She just came up with the witness. I intended to find out and clarify why she was there. I now know who she is. I know now why she's there. We'll have her be seated on a chair substantially behind the witness so that she's not interfering with the jury visiting – viewing the witness. There will be no indication as to who she is, why she's there or anything else, other than she's just simply there. The badge, if she's wearing one, will be removed. And she'll not be allowed to consult with the witness at any time during the course of the testimony. *But the fact that she's there and the jury doesn't know who she is, I didn't know who she was,*

is inconsequential, as far as I'm concerned.

(14 RT 1989-1990, italics added.)

The trial court's indifference in the face of an unidentified witness advocate accompanying a testifying witness without a prior finding of need or the required admonishment appears to stem from the trial court's belief that such appearances were common practice in San Bernardino. Having unidentified support persons accompany witnesses to the stand was, according to the trial court, something that "happens all the time." (14 RT 1991.)

The trial court, rather than hear evidence to determine whether this specific witness needed this advocate, accepted the prosecutor's offer of proof that Garcia was scared of the defendants. (14 RT 1991-1992.) Trial counsel, having heard the trial court make clear its position ("the fact that [the advocate is] there and the jury doesn't know who she is, I didn't know who she was, is inconsequential"), offered to waive a hearing on the necessity of an advocate for that particular witness, but requested notice in the future for possible hearings on the need for such advocates. (14 RT 1990-1991.) The trial court ultimately held that the witness advocate could sit,

> substantially behind the witness very unobtrusively. And it happens all the time. Based on [the prosecutor's] representation, I will accept that as an offer of proof as to what she would tell me. And with that, I'll make the necessary finding that the presence of this individual, whomever she may be, has been adequately established, a need for that.

(14 RT 1991-1992.)

The following day, May 12, 1999, defense counsel continued their objection to the use of victim witness advocates, noting that the previous

day, an advocate stood behind the witness within two or three feet of the jury box and then during another witnesses's testimony an advocate sat in the first row of the audience. (15 RT 2237.) The second witness advocate was not identified or admonished on the record, nor did the court make the required case specific finding of need.

On May 18, 1999, the court and counsel discussed witness advocates for Mei Tuyet and Amie Le, who had had such advocates present during an earlier Evidence Code section 402 hearing. (18 RT 2688-2690; 3 CT 761-762.) The prosecution represented that the two wanted victim advocates present during their testimony before the jurors, but neither Mei nor Amie was present to make such a claim for herself. (18 RT 2688-2689.) The trial court stated that it had read section 868.5 and, "the only admonition I got out of that section says: In all cases the Court shall admonish the support person or persons not to prompt, sway, or influence the witness in any way." (18 RT 2689.) Defense counsel agreed that admonishment was the only one necessary, but argued for an additional admonishment directed at the jury, which the trial court interrupted, stating, "I am not going to admonish anybody unless there is some evidence this person is supporting, or prompting, swaying, or influencing." (18 RT 2689.)

Trial counsel noted that a uniformed bailiff that had sat behind a witness earlier was explainable, but not so the witness advocates, and counsel requested that the jury be made aware who the advocate was, and that the advocate was an employee of the prosecutor's office. (18 RT 2690.) The trial court denied the request in favor of "simply tell[ing] the jury that this individual, the witness, has requested that there be a person in the courtroom pending her testimony to act as liaison support and that this

individual is in that capacity." (18 RT 2690.) Again, the court failed to conduct a hearing into the need of the witnesses for advocates and the extent of the infringement of appellant's confrontation rights, but rather relied upon the prosecutor's assertion that the witnesses desired victim witness advocates.

Prior to Mei Tuyet Le's testimony the witness advocate sat behind her and the court admonished the jurors that the advocate's presence was allowed for moral support. The individual was not to attempt to influence or confer with the testimony, but simply be there to assure the witness. (19 RT 2708-2709.) The prosecutor supplied a witness advocate for Amie Le during the Evidence Code section 402 hearing, but there is nothing in the record to determine whether or not she had an advocate during her testimony before the jurors.

Finally, over defense objection, Shirley Amador was permitted to serve as a support person for Karol Tran and remain in the courtroom during Tran's testimony. (25 RT 3386-3387; 3 CT 787-788.) The prosecutor again failed to give notice to the trial court or defense that Amador would serve as a support person; the defense asked for an in-chambers discussion once Amador was spotted sitting behind the prosecutor, inside the railing. (25 RT 3386.) The prosecutor initially said that Amador was serving as a proxy for her husband who was Tran's defense lawyer, before stating Amador was present to provide moral support for Tran. (25 RT 3386.)

Karol Tran was represented by Robert Amador in the robbery, burglary and murder charges stemming from the Elm Avenue crime. Shirley Amador was Tran's defense investigator. Shirley Amador was a potential witness in appellant's trial. She had participated in a series of

conferences with Tran's counsel, the district attorney and law enforcement; she had provided discovery, including reports and interviews of Karol Tran; and she had written letters to the District Attorney supporting a reduction in Karol Tran's conviction from first to second degree murder. (23 RT 3195-3196, 3220, 3229-3230; 24 RT 3372-3733; 25 RT 3386-3387; 33 RT4474, 4505, 4515; 3 CT 787-788.)

The trial court once again erroneously failed to conduct an inquiry into the need for a support person for Karol Tran. It simply overruled the defense objection to her presence as an unidentified support witness. (25 RT 3387.) Further, the court permitted Amador to act in the role of support person despite the fact Amador herself was a prospective witness and thus potentially subject to the restrictions set forth in subdivisions (b) and (c) of section 868.5. Finally, the court failed to admonish Amador to refrain from prompting, swaying, or influencing the witness in any way as required by section 868.5, subdivision (b).

According to appellant's trial counsel, Karol Tran and Shirley Amador mouthed words and signaled to each other during Tran's testimony. (25 RT 3436-3437.) Apparently, Shirley Amador was looking at the preliminary hearing transcript while Karol Tran was on the stand. (25 RT 3437.) Karol Tran's answers to defense counsel's questions about the Elm Avenue house were inconsistent when the signaling took place, as follows:

Mr. Duncan: So you were the only one that knew where it was, weren't you?
Karol Tran: Yeah.
Mr. Duncan: Okay.
Karol Tran: No.
Mr. Duncan: Well, which is it?
Karol Tran: No.
Mr. Duncan: No. Okay. Somebody else knew where it was?

Karol Tran: Yes.
Mr. Duncan: Because you told them?
Karol Tran: No.
Mr. Duncan: Excuse me?
Mr. Duncan: Your Honor, I would appreciate if we didn't have any signaling or coaching of the witness.
The Court: Who is coaching?
Mr. Duncan: This individual here and the witness are conversing.
Ms. Amador: I didn't say anything.
The Court: Whatever, enough said. Go ahead.

(25 RT 3435-3436.)

Again, defense counsel's objection to the prosecution's unannounced use of Shirley Amador as a witness advocate for Karol Tran was overruled without comment by the trial court. (25 RT 3387.) At a later sidebar out of the presence of the jury all parties discussed the incident. It was noted that Shirley Amador was consulting the preliminary hearing testimony and apparently mouthing some words, though possibly to her husband. Karol Tran may have been attempting to communicate with Ms. Amador or with Mr. Amador, as Mr. Amador had told Tran she could ask the court to allow her to speak to him during her testimony if needed. (25 RT 3436-3438.) The prosecutor explained that the problem was where Ms. Amador was seated, "the problem is they are right in the same line of sight. It would be better to have Shirley sit somewhere else." (25 RT 3438.)

B. The Use of Witness Advocates is Limited

Section 868.5 allows for a prosecution witness in cases involving certain enumerated crimes to have one or two support persons of the witness's own choosing present while the witness is testifying, one of whom may accompany the witness to the stand. (*People v. Myles* (2012) 53 Cal.4th 1181, 1214.) The principal concern that led to enactment of the statute was minimizing the trauma suffered by a child witness in a sexual

offense trial. (*People v. Kabonic* (1986) 177 Cal.App.3d 487, 495.) Since the original enactment of the statute, it has been amended to expand the list of crimes to which it applies and to eliminate the requirement that the prosecuting witness be a minor. (*People v Adams*, *supra*, 19 Cal.App.4th at pp. 442-443.) The statute also requires that in all cases the judge must admonish the support person to not prompt, sway, or influence the witness in any way. (§ 868.5, subd. (b).)

The confrontation clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." "[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (*Coy v. Iowa* (1988) 487 U.S. 1012, 1016.) The Supreme Court in *Coy* traced the history of the right to confront one's accusers up to modern times, quoting President Eisenhower, "if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow." (*Coy v. Iowa*, *supra*, 487 U.S. at p. 1018.) Thus, in *Coy*, the Supreme Court found that the placement of a screen in the courtroom between the defendant and the accusing child sexual assault victims during testimony violated the defendant's Sixth Amendment right to confrontation. (*Id.* at p. 1020.)

The confrontation clause does not, however, guarantee defendants the absolute right to a face-to-face meeting with the witnesses against them. (*Maryland v. Craig*, *supra*, 497 U.S. at p. 844.) In *Maryland v. Craig*, the Court analyzed the use of closed-circuit television to allow child abuse victim witnesses to testify and noted that the procedure left intact most of the elements of the confrontation right, such as contemporaneous

cross-examination and the ability of the judge, jury and defendant to observe the demeanor of the witness, and thus did not "impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." (*Id.* at pp. 851-852.) Nevertheless, the Court held that a trial court must make a case-specific finding of necessity before utilizing a witness procedure that impacts confrontation. (*Id.* at pp. 855-856.)

Section 868.5, subdivision (b), by providing a buffer between the defendant and his accuser, necessarily infringes upon a defendant's Sixth Amendment right of confrontation and thus requires a case-specific finding of need before it can be utilized. (*People v. Adams*, *supra*, 19 Cal.App.4th at pp. 433, 437-444; see *People v. Lord* (1994) 30 Cal.App.4th 1718, 1722; accord *Maryland v. Craig*, *supra*, 497 U.S. at pp. 855-856; *Coy v. Iowa*, *supra*, 487 U.S. at p. 1021.) "The presence of a second person at the stand affects the presentation of demeanor evidence by changing the dynamics of the testimonial experience for the witness." (*People v. Adams*, *supra*, 19 Cal.App.4th at p. 438.) Confrontation is essential to fairness; the cross-examination experience may "upset the truthful rape victim . . . ; but by the same token [it] may confound and undo the false accuser . . . ." (*Coy v. Iowa*, *supra*, 487 U.S. at p. 1020.) The very idea that the support person's presence will be helpful assumes that the witness's performance, including the witness's demeanor, will be affected.

The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. (*Ibid.*)

This Court has found that the presence of a support person "does not *necessarily* bolster the witnesses' testimony," and thus the mere presence of a support person alone does not constitute a due process or confrontation clause violation per se. (*People v. Myles*, *supra*, 53 Cal.4th at p. 1214, italics in original.) In *Myles*, however, the defendant did not object at trial to the presence of the witness advocate and thus forfeited his claim. This Court ultimately reviewed the claim nonetheless and found the defendant did not suffer prejudice from the presence of a sole witness advocate. (*Id.* at pp. 1214-1215.)

In *People v. Adams*, the reviewing court examined the potential confrontation problems posed by witness advocates: the support person's presence can distract the jury from its focus on the witness alone; the mere presence of a support person enhances the witness's credibility; and the support person's own demeanor, which will not show in the appellate record, can influence the jury "and operate as unsworn opinion evidence of the truth of the charges." (*People v. Adams*, *supra*, 19 Cal.App.4th at pp. 439–441.) These concerns are particularly salient when the witness advocates are in fact agents of the prosecutor.

Infringements on the confrontation clause "must be interpreted in the context of the necessities of trial and the adversary process." (*Maryland v. Craig*, *supra*, 497 U.S. at p. 580.) Narrowly-tailored infringements on a defendant's Sixth Amendment rights are permissible if they serve a compelling state interest, such as protecting testifying child victims of sexual abuse. (*Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 607.) Relying on United States Supreme Court decisions regarding witness procedures in *Maryland v. Craig*, *supra*, 497 U.S. 836, and *Coy v. Iowa*, *supra*, 487 U.S. 1012, the court of appeal in *People v. Adams* read

into section 868.5 a constitutional requirement that the prosecution show a need that the complaining witness desires and would be helped by the support person. (*People v. Adams*, *supra*, 19 Cal.App.4th at pp. 443–444; accord, *People v. Patten* (1992) 9 Cal.App.4th 1718, 1733 [finding is required where circumstances risk influencing jury, but not where unidentified support person passively sits in audience].)

Allowing the presence of an advocate without an individualized showing of need violates a defendant's due process rights and the confrontation clause. (*People v. Adams*, *supra*, 19 Cal.App.4th at pp. 442–444.) If the complaining witness does not need a support person, there is no legitimate reason for the support person to be present – and therefore no valid interest that might outweigh interference with the defendant's rights. If a witness does need protection, the means chosen must be narrowly tailored to minimize the intrusion on the truth-finding function of the jury. (*Ibid.*; see also *People v. Patten*, *supra*, 9 Cal.App.4th at p. 1733.)

In *People v. Gonzalez* (2012) 54 Cal.4th 1234, 1268, this Court indicated the type of case-specific inquiry of need a trial court should conduct. There, the defendant challenged the trial court's failure to make a sufficient finding of need for an advocate for a child witness. This Court rejected defendant's claim, observing that the trial court had "made extensive findings that the child would be traumatized if he were made to testify at trial," and noted that the defendant "does not dispute the vulnerability of the young witness." (*People v. Gonzalez*, *supra*, 54 Cal.4th at p. 1268.)

Procedures that affect a defendant's exercise of his Sixth Amendment right to confront witnesses against him "would surely be allowed only when necessary to further an important public policy." (*Coy*

v. Iowa, *supra*, 487 U.S. at p. 1021.) In *Adams*, the appellate court found that, "[a]s regards child witnesses, the state has a transcendent interest in protecting the welfare of children." (*People v. Adams*, *supra*, 19 Cal.App.4th at p. 442, internal citations omitted.) In *People v. Patten*, *supra*, 9 Cal.App.4th at p. 1726, the appellate court similarly noted that, "[t]he state's interest in safeguarding the physical and psychological well-being of a minor or victim of sexual abuse can be a compelling one."

C. The Prosecutor's Witness Advocates Served No Compelling State Interest, and the Trial Court Failure's to Follow Procedure and Determine the Necessity of the Advocates Violated Appellant's Constitutional Rights

1. The Trial Court Failed to Follow the Procedural Requirements of Section 868.5

The trial court did not attempt to determine the need for the various witness advocates but simply accepted without question the prosecutor's characterizations of need – Garcia was scared; Karol Tran needed moral support. Use of a procedure that infringes on the confrontation clause may not be based on a "generalized finding underlying . . . a statute;" such a procedure must involve "individualized findings that these particular witnesses needed special protection." (*Coy v. Iowa*, *supra*, 487 U.S. at p. 1021.) As part of the individualized balancing test courts must undertake to determine the need for witness advocates, "the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimus, i.e., more than 'mere nervousness or excitement, or some *reluctance to testify*.'" (*People v. Adams*, *supra*, 19 Cal.App.4th at p. 443, quoting *Maryland v. Craig*, *supra*, 497 U.S. at p. 856, italics added.)

In *Maryland v. Craig*, the Court noted that the state provided expert testimony as to how the trauma of facing the defendant in the courtroom would cause the child-victim witnesses so much trauma they would be unable to speak, and concluded:

> [T]he Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child could not reasonably communicate.

(497 U.S. at p. 858, italics in original.)

The prosecutor's assertions that Garcia was scared and Shirley Amador would provide moral support fall short of a sufficient specific finding of need.

The trial court also failed to give the required admonition to the witness advocates to not prompt, sway or influence the witnesses in any way. The failure to follow the procedures of section 868.5, including conducting a need assessment, was held to be error in both *Adams* and *Kabonic*. (*People v. Adams*, *supra*, 19 Cal.App.4th at p. 444; *People v. Kabonic*, *supra*, 177 Cal.App.3d at pp. 496-497.) It is error here.

2. There Was No Compelling State Interest or Interests That Justified the Use of Any of the Witness Advocates That Infringed on Appellant's Sixth Amendment Confrontation Rights

Witness advocate statutes, including section 868.5, arose to protect particularly vulnerable witnesses, such as children and the victims of sexual abuse, from additional psychological harm and trauma. (*People v. Adams*, *supra*, 19 Cal.App.4th at pp. 442-443; *People v. Patten*, *supra*, 9 Cal.App.4th at p. 1726.) The need to protect such witnesses can provide a compelling state interest that justifies an infringement on a defendant's

confrontation rights. Here, by way of contrast, none of the witnesses who utilized advocates was a minor, and none was a victim of sexual assault. Indeed, neither Garcia nor Karol Tran was a victim of anything.

Lilah Garcia testified about coming across the crime scene at Elm Avenue. Garcia herself never mentioned being frightened or receiving any threats. There was no "compelling state interest" that could possibly permit the infringement on appellant's Sixth Amendment right to confront the witness against him, which included the jurors' ability to observe Garcia's demeanor unadulterated by the presence of a prosecutorial minder. The prosecutor's broad assertion that Garcia was "scared" cannot possibly serve as a compelling state interest on par with protection of a child victim testifying about sexual abuse.

Karol Tran was certainly not a victim. To the contrary, she was a codefendant who secured a deal to serve a lesser prison sentence in exchange for testifying against appellant. Neither Karol Tran nor the prosecutor articulated her need for an advocate. There was no compelling state interest that justified infringing on appellant's right to confront this key witness.

The closest thing to victim witnesses were the Le sisters, but they testified to an uncharged crime admitted under Evidence Code section 1101, subsection (b). A defendant's constitutional rights should not be infringed in order to provide comfort to witnesses testifying to collateral matters, especially when those witnesses, though witnesses to an attack, were not the sort of young and vulnerable victims, such as child sexual abuse victims, for which the Supreme Court has allowed the infringement of a defendant's constitutional right to confrontation in the past.

Section 868.5 does not grant a prosecutor the right to provide an

unnecessary support person for a prosecution witness, and it certainly does not permit a prosecutor to use an advocate to enhance the prosecution's case or ensure that a witness testifies consistently with the prosecution's theory.

3. Even If Proper Procedure Had Been Followed and a Need for the Witness Advocates Had Been Established, the Advocates Improperly Insinuated Themselves into the Trial, Generating an Improper Influence That Infringed On Appellant's Constitutional Rights

Even if the prosecution is able to articulate a compelling interest in protecting the well-being of certain witnesses, "the protections given must be balanced against opposing considerations affecting the defendant." (*People v. Patten*, *supra*, 9 Cal App.4th at p. 1726.) In *Patten*, the court considered certain possibilities that might generate an improper influence including "the relationship of the support person to the victim-witness," "the location of the support person in relation to [the] victim-witness," and "whether the support person does anything that the jury could see that might interject an influence on the victim-witness or the jury such as crying, nodding the head, hand motions, etc." (*Id.* at pp. 1731-1732.)

In *People v. Myles*, *supra*, 53 Cal.4th at p. 1214, this Court examined a situation where the defendant complained on appeal about one witness's use of a witness advocate. There, at the request of the prosecutor, the trial court had instructed the jurors regarding the advocate's presence and role. (*Id.* at pp. 1213-1214.) This Court found the absence of circumstances indicating improper influence by a witness advocate, such as the lack of a record of the proximity of the advocate to the witness or the use of any emotion or gestures suggesting that the advocate believed the witness's testimony, undermined a claim of prejudice due to the presence of the advocate. (*Id.* at pp. 1214-1215, citing *People v. Patten*, *supra*, 9

Cal.App.4th at pp. 1731-1733.)

Here, Garcia's victim witness advocate stood between Garcia and the jury, in close proximity to the jurors. "The closer the support person is located to the victim-witness, the higher the risk the jury might be influenced." (*People v. Patten*, *supra*, 9 Cal.App.4th at p. 1732; see *State v. Suka* (Hawaii 1989) 777 P.2nd 240, 242-243.) Garcia's advocate, at least initially, wore a badge proclaiming her to be an employee of the district attorney. (14 RT 1989.) When the victim witness advocate is a member of the district attorneys' office, the effect of her presence is to vouch for the witness. The prosecutor placed the "prestige of [his] office behind a witness by offering the impression that [he] had take steps to assure a witness's truthfulness at trial." (*People v. Frye* (1998) 18 Cal.4th 894, 971, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 420-421.)

Karol Tran's support person, Shirley Amador, was part of the defense team that secured a lesser sentence for Tran in exchange for her testimony against appellant, and someone who had participated in many pre-trial interviews. Amador had firsthand knowledge of Tran's prior inconsistent statements. During Tran's testimony, Amador sat inside the railing with the prosecution team and signaled to Tran, allegedly while reviewing Tran's preliminary hearing testimony. (25 RT 3435-3438.) Finally, Tran's testimony was inconsistent and contradictory during the time she and Amador were signaling to one another. Unlike the situation in *People v. Myles* then, here there was clear evidence of inappropriate gestures and displays by one of the witness advocates, "that the jury could see that might interject an influence on the victim-witness or the jury such

as . . . nodding the head, hand motions." (*People v. Patten*, *supra*, 9 Cal.App.4th at pp. 1731-1732.)

Further, the trial court below not only failed to admonish the victim-witness advocates, it, in most instances, also failed to admonish the jurors as to the role of the advocates. In *People v. Patten*, *supra*, 9 Cal.App.4th at p. 1732, the court approved the use of a cautionary instruction where the "presence of the support person is clearly known by the jury." This Court, in *People v. Myles*, *supra*, 53 Cal.4th at p. 1215, placed great weight on the trial court's admonition in that case: "Notably, the court informed the jurors that [the witness] was entitled by law to be attended by a support person during her testimony, and admonished them that the support person was 'not the witness.'" The trial court's failure to provide such an instruction invited jury speculation and risked that impermissible factors would come into play during the jury's evaluation of the tainted witness testimony.

D. Appellant Was Prejudiced by the Trial Court's Failure to Comply with Section 868.5

Where the requisite showing of need has not been made under section 868.5, the defendant's constitutional rights have been violated, and the state bears the burden of proving beyond a reasonable doubt that the error was harmless. (*People v. Adams*, *supra*, 19 Cal.App. 4th at p. 444, citing *Chapman v. California* (1967) 386 U.S. 18.) If the confrontation clause has been violated, "[a]n assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation." (*Coy v. Iowa*, *supra*, 487 U.S. at pp. 1021-1022; see also *People v. Adams*,

supra, 19 Cal.App.4th at p. 444.) Harmlessness must be determined solely based on the remaining evidence.

In other words, the error is prejudicial unless there is substantial evidence of guilt once the testimony of witnesses who used improper advocates is removed from the record. For example, in *Adams*, the court of appeal disregarded the alleged victim's testimony, but found the error harmless because – even apart from her testimony – the testimony of the defendant and his accomplice constituted substantial evidence that the defendant had committed the sexual assaults charged. (*People v. Adams*, *supra*, 19 Cal.App. 4th at pp. 428-432, 444.)

Here, Karol Tran's testimony was the cardinal evidence against appellant, as is clear from the length of her testimony, the favorable plea deal Tran received despite her role in the murders, and the prosecution's reliance on Tran's testimony. (28 RT 3705 [Karol Tran one of prosecution's two "primary witnesses"].) Tran essentially gave the jurors a minute by minute account of the planning of the crime, the crime itself, and the aftermath – with her defense investigator, the wife of her attorney, present as an improper witness advocate. Even with Karol Tran's testimony, the jurors found untrue the personal gun use allegations attached to each murder count, demonstrating the jury was unclear regarding appellant's role in the murders. How much greater this uncertainty without the extensive inculpatory testimony of his accomplice, Karol Tran? In addition, this Court must not consider the bolstering testimony of Garcia's evocative testimony of rescuing Dennis from the crime scene.

Should this Court believe beyond a reasonable doubt that the jury would have voted for conviction and death even without the testimony provided by the aforementioned tainted witnesses, this Court should

consider some of the additional prejudicial effects of the trial court's violation of section 868.5. In *State v. Suka*, *supra*, 777 P.2d at p. 242, a Hawaii court found prejudice where a support person's presence "could have had the effect" of vouching for the witness and therefore denying the defendant a fair trial. In *Suka*, a victim's advocate joined the 15-year-old complaining witness at the stand after the witness broke down and had to stop testifying. Although the witness had represented that she wanted the support person with her, she never said she needed the person in order to testify. (*Id.* at p. 243.) Significantly, the court did not require the defendant to show that the jury interpreted the support person's presence as vouching. Based on the potential improper effect, the court concluded that appellant had been prejudiced by the unnecessary presence of the support person and reversed. (*Id.* at p. 243.)

In this case, the trial court's errors created a similar danger to the one explored in *Suka*, the danger that a state-sponsored witness advocate for Garcia and a member of Karol Tran's defense team sitting inside the railing with the prosecution, would have the effect of vouching for those witnesses, bolstering the prosecution's case. (See *People v. Frye*, *supra*, 18 Cal.4th at p. 971; *United States v. Necoechea* (9th Cir. 1993) 986 F2d 1273, 1278 ["When the credibility of a witness is crucial, improper vouching is particularly likely to jeopardize the fundamental fairness of the trial"].) In addition, the trial court's errors produced a different but arguably more sinister danger: that Karol Tran altered her testimony due to the presence of Shirley Amador. Here, once the statutory violation is proven, it would be unfair to expect appellant to demonstrate how and how much Amador's unauthorized presence impacted Tran's testimony. Therefore, this court should presume prejudice, and the state should be required to show that

Amador's presence exerted no improper influence on Tran.

In *People v. Patten*, *supra*, 9 Cal.App.4th at pp. 1731-1733, the court of appeal listed some positive factors that support a finding of prejudice; this Court has found the absence of those factors mitigates a finding of prejudice. (*People v. Myles*, *supra*, 53 Cal.4th at pp. 1214-1215.) The factors include whether the advocate does anything that might "interject and influence" the witness or the jury, "such as crying, nodding the head, hand motions, etc." The signaling between Karol Tran and Ms. Amador falls squarely within this category. Other factors include whether the credibility of the witness was important, as was the case here. (*People v. Patten*, *supra*, 9 Cal.App.4th at p. 1732.) The court in *Patten* stressed that a trial court's actions are also crucial in determining prejudice; a court might admonish the jury, and has a duty to "use its good judgment to curtail any unnecessary actions by the support person which might sway or influence the victim-witness or jury." (*Id.* at p. 1732.)

Here, the trial court's actions regarding the various witness advocates both at Evidence Code section 402 hearings and in testimony in front of the jury could best be described as indifferent, and the lack of firm guidance from the court exacerbated the prejudicial aspects of the unregulated advocates. It failed to admonish the victim-witness advocates, and in most instances it failed to admonish the jurors.

Finally, compounding the prejudice from bolstering the prosecution's witnesses was the fact that at least one defense witness was disrespected as he attempted to take the stand. Defense expert witness William Foreman was harassed in the courtroom. Sheriff's personnel attempted to search Foreman and his bag when he approached the witness stand. (43 RT 5639.) The disparity between a display of support for the

prosecution witnesses and a display of suspicion of the defense witnesses served to shape a narrative of which "side" the court supported and which it distrusted. Furthering the prejudicial courtroom atmosphere, yellow crime scene tape was strung up in the court room, to separate civilians from the alternate jurors in the first row of the courtroom. (15 RT 2238; 16 RT 2243.) In addition, a second metal detector, in addition to one at the entrance to the building, was set up outside the courtroom. (14 RT 1945, 1957, 1992; 15 RT 2186-2189.) A defendant has a right to be tried in an atmosphere of impartiality. Appellant's trial court atmosphere was anything but.

Appellant was prejudiced because without the improperly affected testimony there was not evidence beyond a reasonable doubt of his guilt. Alternatively, appellant was prejudiced by the impact the unadmonished advocates had on the unadmonished jury, and the state cannot show the presence of the prosecutor's advocates was harmless. Accordingly, this Court should reverse appellant's convictions.

III.

THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF SECTION 187

At the conclusion of the guilt phase of trial, the trial court instructed the jury that appellant could be convicted of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; 28 RT 3747-3748) or killed during the commission or attempted commission of a felony, namely burglary or robbery (CALJIC Nos. 8.21, 8.21.1, 8.21.2; 28 RT 3748-3750). The jury found appellant guilty of five counts of murder in the first degree. (3 CT 808-809.) The instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.

The information alleged that "[o]n or about August 9, 1995, in the County of San Bernardino, State of California, the crime of murder in violation of Penal Code section 187(a), a felony, was committed by [appellant] who did willfully, unlawfully and with malice aforethought, kill," Henry Nguyen (Count 1), Tren Yen Tran (Count 2), Doan Nguyen (Count 3), Daniel Nguyen (Count 4), David Nguyen (Count 5). (2 CT 504-516.) Both the statutory reference ("Penal Code section 187(a)") and the description of the crime ("did willfully, unlawfully, and with malice aforethought, kill") establish that appellant was charged exclusively with

second degree malice murder in violation of section 187, not with first degree murder in violation of section 189.

Section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice aforethought, but without the additional elements – i.e., willfulness, premeditation, and deliberation – that would support a conviction of first degree murder. [Citations.]" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) "Section 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)

Because the information charged only second degree malice murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information," which charges that specific offense. (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7; see, e.g., *People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are

defined by section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' Pen. Code, sec. 187. Murder, thus defined, includes murder in the first degree and murder in the second degree. It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

However, the rationale of *People v. Witt, supra*, and all similar cases was completely undermined by this Court's decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "subsequent to *Dillon, supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt, supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely," (*People v. Hughes, supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*. In fact, it cannot.

Witt reasoned that "it is sufficient to charge the offense of murder in the language of the statute defining it." (*People v. Witt, supra*, 170 Cal. at

pp. 107-108.) *Dillon* held that section 187 was not "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, this Court concluded that "[w]e are therefore *required* to construe section 189 as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon, supra*, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the single statute which defines that offense is section 189.

No other statute purports to define premeditated murder (see § 664, subd. (a) [referring to "willful, deliberate, and premeditated murder, as defined by Section 189"]) or murder during the commission of a felony, and this Court expressly held that the first degree felony-murder rule was codified in section 189. (*People v. Dillon, supra*, 34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by section 189, and thus the information here did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder, of *any* type, and second degree malice murder clearly are distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609

[discussing the differing elements of those crimes]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1344 [holding that second degree murder is a lesser offense included within first degree murder].)

The greatest difference is between second degree malice murder and first degree felony murder. By the express terms of section 187, second degree malice murder includes the element of malice. (*People v. Watson, supra*, 30 Cal.3d at p. 295; *People v. Dillon, supra*, 34 Cal.3d at p. 475.) But malice is not an element of felony murder. (*People v. Box* (2000) 23 Cal.4th 1153, 1212; *People v. Dillon, supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in all relevant respects to sections 187 and 189 and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt." (*Id.* at p. 476, emphasis added, citation omitted.) Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree

murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts should have been charged in the information. (See *United States v. Robinson* (5th Cir. 2004) 367 F.3d 278, 284; *United States v. Higgs* (4th Cir. 2003) 353 F.3d 281, 299; *United States v. Quinones* (2d Cir. 2002) 313 F.3d 49, 53, fn. 1; *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036 ["In a criminal justice system in which all of the elements of a crime must be submitted to the grand jury it would be odd to make capital murder the one exception"]; See also *United States v. Cotton* (2002) 535 U.S. 625, 632 [omission from non-capital indictment of sentencing factor, which must be treated as element under *Apprendi*, was error.)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *Ex parte Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *Carella v. California* (1989) 491 U.S. 263, 265; *People v. Kobrin* (1995) 11 Cal.4th 416, 423.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama, supra,* 447 U.S. at p. 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been

convicted only of second degree murder, a noncapital crime, and thus ineligible to be killed by state execution. (See *State v. Fortin, supra*, 843 A.2d at pp. 1034-1035.) Therefore, appellant's conviction for first degree murder must be reversed.

IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON THE THEORY OF FIRST DEGREE MURDER

A. The Trial Court Instructed the Jury on Multiple Theories of First Degree Murder, But Failed To Instruct the Jury That it Had to Unanimously Agree on the Type of First Degree Murder Before Convicting Appellant of First Degree Murder

The trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; 3 CT 869-870), on felony murder generally (CALJIC No. 8.21; 3 CT 871), on felony murder predicated on robbery (CALJIC No. 8.21.1; 3 CT 872), on felony murder predicated on burglary (CALJIC No. 8.21.2; 3 CT 873) and on aiding and abetting felony murder. (CALJIC No. 8.27; 3 CT 850.) However, the court did not instruct the jury that it had to agree unanimously on the same type of first degree murder before convicting appellant.

When a charge is submitted to the jury on alternate theories of guilt, the trial court is required to instruct the jury that there must be unanimous agreement on the specific theory of guilt adopted by the jury. (*People v. Diedrich* (1982) 31 Cal.3d 263, 280-282; *People v. Wesley* (1986) 177 Cal.App.3d 397, 401 [conviction of possession for sale of a controlled substance, either cocaine *or* heroin, reversed because "some of the jurors might base their verdict on the cocaine while the other jurors base theirs on the heroin, and the fundamental principle that a criminal conviction requires a unanimous jury verdict would be violated"].) The failure to require the jury to agree unanimously on a theory of first degree murder deprived appellant of his rights under Sixth, Eighth and Fourteenth Amendments and

their state constitutional analogs to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, to a verdict of a unanimous jury, and to a fair and reliable determination that he committed a capital offense. (U.S. Const., Amends. 6, 8, 14; Cal. Const. art. I, §§ 7, 15, 16, 17.)

Appellant acknowledges that this Court has rejected the claim that a jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony murder. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1221; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) Appellant submits the issue deserves reconsideration; this Court's ruling in *People v. Cole,* et. al. is incongruous with its longstanding precedent that the elements of first degree premeditated murder and first degree felony murder are not the same.

B. Felony Murder Does Not Have the Same Elements as Premeditated and Deliberate Murder

Due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant has been charged. (*In re Winship* (1970) 397 U.S. 358, 364.) Although each state has great latitude in defining what constitutes a crime, once it has set forth the elements of a crime, it may not remove from the prosecution the burden of proving every element of the offense charged. (See *Sandstrom v. Montana* (1979) 442 U.S. 510, 524; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.)

In *Schad v. Arizona* (1991) 501 U.S. 624, the defendant challenged his Arizona murder conviction where the jury was permitted to render its

verdict based on either felony murder or premeditated and deliberate murder. The Supreme Court reaffirmed the general principle that there is no requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict. (*Id.* at p. 632, citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 449.) The Supreme Court acknowledged, however, that due process does limit the states' capacity to define different courses of conduct or states of mind as merely alternative means of committing a single offense. In finding that Schad was not deprived of due process, the Court relied on Arizona's determination that under their statutory scheme "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element." (*Schad v. Arizona, supra*, 501 U.S. at p. 637.) "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that." (*Id.* at p. 636.) Thus, where a state has determined that the statutory alternatives are independent elements of the crime, *Schad* indicates that due process is violated if there is not unanimity as to all the elements. "In criminal cases this requirement of unanimity extends to all issues – character or degree of the crime, guilt and punishment – which are left to the jury." (*Andres v. United States* (1948) 333 U.S. 740, 748.)

This Court has consistently held that the elements of first degree premeditated murder and first degree felony murder are not the same. In *People v. Dillon, supra,* 34 Cal.3d 441, this Court first acknowledged that "[i]n every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime." (*Id.* at p. 475.) The Court then declared that "in this state the two kinds of

murder [felony murder and malice murder] are not the 'same' crimes and *malice is not an element* of felony murder." (*Id.* at p. 476, fn. 23, italics added.) The Court further observed:

> It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [This is a] profound legal difference. . . .

(*Id.*, at pp. 476-477, fn. omitted.)

In subsequent cases, this Court has downplayed the legal differences between murder committed during the course of a felony and premeditated murder (see, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 712 [holding that felony murder and premeditated murder are not distinct crimes]), but it has continued to hold that the elements of those crimes are not the same. This Court has explained that the language from footnote 23 of *People v. Dillon, supra*, quoted above, "meant that the elements of the two types of murder are not the same." (*People v. Carpenter, supra*, 15 Cal.4th at p. 394.) Similarly, this Court has declared that "the elements of the two kinds of murder differ" (*People v. Silva* (2001) 25 Cal.4th 345, 367), and that "the two forms of murder [premeditated murder and felony-murder] have different elements." (*People v. Nakahara, supra*, 30 Cal.4th at p. 712; *People v. Kipp, supra*, 26 Cal.4th at p. 1131).

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element."

(*Ibid.*) The analysis is different for facts which are not elements in themselves but rather theories of the crime – alternative means by which elements may be established. The Supreme Court in *Richardson v. United States, supra*, 526 U.S. at p. 817, explained this distinction and also showed why *Schad* is inapplicable in the present case. In *Richardson*, the Court cited *Schad* as an example of a case involving means rather than elements:

> The question before us arises because a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. (*Schad v. Arizona*, 501 U.S. 624, 631-632, ... Where, for example, an element of robbery is force or the threat of force, some jurors may conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement – a disagreement about means – would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force.

(*Richardson v. United States, supra,* 526 U.S. at p. 817, citations omitted.)

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if the crimes are different or the same. The question first arose as an issue of statutory construction in *Blockburger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections described different crimes because "each of the offenses created requires proof of a different element," and that the test to determine whether the same transaction results in one offense or two is whether each offense "requires proof of an additional fact that the other does not." (*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockburger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697), the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173), the Sixth Amendment right to trial by jury, and the Fifth and Fourteenth Amendment rights to proof beyond a reasonable doubt. (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.); see *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.).)

As noted, this case involves two forms of murder which California has determined are not merely separate theories of murder, but contain separate elements. Felony murder requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not. (§§ 187, 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.) For first degree malice murder the prosecution must prove the defendant premeditated and deliberated the murder, that he specifically intended to kill; felony murder does not require that element.

Therefore, it is incongruous to say, as this Court did in *Carpenter*, that the language in *People v. Dillon, supra*, 34 Cal.3d 441, on which appellant relies, "only meant that the *elements* of the two types of murder are not the same." (*People v. Carpenter, supra*, 15 Cal.4th at p. 394, emphasis in original.) If the elements of malice murder and felony murder are different, as this Court acknowledges is true, then malice murder and felony murder are different crimes. (*United States v. Dixon, supra*, 509 U.S. at p. 696.)

Examination of the elements of a crime is also the method used to determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge v. California, supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if a finding that those facts are true will increase the maximum sentence that can be imposed. "'[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" (*Apprendi v. New Jersey, supra*, 530 U.S. at pp. 476, 490, internal citation omitted.) Any fact that, if proven, would increase the maximum punishment available, counts as an "element," no matter how labeled, and it must be proven beyond a reasonable doubt in accordance with the Fifth and Fourteenth Amendment due process guarantees; thus "'murder plus one or more aggravating circumstances' is a separate offense from 'murder' simpliciter." (*Sattazahn v. Pennsylvania, supra,* 537 U.S. at p. 112.)

When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; §§ 1163, 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693), and protected from arbitrary infringement by the due process clause of the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488.)

This conclusion cannot be avoided by employing euphemisms to label premeditation and the facts necessary to invoke the felony-murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160-161, citing *Schad v. Arizona,*

supra.) Since its decision in *People v. Dillon, supra,* this Court has provided an interpretation of the law that essentially permits non-unanimous findings when they are not otherwise permitted. There are three reasons why this is so.

First, in contrast to the situation reviewed in *Schad*, where the Arizona courts had determined that "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element" (*Schad v. Arizona, supra*, 501 U.S. at p. 637), the California courts have repeatedly characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [premeditation and deliberation are necessary elements of first degree murder]; *People v. Albritton* (1998) 67 Cal.App.4th 647, 654, fn. 4 [malice and premeditation are the ordinary elements of first degree murder].) The specific intent to commit the underlying felony has likewise been characterized as an element of first degree felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258, 1268.)

Moreover, this Court has recognized that it was the intent of the Legislature to make premeditation an element of first degree murder. In *People v. Steger* (1976) 16 Cal.3d 539, the Court declared:

> We have held, "By conjoining the words 'willful, deliberate, and premeditated' in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require as an element of such crime substantially more reflection than may be involved in the mere formation of a specific intent to kill. [Citation.]"

(*Id.* at p. 545, quoting *People v. Thomas, supra*, 25 Cal.2d at p. 900.)

As the United States Supreme Court has explained, *Schad* held only that jurors need not agree on the particular means used by the defendant to commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States, supra*, 526 U.S. at p. 817.) This case involves the elements that make up first degree premeditated murder and first degree murder predicated on different enumerated felonies, not the means or the "brute facts" which may be used at times to establish those elements.

Second, no matter how they are labeled, premeditation and the facts necessary to support a conviction for first degree felony murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (§§ 189, 190, subd. (a).) Therefore, they must be found by procedures that comply with the constitutional right to trial by jury (see *Blakely v. Washington* (2004) 542 U.S. 296, 302-305; *Ring v. Arizona* (2002) 536 U.S. 584, 603-605; *Apprendi v. New Jersey, supra*, 530 U.S. at pp. 494-495).

Third, at least one indisputable "element" is involved. First degree premeditated murder does not differ from first degree felony murder solely because the former requires premeditation while the latter does not. The crimes also differ because first degree premeditated murder requires malice while felony murder does not. "'The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See . . . §§ 187, subd. (a), 189.)'" (*People v. Hart, supra*, 20 Cal.4th at p. 608, quoting *People v. Berryman* (1993) 6

Cal.4th 1048, 1085; accord *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Thus, malice is a true "element" of murder. Furthermore, there was more than one felony underlying the "theory" of felony murder. Put another way, some of the jurors might base their first degree murder verdicts on the robberies while the other jurors base theirs on the burglary, and the fundamental principle that a criminal conviction requires a unanimous jury verdict would be violated. Simply grouping these two crimes, along with aiding and abetting felony murder, under the umbrella of "felony murder" ignores that each has a distinct separate element.

Accordingly, it was error for the trial court to fail to instruct the jury that it must agree unanimously on whether appellant had committed a premeditated murder, or a felony murder predicated on robbery, or a felony murder predicated on burglary, or simply aided and abetted felony murder. Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, there is no valid jury verdict on which harmless error analysis can operate. The failure to so instruct was a structural error, and reversal of the entire judgment is therefore required. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

Furthermore, this was not simply an abstract error. There was not compelling evidence supporting any of the various forms of murder over the others, and reasonable jurors could have credited evidence supporting one form while rejecting evidence supporting the others. We cannot assume that the jury unanimously agreed the crimes were either premeditated murder or felony murder predicated on burglary or felony murder predicated on robbery (or even what theory each juror applied to each specific murder charge). The prosecutor was extremely cavalier about how the jurors could reach a guilty verdict on the first degree murder charges, at

one point explaining all the elements underlying premeditated first degree murder, intention, deliberation, premeditation, malice, while opining that "to be quite frank with you, this is the harder way of doing it, more complicated," than finding felony murder. (28 RT 3691.) The prosecutor assured the jurors that they were not required to find those extra elements existed; if the concepts behind those elements were not clear, the jurors "might want to try just using the felony murder rule. It's a lot easier." (28 RT 3697.)

Of course, the reason finding first degree premeditated murder is "harder" than finding first degree felony murder is that first degree premeditated murder has extra elements that must be proven. The prosecutor closed his argument by arguing that "[t]he proper verdict in this case, ladies and gentlemen, is clearly guilty of first degree murder on whatever theory you use." (28 RT 3739.)

"The jury [cannot] function as circuit breaker in the State's machinery of justice if it [is] relegated to making a determination that the defendant at some point did something wrong." (*Blakely v. Washington, supra*, 542 U.S. at pp. 306-307.) "The Framers would not have thought it too much to demand that before depriving a man of . . . his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors.'" (*Id.* at p. 313, citation omitted.) The prosecution presented evidence in support of the different forms of murder, and argued each form to the jury. The court should have required the jurors to unanimously agree, if they could, on one of the three forms in order to convict appellant. Because the court failed to do so, the first degree murder conviction must be reversed.

V.

THE TRIAL COURT INSTRUCTED THE JURY WITH THE DISAPPROVED CALJIC NO. 17.41.1, VIOLATING APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY A FAIR AND IMPARTIAL JURY, WHICH REQUIRES REVERSAL

The jury in this case was instructed in the guilt phase with CALJIC No. 17.41.1 as follows:

> The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation.

(4 CT 910; 28 RT 3765-3766.)

The court committed prejudicial error in giving this instruction.

A. This Court Properly Forbade the Use of CALJIC No. 17.41.1

In *People v. Engelman* (2002) 28 Cal.4th 436 (hereinafter *Engelman*), a majority of this Court disapproved of CALJIC No. 17.41.1, while concluding that in that case its provision did not violate the federal Constitution. Appellant respectfully submits that its provision in his capital case did violate his rights under the Sixth and Fourteenth Amendments. He raises the issue here to ask relief from this Court and to preserve the error for review in federal court. While defense counsel did not object to the instruction, no such objection was required to preserve the error for appeal. (§ 1259.)

In the first half of its opinion in *Engelman,* a majority of this Court set forth the factual and procedural history of the case, and then ultimately

found that the use of CALJIC No. 17.41.1 did not violate the defendant's constitutional rights. (*Engelman, supra,* 28 Cal.4th at pp. 444-445.) However, the entire second half of the opinion was set aside for the invocation of this Court's seldom used supervisory power to stress that criticism of CALJIC No. 17.41.1 was warranted, and the instruction was no longer acceptable in California courts. (*Id.* at p. 445.) The majority held that CALJIC No. 17.41.1 created an unnecessary "risk to the proper functioning of jury deliberations," and thus directed trial courts to never again give the instruction. (*Id.* at p. 449.) Justice Baxter dissented from the decision and noted that in the future a modified jury misconduct instruction, not highlighted by being given toward the end of instruction, might be acceptable. (*Id.* at pp. 455-456 (dis. opn. of Baxter, J.).) Here, the instruction was not modified from the original impermissible version, and, as in *Engelman*, was given as part of the final instructions before the jury was sent to deliberate.

CALJIC No. 17.41.1 jeopardizes the proper functioning of jury deliberations by instructing jurors that their words might be used against them and that candor in the jury room could be punished. The instruction therefore chills speech and free discourse in a forum where "free and uninhibited discourse" is most needed. (*Attridge v. Cencorp* (2d Cir. 1987) 836 F.2d 113, 116.) The instruction virtually assures "the destruction of all frankness and freedom of discussion" in the jury room. (*McDonald v. Pless* (1915) 238 U.S. 264, 268.) Accordingly, the instruction improperly inhibits free expression and interaction among the jurors which is so important to the deliberative process. (See, e.g., *People v. Collins* (1976) 17 Cal.3d 687, 693.) Where jurors find it necessary or advisable to conceal concerns from one another, they will not interact and try to persuade others to accept their

viewpoints. "Juror privacy is a prerequisite of free debate, without which the decision making process would be crippled." (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1086 (internal citations omitted).) Justice Cardozo once noted, "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." (*Clark v. United States* (1933) 289 U.S. 1, 13.)

Jury trial is a fundamental constitutional right. The federal right to trial by jury is secured by the Sixth and Fourteenth Amendments to the Constitution of the United States. (*Ring v. Arizona, supra,* 536 U.S. at p. 609; *Duncan v. Louisiana* (1968) 391 U.S. 145, 148-150.) The state right to trial by jury, which also includes the requirement that the jury in felony prosecutions consist of 12 persons and that its verdict be unanimous, is secured by article I, section 16 of the California Constitution (*People v. Collins, supra,* 17 Cal.3d at p. 693) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346). That right is abridged by CALJIC No. 17.41.1 because it coerces potential holdout jurors into agreeing with the majority. (See, e.g., *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1426-1428.)

Private and secret deliberations are essential features of the jury trial guaranteed by the Sixth Amendment. (See, e.g., *Tanner v. United States* (1987) 483 U.S. 107, 127; *United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 596.) CALJIC No. 17.41.1, however, pointedly tells each juror that he or she is not guaranteed privacy or secrecy. At any time, the deliberations may be interrupted and a fellow juror may repeat his or her

words to the judge and allege some impropriety, real or imagined, that the juror believed occurred in the jury room.

The free discourse of the jury has been found to be so important that, as a matter of policy, post-verdict inquiry into the internal deliberative process has been precluded even in the face of allegations of serious improprieties. (See, e.g., *Tanner v. United States, supra*, 483 U.S. at pp. 120-121, 127 [inquiry into juror intoxication during deliberations not permitted]; *United States v. Marques* (9th Cir. 1979) 600 F.2d 742, 747 [no evidence permitted as to juror compromise].) Under Evidence Code section 1150, "[n]o evidence is admissible to show the effect of [a] statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." These same policy considerations apply to CALJIC No. 17.41.1.

In *Engelman, supra,* 28 Cal.4th at pp. 446-447, this Court focused on the pernicious "active" effects of CALJIC No. 17.41.1: jurors might use the instruction as grounds to threaten or coerce other jurors, or as a means to "short-circuit" discussions or browbeat minority jurors. It is not a satisfactory answer to say that the matter is moot here because no juror called any such problem to the court's attention. Such an answer ignores the likelihood that a juror would hold fast to an unpopular decision if he knew that he could not be brought before the court to account for it. He may, nevertheless, be unwilling to do so if he knows his fellow jurors are going to report his deviancy to the judge. The likelihood of such a "chilling effect" is a strong argument in favor of simply not giving an instruction such as CALJIC No. 17.41.1 in the first place; California courts have been so admonished by this Court in *Engelman.* There is no way to assess how

much the instruction chilled speech in the jury room. There is no way to determine what thoughts and arguments were squelched by jurors who anticipated, feared and wished to avoid sanctions at the hands of the trial court. "Jury decision-making is designed to be a black box: the inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publicly announced, but the inner workings and deliberation of the jury are deliberately insulated from subsequent review." (*People v. Guerra* (2009) 176 Cal.App.4th 933, 942.)

It is true, as noted by this Court in *Engelman*, *supra*, 28 Cal.4th at pp. 448-449, that intrusions into the content of jury deliberations are sometimes justified, such as when jurors refuse to deliberate or bring outside investigation into deliberations. But CALJIC No. 17.41.1 does not *sometimes* intrude on secret jury deliberations; as described above, CALJIC No. 17.41.1 changes the very nature of jury deliberations in a way detrimental to juror privacy and the free discourse that flows from that secrecy. The question becomes: does any state interest justify such an intrusion on the constitutionally protected secrecy of capital guilt phase jury deliberations? This Court's holding in *Engelman* demonstrates that there is no such interest. This Court held that the instruction should no longer be given, and that the risk it engendered was not balanced by any utility; the state interest in guarding against jury misconduct is adequately protected by other instructions. (*Id.* at p. 448.)

The instruction also violates due process in that it infringes a right "deeply rooted in this Nation's history and tradition" – the sanctity of jury deliberations. (*Moore v. City of East Cleveland* (1977) 431 U.S. 494, 503; see *In re Winship* (1970) 397 U.S. 358, 361-362 [finding reasonable doubt requirement protected by due process because firmly entrenched in history

and tradition of Anglo-American trial]; *Engelman, supra*, 28 Cal.4th at p. 443.)

Finally, the instruction violates the state constitutional right to trial by jury, not only for the reasons stated above, to the extent the state constitutional right is coextensive with the federal constitutional right, but also because it infringes the state constitutional right, in felony cases, to a jury of 12 persons and to a unanimous verdict. (See Cal. Const., art. I, §§ 7, 13, 15, 16; *People v. Peters* (1982) 128 Cal.App.3d 75, 89-90.) The instruction's potential for use as a tool for coercing fellow jurors and the instruction's chilling effect infringes the right to a unanimous verdict reflecting the individual judgment of each juror. (See *Engelman, supra*, 28 Cal.4th at pp. 445, 447.) This state right to a unanimous verdict in turn is protected from arbitrary infringement by the due process clause of the Fourteenth Amendment to the federal Constitution; its violation thus constitutes a due process violation as well. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

B. Instructing Guilt-Phase Jurors in a Capital Trial with CALJIC No. 17.41.1 Violates the Eighth and Fourteenth Amendments

Although this Court found that CALJIC No. 17.41.1, while too risky for continued use, did not go so far as to violate a defendant's constitutional rights in the factual situation presented in *Engelman*, that case dealt with a non-capital trial. CALJIC No. 17.41.1 has even greater impact on the guilt and penalty phases of a capital trial. In a capital case, CALJIC No. 17.41.1 violates the Eighth and Fourteenth Amendment rights to reliable determinations of guilt and penalty, and the state constitutional counterparts. (See U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

In *People v. Brown* (2004) 33 Cal.4th 382, 392-393, a capital case, this Court addressed a claim that CALJIC No. 17.41.1 violated the rights to jury trial, to due process, and a unanimous verdict, and declined to revisit *Engelman, supra,* because the defendant had made no argument warranting reconsideration. This Court also addressed the incorporation of CALJIC No. 17.41.1 by reference at the penalty phase of a capital case, as was done here. It rejected without significant analysis the defendant's single argument that the instruction would have pressured jurors disinclined to impose death "to go along with the majority . . . or risk being reported to the court." (*People v. Brown, supra,* 33 Cal.4th at p. 400.) Appellant respectfully asks this Court to reconsider that conclusion. Moreover, as set forth below, appellant makes a broader, and different, argument than that made in *People v. Brown* – one which has not yet been explicitly addressed by this Court.

1. Instructing Guilt-Phase Jurors in a Capital Trial with CALJIC No. 17.41.1 Violates the Eighth and Fourteenth Amendments

The Eighth Amendment requires reliability not only in the ultimate determination whether a defendant convicted of murder should live or die, but also in the determination of whether he is guilty or not guilty in the first instance. (*Beck v. Alabama, supra,* 447 U.S. at p. 638.) The risk to the integrity of deliberations recognized by this Court in *Engelman,* even if tolerable in noncapital cases, cannot be countenanced where life is at stake. As the United States Supreme Court has repeatedly recognized, death is different. (*Id.* at p. 637.)

The risks to the deliberative process that led this Court to direct that CALJIC No. 17.41.1 not be given in all future cases are even graver here. First, because CALJIC No. 17.41.1 fails to specify what an "improper

basis" is, jurors may define without guidance what is improper and impose it on others. (*Engelman, supra,* 28 Cal.4th at p. 447.) Jurors otherwise "confident of their own good faith and understanding of the evidence and the court's instructions on the law, mistakenly may believe that those individuals who steadfastly disagree with them are refusing to deliberate or are intentionally disregarding the law." (*Id.* at p. 446.) Second, the instruction "could cause jurors to become hypervigilant during deliberations about *perceived* refusals to deliberate or other ill-defined 'improprieties'" threatening the "free exchange of ideas that lies at the center of the deliberative process." (*Id.* at p. 447, italics in original.) "[A] juror endowed with confidence in his or her own views . . . might rely on CALJIC No. 17.41.1 as a license to scrutinize other jurors for some ill-defined misconduct rather than to remain receptive to the views of others." (*Ibid.*) Third, the instruction may be used by a juror to browbeat other jurors; a juror, without ever communicating with the court, might "place undue pressure on another juror by threatening to accuse that juror in open court of reasoning improperly or of not following the court's instructions[;]" or the instruction might be used to "short-circuit discussions by threatening to call upon the court to arbitrate normal disagreements." (*Id.* at pp. 445-447). Fourth, jurors likely censor themselves, unwilling to articulate ideas or opinions that might be deemed "improper," thus crippling deliberations and robbing them of the free exchange of ideas from differing viewpoints; the "chilling effect" described above. (*Id.* at pp. 443, 446.)

All of these effects were surely magnified here, with a "death-qualified" jury forged in the crucible of the extensive voir dire process (here taking eight days of court time over the course of two weeks) required for a capital case. The idea that some modes of thought or some area of

disagreement are improper would have been cemented in the minds of jurors tasked with filling out a lengthy questionnaire about their "thoughts and attitudes about the imposition of the death penalty" (7 RT 873), and answering questions such as:

> One thing we want to make clear, folks . . . you should not try to pre-judge this case and say, well, in this case I would do thus and thus. That is not what we want to do. We simply want to take you from the abstract, yes, I favor the death penalty; yes, I think in most cases it should be imposed; yes, I think under today's society probably not used enough, but in every case that I am sitting as a juror. . . [i]ncluding this one, I will listen to the evidence, and even though I find these defendants guilty of these horrible crimes that are charged, I still will tell you, judge, that when I get around to the penalty phase, it is a reasonable possibility in my mind, not just a theoretical possibility, but a reasonable possibility, I will still go through the weighing process and still form my own opinion as to the appropriate penalty. Is that the way you feel?

(9 RT 1194-1195.) Jurors who underwent the rigorous death-qualifying process would necessarily view CALJIC No. 17.41.1 through the lens of that experience and thus be tightly attuned to the concept that some modes of thought are acceptable while others are not to be tolerated, with deviancy to be reported to the Court.

As this Court recognized in *Engelman*, "[j]ury deliberation is a sensitive mechanism that most often simply must – and will – accommodate itself to the resolution of strong differences of opinion." (*Engelman, supra,* 28 Cal.4th at p. 447.) This Court found that CALJIC No. 17.41.1's tinkering with this "sensitive mechanism" is unwarranted in criminal cases in general because that instruction "creates a risk to the proper functioning of jury deliberations and [] it is unnecessary and

inadvisable to incur this risk." (*Id.* at p. 449.) In a capital case, such an unnecessary risk is untenable and, because no state interest justifies such a breathtaking risk to a defendant's Sixth and Fourteenth Amendment rights, unconstitutional.

2. Instructing Penalty-Phase Jurors with CALJIC No. 17.41.1 Violates the Eighth and Fourteenth Amendments

The trial court did not reread applicable guilt-phase instructions at the penalty phase. Rather, it told the jurors that they were, "again instructed [that] . . . you are to be guided by those previously given instructions as you find them applicable and pertinent to the issue now before you in determination of the penalty." (47 RT 6109; see also 47 RT 6090-6091.) Thus, each juror was required to follow the directive of CALJIC No. 17.41.1 to police fellow jurors during penalty deliberations.

Instructing with CALJIC No. 17.41.1 at the penalty phase poses an even more serious threat to a defendant's constitutional rights. The instruction is incompatible with the unique role of capital jurors, who "express the conscience of the community on the ultimate question of life or death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519.) The jurors' task at the penalty phase is "'inherently moral and normative, not factual . . . .'" (*People v. Prieto* (2003) 30 Cal.4th 226, 264, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 739.) Faced with this weighty moral task, however, capital jurors "are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 333.) A juror must be "free to reject death if [he or she] decides on the basis of *any* constitutionally relevant evidence or observation that it is not the appropriate penalty." (*People v. Brown* (1985) 40 Cal.3d 512, 540,

reversed on other grounds in *California v. Brown* (1987) 479 U.S. 538.)

In this context, all the risks posed by CALJIC No. 17.41.1, set forth above, are particularly acute. Given only partial guidance, and vested with significant discretion, jurors are even more free to decide for themselves what might constitute "any . . . improper basis" for decision. (See *Engelman, supra*, 28 Cal.4th at p. 447 [language referring to "'any other improper basis' permits members of the jury to provide their own interpretation of what is improper"].) In weighing aggravating and mitigating circumstances – and thus deciding whether appellant was to live or die – the jurors were told to "assign whatever moral or sympathetic value *you deem appropriate* to each and all of the various factors you are *permitted* to consider." (47 RT 6197, italics added.) This language, granting broad discretion to the jurors, nonetheless includes the concept that choosing life cannot be based on an improper, inappropriate, or impermissible basis. Importantly, this was one of the last instructions the trial court gave the jury before sending them off to deliberate.

Appellant therefore respectfully disagrees with this Court's determination that CALJIC No. 17.41.1 does no constitutional harm because "[t]hese instructions plainly inform the jurors of the nature of their task and the basis on which they are to determine the appropriate penalty." (*People v. Brown, supra*, 33 Cal.4th at pp. 400-401.) Permissible exercises of the constitutionally-mandated discretion jurors are granted at the penalty phase may *appear* improper, particularly to jurors more familiar with the less discretionary determinations of guilt or innocence. The risk that a juror may deem another juror's constitutionally-relevant evidence or observation improper, and attempt to cut off discussion or threaten to report the matter to the judge – or the more likely and pernicious risk that jurors may censor

themselves, fearful that their ideas will be deemed improper or reported to the court – are all the more threatening to a defendant's constitutional rights at the penalty phase.

For example, although not enumerated in the standard instructions, mercy can and should play a role in the jury's determination of the appropriate penalty; a juror inclined to consider mercy may properly do so. (See *People v. Benavides* (2005) 35 Cal.4th 69, 108.) But a juror in this case might easily have thought that mercy *could not* be considered, since it was not specifically enumerated in the instructions given by the trial court. CALJIC No. 17.41.1 might have cowed some jurors into forgoing merciful inclinations for fear of being remanded to the trial judge by the other jurors and accused of improper deliberations. To be sure, this example rests on speculation, but this Court recognizes that the harm of CALJIC No. 17.41.1 lies not in the outcomes it assures but in the risks it poses – unnecessary and inadvisable risks (*Engelman, supra,* 28 Cal.4th at p. 449), and risks are by definition speculative.

With capital juries, the risks are more than merely speculative. Results from the Capital Jury Project, a nationwide study funded by the National Science Foundation that has interviewed over 1200 capital trial jurors in fourteen states since 1992, show that, time and again, a jury with a majority voting for death will attempt to persuade, coerce and browbeat minority jurors into coming around to their view, often by invoking the fear of (incorrect) consequences of a "hung jury," or by charging that the minority favoring life were allowing their emotions to interfere with their reason, or by simply arguing that minority jurors were not following the law. (Sundby, "*War & Peace In the Jury Room*" (2010) 62 Hastings L.J. 103, 119-136.) In his article discussing the project's findings, Sundby

noted one tactic juries would use to bring their holdout "life voters" back into the majority "death voter" fold:

> The majority would ask the holdout if his or her reasons for a life sentence were, at bottom, simply a personal inability to impose a sentence of death. Jurors would tell the holdout, for instance, that "she had stated sometime along the line that she could issue a death penalty if warranted and now was not the time to change her mind," or would "remind [the] uncertain ones that they had testified that they could vote for death." The implicit, and sometimes explicit, suggestion being, of course, that the holdouts had not been entirely honest with themselves during jury selection in saying that they could impose the death penalty and that they could follow the law. This line of questioning acted as a chisel for chipping away at the legitimacy of the holdouts' reasons for favoring life and further characterized the divide as one based on those who wanted to apply the law objectively – the majority favoring death – and those who were defying their oaths by allowing their personal emotions to dictate their vote – the life holdouts.

(Id. at p. 129.)

The many risks of instructing with CALJIC No. 17.41.1 are inconsistent with the Eighth Amendment's heightened need for reliability; the risks that led this Court to decide that CALJIC No. 17.41.1 should not be given in a noncapital case cannot be accepted at all in cases where life is at stake. The instruction "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty" (*Lockett v. Ohio, supra,* 438 U.S. at p. 605) – because the free exchange of ideas has been chilled, deliberations have been curtailed by the implicit or explicit threat of a report to the judge of alleged impropriety, or an argument for life has been improperly dismissed. "When the choice is

between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Ibid.*)

C. The Trial Court's Error in Instructing this Capital Jury With CALJIC No. 17.41.1 Amounted to a Structural Defect Requiring Automatic Reversal; Even Under Harmless Error Analysis, it Cannot Be Shown that the Verdicts Rendered Were Surely Unattributable to the Erroneous Instruction

Giving CALJIC No. 17.41.1 at the guilt phase and then effectively giving it again at the penalty phase requires reversal of the judgment. The instruction amounted to a "structural" defect in the trial mechanism, much like a complete denial of a jury. (*Rose v. Clark* (1986) 478 U.S. 570, 579; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) The errors are structural because the harm is "necessarily unquantifiable and indeterminate." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150.) The effects of CALJIC No. 17.41.1 are unquantifiable because the instruction is likely to chill the free exchange of ideas in the jury room – a harm that is by its nature hard to assess as it relates to things unsaid. There is simply no way of knowing what arguments for life were left unstated in the fear of advocating an "improper" argument. Automatic reversal of the judgment is the appropriate remedy because where this novel and threatening instruction is given, "there has been no jury verdict within the meaning of the Sixth Amendment." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280; *People v. Cahill* (1993) 5 Cal.4th 478, 502.)

Even should this Court apply harmless-error analysis, the prosecution cannot sustain its burden of proving beyond a reasonable doubt that the errors in delivering CALJIC No. 17.41.1 at the guilt and penalty phases did not contribute to the verdicts obtained. The question is not whether "in a trial that occurred without the error, . . .[the] guilty verdict[s]

[and death sentences] surely would have been rendered" (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279) – though in this case the prosecution could not even meet that standard. Rather, the question is whether the verdicts "actually rendered in this trial [were] surely unattributable to the error." (*Ibid.*) The prosecution cannot prove that beyond a reasonable doubt.

In *People v. Brown, supra*, this Court declined to revisit *Engelman*, in part because the defendant in *Brown* did not "cite anything in the record indicating the jurors in his case were improperly influenced by the instruction in their deliberations." (*People v. Brown, supra,* 33 Cal.4th at p. 393.) The question of prejudice cannot be averted simply by speculating that the instruction did not affect the verdict because there was no indication of deadlock or a holdout juror and no juror reported any "misconduct." Such an answer ignores that the fundamental vice in the instruction is its chilling effect, which manifests as unrecorded inaction from minority jurors fearful of revealing themselves under threat of punishment or removal, rather than something as dramatic as a holdout juror.

The jurors' verdict here, finding that appellant personally used a gun to commit robbery and burglary, finding appellant guilty of five counts of murder in a case where all five victims died of gunshot wounds, but finding untrue the allegations that appellant used a gun to commit the murders, may be evidence of a compromise verdict worked out by jurors who felt the need to make concessions to viewpoints they did not hold rather than stand strong behind their own convictions for fear of having those convictions branded as improper refusal to deliberate. The jurors may have felt such concessions were necessary to avoid running afoul of the trial court's

instruction, pursuant to CALJIC No. 17.41.1, that jurors who engage in "improper deliberations" should be turned in to the presiding judge.

The instruction poses a myriad of risks, all acknowledged by this Court and all significant enough that this Court has concluded the instruction should not be given. Given such risks the prosecution cannot sustain its burden of showing beyond a reasonable doubt that the errors did not contribute to the verdicts. The protection of constitutional rights afforded future capital defendants free of this instruction is cold comfort to appellant, convicted by a jury admonished with an instruction, CALJIC No. 17.41.1, that this Court directed not be given to juries. The judgment in this case must be reversed.

VI.

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT, REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

The trial court instructed the jury at the guilt phase with CALJIC Nos. 2.01, 2.02, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, 8.20, 8.83, and 8.83.1. (27 RT 3645-3646, 3669-3670, 3672-3673; 28 RT 3747-3748, 3762-3763.) These instructions violated appellant's right not to be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (*In re Winship* (1970) 397 U.S. 358, 364), and thereby deprived him of his constitutional rights to due process and trial by jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 7, 15-16; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The instructions also violated the fundamental requirement of reliability in a capital case, by relieving the prosecution of its burden to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638.) Because these instructions violated the federal Constitution in a manner that can never be "harmless," the judgment must be reversed. (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 280-281.)

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

for federal review, if necessary.[55]

A. The Instructions on Circumstantial Evidence – CALJIC Nos. 2.01, 2.02, 8.83, 8.83.1 – Undermined the Requirement of Proof Beyond a Reasonable Doubt

The trial court instructed the jurors with CALJIC No. 2.90 that the defendant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving [him] guilty beyond a reasonable doubt." (28 RT 3764.) CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(28 RT 3764.)

The jury was also given several instructions that supplemented and expanded upon the concept of reasonable doubt, and its relationship to circumstantial evidence: CALJIC No. 2.01, addressing the relationship between the reasonable doubt requirement and circumstantial evidence, generally (27 RT 3669-3670); CALJIC No. 2.02, addressing the use of circumstantial evidence to prove specific intent or mental state (28 RT

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

3758); CALJIC No. 8.83, addressing the use of circumstantial evidence to prove special circumstances (28 RT 3762-3763); and CALJIC No. 8.83.1, addressing the use of circumstantial evidence to prove specific intent or mental state in the context of special circumstances (28 RT 3763).

These instructions, addressing different evidentiary issues in nearly identical terms, all advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you *must* accept the reasonable interpretation and reject the unreasonable." (27 RT 3669-3670; 28 RT 3758, 3763 [italics added].) The disputed evidence presented in this case was almost entirely circumstantial. The repeated admonition thus informed the jurors that if appellant reasonably appeared to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. The instructions undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process, trial by jury, and a reliable capital trial. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; see *Sullivan v. Louisiana, supra*, 508 U.S. at p. 278; *Carella v. California, supra,* 491 U.S. at p. 265; *Beck v. Alabama, supra*, 447 U.S. at pp. 642-643.)[56]

First, the instruction compelled the jury to find appellant guilty and the special circumstances true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship* (1970) 397 U.S. 358, 364.) The instructions directed the jury to convict appellant based on the appearance

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[56]Although defense counsel did not object to these instructions, the errors are cognizable on appeal because they affect appellant's substantial rights. (§ 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (27 RT 3670.) An interpretation that appears reasonable, however, is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required conviction on a degree of proof less than that constitutionally mandated.

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

In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to its existence. Accordingly, this Court should invalidate the suite of instructions given here, which required the jury to presume all elements of the crimes supported by a "reasonable interpretation" of the circumstantial evidence unless appellant produced a competing reasonable interpretation of that evidence pointing to his innocence. The jury may have found appellant's defense unreasonable but still have harbored serious questions

about the sufficiency of the prosecution's case. Nevertheless, under the erroneous instruction, the jury was required to convict appellant of murder if he "reasonably appeared" guilty of murder, even if the jurors still entertained a reasonable doubt of his guilt. The instruction thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution's case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1214-1215.)

The prosecutor's closing argument explicitly conflated the reasonable doubt standard with choosing a "reasonable" interpretation of the evidence in just the manner discussed above. As part of his final remarks to the jury before the trial court instructed them with CALJIC No. 2.01 and the other "reasonable interpretation" instructions, the prosecutor admonished the jurors to

> ask yourselves, do I have a reasonable doubt about [appellant]'s guilt? That's your decision. *Whatever is reasonable to you is what matters.* ¶And you have to look at yourself in the mirror. And I think if you do that, if you look at all the facts of the case, you're going to have to find him guilty as charged. *That's the only reasonable interpretation that I think this evidence allows.*

(28 RT 3738, italics added.) Given the circumstances of the case and the argument of the prosecutor, the circumstantial evidence instructions wrongfully and prejudicially shifted the burden of proof to appellant.

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty on a standard less than the what is constitutionally required.

B. CALJIC Nos. 2.21.1, 2.21.2, 2.22, 2.27, and 8.20 Also Vitiated the Reasonable Doubt Standard

The trial court gave five other standard instructions that magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC Nos. 2.21.1 (discrepancies in testimony), 2.21.2 (witness wilfully false – discrepancies in testimony), 2.22 (weighing conflicting testimony), 2.27 (sufficiency of testimony of one witness), and 8.20 (deliberate and premeditated murder). (3CT 829-832, 869-870.) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and violated the constitutional prohibition against convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.21.2 lessened the prosecution's burden of proof by authorizing the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (3 CT 830.) The instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be

proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22,[57] regarding the weighing of conflicting testimony (3 CT 831), specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing, replacing the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard."

CALJIC No. 2.27,[58] regarding the sufficiency of the testimony of a single witness to prove a fact (3 CT 832), erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the

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[57]"You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice or from a desire to favor one side against the other. You must not decide an issue by simply -- by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, *but in the convincing force of the evidence*." (27 RT 3672-3673, italics added.)

[58]"You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact, whose testimony about that fact does not require corroboration, *is sufficient for the proof of that fact*. You should carefully review all of the evidence upon which the proof of the fact or that fact depends." (27 RT 3673, italics added.)

prosecution's case, and cannot be required to establish or prove any "fact." (*People v. Serrato* (1973) 9 Cal.3d 753, 766, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn.1.)

Finally, CALJIC No. 8.20, which defines premeditation and deliberation, misled the jury regarding the prosecution's burden of proof. The instruction told the jury that the requisite deliberation and premeditation "must have been formed upon preexisting reflection and not under a sudden heat of compassion [*sic*] or other condition precluding the idea of deliberation. . . ." (28 RT 3748, 3753.) In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean absolutely prevent].)

Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." This case was built on circumstantial evidence and accomplice testimony from codefendants who testified against appellant in order to comply with plea deals that would result in reduced sentences for themselves. No one who was in the Nguyen home during the shootings testified about who shot whom or why. Instead, the prosecutor attempted to tie together circumstantial evidence, irrelevant evidence regarding a different crime that occurred in Sacramento, and compromised testimony from self-interested criminals by way of a "gang expert" who knew nothing about appellant or the San Bernardino version of the Tiny Rascals Gang and thus testified generally about the

behavior of Asian-American gangs and gangsters in North America. In the face of so many instructions permitting conviction on a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process, trial by jury, and a reliable capital trial. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.)

C. The Motive Instruction Also Undermined the Burden of Proof Beyond a Reasonable Doubt

The trial court instructed the jury pursuant to CALJIC No. 2.51, as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant's guilt. Absence of motive may tend to establish the defendant is not guilty.

(27 RT 3673.)

This instruction improperly allowed the jury to determine guilt based upon the presence of a motive, here, to take money and valuables, and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. Due process, however, requires substantial evidence of guilt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning could mislead reasonable juror as to scope of instruction].)

This Court has recognized that differing standards in instructions create erroneous implications. (*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [if a generally applicable instruction is expressly applied to one aspect of a charge but not another, the inconsistency may be prejudicial error].) Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt, effectively placing the burden on appellant to negate or show an alternative to the motive advanced by the prosecutor.

Moreover, the instruction was misleading as to the probative value of the evidence of motive to the primary issue in this case. In this case, motive was simply not an issue; it "had no application to the facts of the case." (*People v. Martinez* (1984) 157 Cal.App.3d 660, 669.) It was well-established, and uncontested, that the four TRG members, guided by Karol, went to the Nguyen home and entered it with the goal of taking money and valuables. The instruction told the jury to consider motive as a circumstance "tend[ing] to establish the defendant is guilty." It did not tell the jury that the same evidence could establish a mental state in which appellant did not premeditate or deliberate murder; that is, say, a mental state consistent with a burglar whose plan to threaten the Nguyen family to

extract money fell apart when his partner, Vinh Tran, took it upon himself to start shooting everyone in the house. (Cf. *People v. Martinez, supra*, 157 Cal.App.3d at p. 669.) It thereby put a thumb on the scales in favor of the prosecution's view of the evidence.

CALJIC No. 2.51 failed to state the applicable law impartially, invited the jury to draw inferences favorable to the prosecution, and lessened the prosecution's burden of proof, depriving appellant of due process, a fair trial, equal protection and a reliable determination of guilt and penalty. (*In re Winship, supra,* 397 U.S. at p. 368.)

D. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

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

instructions written in plain English because the CALJIC instructions are "simply impenetrable to the ordinary juror" (Blue Ribbon Commission on Jury System Improvement, Final Report (May 1996) p. 93), this Court's old evaluations of the validity of those instructions must be re-examined.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions actually say. (See *People v. Jennings* (1991) 53 Cal.3d 334, 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the federal Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin* (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"].)

Furthermore, nothing in the challenged instructions explicitly informed the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to the evaluation or sufficiency of particular evidence.

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E. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was structural error, which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) Minimally, because the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) The prosecution cannot make that showing here. Because these instructions distorted the jury's consideration and use of circumstantial evidence, lessened the prosecution's burden and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined. The dilution of the reasonable doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, appellant's judgment must be reversed in its entirety.

PENALTY PHASE

VII.

THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS OVERHEARD BY CHAMPA ONKHAMDY THAT DID NOT COME WITHIN THE COCONSPIRATOR OR THE ADOPTIVE ADMISSION EXCEPTIONS TO THE HEARSAY RULE

A. Factual and Procedural Background

During the penalty phase, Champa Onkhamdy described a trip she took with appellant in early July of 1995, while she was pregnant with appellant's child. Appellant visited her in Portland, where she lived at the time, accompanied by Gaio Ly and Kunthea Sar. (32 RT 4196-4197.) The four of them then drove to Spokane, Washington, and went to an apartment she believed was owned or rented by Ly. (32 RT 4197-4198.) At some point appellant and Ly told Onkhamdy they were leaving and would return later. (32 RT 4200.) Onkhamdy and Sar stayed at the apartment and went to sleep; Onkhamdy slept on the living room couch. (32 RT 4200-4201.) When Onkhamdy woke up, appellant and Ly were back, along with one or possibly two other men she did not know. (32 RT 4201, 4203.) She saw a roll of money on the table, as well as jewelry; appellant offered her some of the jewelry, to which she replied, "whatever." (32 RT 4201-4202.)

The men were speaking in Cambodian. (32 RT 4203.) Onkhamdy did not speak Cambodian, and she could not understand what they were saying. (32 RT 4203.) Onkhamdy remained on the couch; she was turned away from the men and could hear them passing out money for a few minutes before she fell back asleep. (32 RT 4202.)

The prosecutor asked Onkhamdy if she overheard a conversation among the men about a murder. Onkhamdy replied that, "all the

conversations they had, they always spoke Cambodian." (32 RT 4204.) Appellant objected to the prosecutor's questions on the ground they would elicit hearsay. (32 RT 4204-4205, 4207.) The prosecutor then attempted to refresh Onkhamdy's memory with a police report prepared by Detective Peterson on May 13, 1996, detailing an earlier interview with Onkhamdy conducted on May 8, 1996. (32 RT 4199-4200, 4204-4205.) Upon reading the report, Onkhamdy stated that she told the officers she was nauseated due to her pregnancy, and did not "remember saying what it says on here." (32 RT 4205.) Appellant and the prosecutor then asked to approach the bench. (32 RT 4206.)

During a hearing outside the presence of the jurors it was revealed that although Peterson's interview with Onkhamdy was not recorded, his report stated that "she knew from the conversation that the subjects had committed a murder, and upon hearing this, it made her nauseous to know what had occurred." (32 RT 4206.) Defense counsel objected on hearsay grounds, noting that Onkhamdy did not identify the speaker or speakers or what was said regarding a murder. (32 RT 4207.) The Court stated that it was leaning toward declaring the statement an adoptive admission. "[L]et's assume she said 'yes, I heard somebody say they committed a murder.' The prosecutor] says, 'who did you hear say that?' She says, 'I don't know.' Then we have a situation that one of the group said they committed a murder. And then if [appellant] didn't do anything to deny that, then we may have an exception." (32 RT 4209.) Defense counsel pointed out that Onkhamdy said the men were speaking in Cambodian, so determining who said what in what words would be impossible; the statement was thus

irrelevant and inadmissible.[59] (32 RT 4209.) Defense counsel asserted it was not an adoptive admission, at which point the prosecutor stated he would leave it to the court. The trial court replied, "[t]hat's my decision." (32 RT 4210.)

When the parties returned to open court and the prosecutor resumed his questioning of Onkhamdy, the following colloquy took place:

> Q Did you tell Detectives Peterson and Giese, in this interview that they were conducting, that the subjects were talking and there was discussion about some murder and it made it – made you nauseous to know what had occurred?
> A I told him that I was nauseated because I was pregnant and did not say that I was nauseated because people were talking about murder.
> Q Do you deny saying that anybody talked about murder?
> A They spoke most of the time in Cambodian and I don't understand Cambodian.
> Q I'm just asking, do you deny –
> A Yes.

(32 RT 4212.)

Later that morning, the prosecution called Detective Dillon who testified that he was present for the May 8, 1996, interview of Onkhamdy by Detectives Peterson and Giese. (32 RT 4237-4238.) The prosecutor asked Dillon if Onkhamdy stated that "she knew from the conversation that the subjects had committed a murder and upon hearing that, it made her nauseous to know what had occurred." Before Dillon answered, another hearsay objection was made. (32 RT 4238.) The trial court then queried Dillon, who stated that he did not hear Onkhamdy say who said anything about the murder or in what language. (32 RT 4238-4239.)

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[59]Onkhamdy later testified that the only words she understood in Cambodian were hello and goodbye. (32 RT 4219.)

Upon further questioning, Dillon related that Onkhamdy said she had heard a conversation between appellant, "Sandman," and a person named Gaio Ly, which is in fact Sandman's true name. (32 RT 4239; 30 RT 3981.) Onkhamdy did not identify who made the comments or relate any specific statement, just that the topic of murder was mentioned by one or more persons, and Onkhamdy said that conversation about the murder made her nauseous. Dillon testified:

A. The conversation was between Sandman, [appellant], and I believe it was Gaio Ly.
Q. Gaio Ly?
A. That's correct.
Q. G-A-I-O, L-Y?
A. That's correct.
Q. So she related to Mr. Peterson she heard the three of them talking?
A. That's correct.
Q. And in that conversation there was a topic of a murder mentioned by some of them or one or more of them?
A. Yes.
Q. And you heard that?
A. Yes, I did.
Q. And did she tell Detective Peterson that when she heard that conversation about a murder, it made her nauseous to know what had occurred?
A. That's correct.

(32 RT 4239-4240.)

After this line of questioning the trial court called the parties into chambers to again discuss the statement. Appellant argued that the inadmissible and prejudicial testimony was now in front of the jury, and he moved for a mistrial. (32 RT 4244.) The trial court explained that it was going to overrule appellant's hearsay objections and mistrial motion:

> Seems to me, it is reasonable to assume that under the circumstances where Mr. Chhoun had left with other

> individuals and returned, and then there was some discussion amongst them regarding the murders having been committed, these individuals who left and came back, that this is sufficient, reasonable basis to believe that we can assume, or I can find, that it was an adoptive admission. I think there is perhaps another area which it might be admitted and that is the admission or the statement of the co-conspirator. I realize that the theory is perhaps questionable as to whether there is – was a conspiracy or not. We have individuals leaving this house and returning. Their purpose in leaving may be inferentially, circumstantially be determined as, to wit, this crime. That, in fact, may constitute a form of conspiracy, which would at least be sufficient to allow this in. I think there is sufficient evidence to justify the impeachment evidence of this witness's testimony as to what he heard this witness say as to whether she heard them say it in Cambodian, or Vietnamese or South African, I don't know. She understood what they said and told officer Peterson and this officer what she heard. And if she couldn't understand a foreign language? I don't know how she understood it. At least she made that statement to Officer Peterson: I heard him say that. So I don't think we have the problem of the language difficulty.

(32 RT 4245-4246.)

Appellant argued that there was no evidence of a statement that would require a response from the person to whom it was being attributed; accordingly, there was no admission to adopt or deny. (32 RT 4246-4248.) Appellant also argued that only appellant and Gaoi Ly were accused of the crime, yet there were three or four people having the conversation Onkhamdy overheard, and thus no specific statement could be attributed to any coconspirator. (32 RT 4248.) The trial court replied that while not all of the men may have been conspirators:

> [W]e have to assume circumstantially, reasonably, I think, that in order for there to be this conversation, there had to be conversation or something said by one of the two individuals

> who were participants regarding the murder/robbery having been committed, and so I think it eliminates the two that were not involved in the murder/robbery situation and narrows it down to the two who were. [¶] So then we have a statement being made by one of those two who went out and committed this, and I think circumstantially it can be established, with a plan of doing it, and that there was some reasonable basis to believe they could be found to be co-conspirators.

(32 RT 4249-4250.)

The trial court went on:

> But more importantly, I am also finding, I think, it's an adoptive admission where you've got a situation where you got a conversation that involves at least two participants in a murder/robbery, one of them, one or the other, has said something about this having been done, this crime having been committed; the other apparently says nothing to deny it or to in any way question that statement. To me that is sufficient to bring it within the exceptions of [Evidence Code section] 1221.

(32 RT 4250.)

Finally, the Court stated, "Whether she heard Cambodian, Vietnamese, or whatever, she heard enough to make her sick, and that to me indicates circumstantially simply more than some kind of a nebulous unambiguous reference to somebody killing somebody." (32 RT 4252.)

At the end of the penalty phase, appellant moved for a directed verdict on the Spokane murders as an aggravator, arguing the evidence did not prove beyond a reasonable doubt that appellant actually committed the murders; he also moved in the alternative for a mistrial on the same grounds. (47 RT 6071.) As part of the motion, appellant again argued Onkhamdy's alleged statement related by Dillon was improperly admitted as within an exception to the hearsay rule, because Onkhamdy merely related the subject matter of a conversation, rather than any statement. (47

RT 6072-6074.) There was discussion among appellant, the prosecutor and the trial court regarding the theory of admission of Onkhamdy's statement and the trial court clarified that it allowed the statement in under the adoptive admission theory and did not rely on the coconspirator exception. "[Adoptive admission] was the theory upon which I allowed it in. I mentioned that I felt it was possibly admissible under a coconspirator theory but I did not specifically allow – rely upon that theory to receive it in. So it is there, but I guess it is sort of a back up. If you don't like this one Supreme Court, look at this one. But whatever." (47 RT 6076-6077.)

B. Detective Dillon's Recollection That Onkhamdy Said She Overheard a Conversation Between Appellant and One or Two Other People about a Murder That Made Her Nauseous Was Not Accusatory and Thus Could Not Constitute an Adoptive Admission by Appellant

Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." This Court has interpreted this provision to mean that if a person is *accused of having committed a crime*, under circumstances which fairly afford the person an opportunity to hear, understand, and reply, and the person fails to speak, or makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt. (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

Here, the conversation about a murder was hearsay because the jury was asked to conclude the conversation conveyed the truth of the assertion that appellant committed the murders of Thi Hong Nga Pham and Johnny

Hagan Jr.. Dillon's recitation of Onkhamdy's alleged statement that she heard a conversation about murder was improperly admitted under the adoptive admission exception to the hearsay rule because it was not accusatory. The trial court erred in ruling otherwise.

In *People v. Carter* (2003) 30 Cal.4th 1166, 1196-1197, this Court analyzed a statement the trial court had admitted as an adoptive admission pursuant to Evidence Code section 1221 and held that the trial court erred in doing so because no part of the statement referred to the defendant or accused him of anything. The statement analyzed by this Court was a disquisition by an acquaintance of the defendant regarding the shooting of two men; though the statement was a lengthy description of the crime, there was no accusation regarding the defendant's involvement. "There being, in essence, nothing for defendant to deny, a condition of the hearsay exception for adoptive admissions did not exist." (*People v. Carter, supra*, 30 Cal.4th at p. 1196.)

The prosecutor here failed to show that any part of the overheard conversation was accusatory; he also failed to show that appellant adopted any statements. In order for a defendant's failure to reply to accusatory statements to be considered proper evidence there should be a prima facie showing that some action or reply by the defendant would naturally be called for and that defendant had opportunity to reply. (*People v. Shellenberger* (1938) 25 Cal.App.2d 402, 407.) Here the evidence was that somebody, either appellant, Gaio Ly, possibly Dennis, or some combination of speakers, said something, what was said remains unknown, about a murder in a language Onkhamdy claimed not to understand. (32 RT 4203-4205, 4238-4240.)

The burden is on the prosecution, as the proponent of the purported adoptive admission, to offer sufficient proof of the preliminary facts to demonstrate that the evidence falls within the purview of Evidence Code section 1221. (*People v. Lebell* (1979) 89 Cal.App.3d 772, 779, citing Evid. Code, §§ 400-403; see *People v. Maki* (1985) 39 Cal.3d 707, 711-713.) The prosecution failed to meet its burden, and the trial court abused its discretion in allowing Dillon to testify about the overheard statement as proof that appellant admitted committing the murders of Pham and Hagan. It is true that a direct accusation in so many words is not essential for the adoptive admission exception to apply. (*People v. Fauber* (1992) 2 Cal.4th 792, 852.) But this Court has held there can be no adoptive admission when nothing in the remarks at issue referred to appellant or accused him of anything. (*People v. Carter, supra,* 30 Cal.4th at pp. 1196-1197; *People v. Snow* (1987) 44 Cal.3d 216, 227.)

The trial court below concluded the remarks were accusatory by engaging in dubious logic. As set forth more fully in Section A, *supra*, the trial court's finding that the statements constituted an adoptive admission by appellant progressed as follows: There was a discussion between appellant and one or two other people regarding the murders; that discussion made Onkhamdy nauseous; and that nausea "indicates circumstantially simply more than some kind of a nebulous unambiguous reference to somebody killing somebody;" thus the statement must have been accusatory as to appellant who presumably failed to deny or question that "accusation." (32 RT 4245, 4249-4252.)

The trial court went beyond the record when it asserted that somebody "said something about this having been done, this crime having been committed; the other [appellant] apparently says nothing to deny it or

to in any way question that statement." (32 RT 4250.) In fact, there was no evidence that appellant failed to deny anything, or failed to question anything, because there was no evidence of anything anybody said during the conversation, except that the topic of the conversation was a murder. (35 RT 4240.)

Yet even the trial court's own erroneous assessment of the prosecutor's proffered statement falls short of an accusation that appellant would have been compelled to deny. In fact, the evidence presented was so broad (there was a conversation about a murder and it made Onkhamdy nauseous), as to make any suggestion of failure to deny an accusation as speculative as an assertion that appellant vigorously denied an accusation of murder. When a person is silent in the face of a statement *that normally calls for a response*, the silence is considered a tacit admission of the statement. (*Estate of Neilson* (1962) 57 Cal.2d 733, 746.) Here, with no accusatory statement about the murders alleged, it is impossible to judge whether appellant's presumed silence or acquiescence to any statement should be considered a tacit admission of a statement.

The situation here is similar to that examined in *People v. Lewis* (2008) 43 Cal.4th 415, where the trial court allowed the prosecution to present as evidence that the defendant committed robberies with a sawed-off shotgun, several drawings by an unidentified artist of a cat with money bags, a sawed off shotgun, "211" (the Penal Code section for robbery), the defendant's nickname and various gang indicia. (*Id.* at pp. 496-498.) A detective with experience interpreting graffiti testified as to the meaning of the drawings. (*Id.* at pp. 496-497.) This Court held that the drawings were inadmissible hearsay that did not fall within the adoptive admissions exception because "there was no evidence that defendant, by words or

conduct, manifested or adopted a belief in their truth. That is because there was no evidence that defendant agreed with the message [the detective] said the drawings were meant to convey." (*Id.* at pp. 498-499.)

Here, the testimony of Onkhamdy and Dillon indicated that appellant was present for and, possibly took part in, a conversation about a murder, but there was no evidence that appellant, by words or conduct, manifested or adopted a belief in the truth of any message, detail or statement Onkhamdy allegedly overheard. It is impossible to determine from the sparse evidence and vague generality of "a conversation about a murder" whether that conversation was inculpatory or exculpatory in regards to appellant.

A trial court must conduct individual analysis of proffered hearsay statements to determine whether they fall within an exception to the hearsay rule. (*Williamson v. United States* (1994) 512 U.S. 594, 603-604 [regarding Federal Rules of Evidence].) The court below failed to conduct such an analysis. Its conclusory assumption that the conversation as a whole was inculpatory as to appellant's role in the Spokane murders and that appellant "apparently says nothing to deny it or to in any way question that statement," and thus adopted an inculpatory or accusatory "statement," regarding the murders was simply unsupported by the evidence.

The court was presumably engaging in self-deprecating humor when it characterized its adoptive admission ruling as, "probably one of the lesser errors," it made during the trial. (32 RT 4251.) Nevertheless, it was error. The trial court should have rejected the prosecutor's offer of Dillon's irrelevant and highly prejudicial testimony that Onkhamdy had earlier said she overheard a conversation among several men that a murder had occurred as proof that appellant admitted to killing Pham and Hagan.

C. The Conversation Was Also Too Vague to Be Admissible Under the Coconspirator Exception to the Ban on Hearsay Evidence

While the trial court stated it did not rely on the coconspirator exception to the hearsay rule to admit Dillon's testimony (47 RT 6076-6077), the absence of any definitive statement by any identified speaker also dooms the trial court's "back-up" theory that the statement was admissible as a coconspirator statement under Evidence Code section 1223.

In order for hearsay statements to be admissible under Evidence Code section 1223, the prosecutor must establish by a preponderance of the evidence the existence of a conspiracy and of the defendant's participation in that conspiracy *at the time the statements were made*, independent of the statements themselves. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61-62, 65, citing *People v. Lucas* (1995) 12 Cal.4th 416, 466.) Once the prosecution presents independent evidence to establish a prima facie existence of a conspiracy, three preliminary facts must be established: (1) the declarant was participating in the conspiracy at time of his declaration, (2) the declaration was in furtherance of the objective of that conspiracy, and (3) at the time of the declaration the defendant was participating or would later participate in the conspiracy. (*In re Hardy* (2007) 41 Cal.4th 977, 996-997.)

A conspiracy is usually deemed to have ended when the substantive crime for which the coconspirators are being tried is either attained or defeated. (*People v. Hardy* (1992) 2 Cal.4th 86, 143.) Here the Spokane crime was not a crime for which appellant was being tried. The prosecutor was presenting appellant's role in the murders of Pham and Hagan to the jurors as evidence of prior violent criminal activity. The crime was clearly over by the time the participants were talking with non-participants in the

safety of Ly's apartment. The trial court itself acknowledged that "the theory is perhaps questionable as to whether there is – was a conspiracy or not." (32 RT 4245.)

Regardless of whether there existed sufficient independent evidence of an extant conspiracy at the time of the conversation overheard by Onkhamdy, again it is unclear who made what statements, and the trial court observed that not all of the participants in the conversation were coconspirators. (32 RT 4250.) The trial court inferred, however, that the declarant must have been at least one of the two who committed the robbery-murders. (32 RT 4249-4250.)

Proof cannot be supplied by mere conjecture. No specific statement was attributed to any of the men present in Ly's apartment that night. The trial court's attempt to deduce a declarant was an improper substitute for the proponent's required proof that the declarant was participating in a conspiracy at the time of the declaration.

Moreover, even assuming a valid conspiracy existed at the time of the conversation, it is impossible to determine if any declaration made during the conversation was made in furtherance of the objective of the conspiracy, as there was no evidence presented of the contents of the conversation. A mere narrative of past events does not qualify as a statement in furtherance of a conspiracy. (*Mayola v. U.S.* (9th Cir. 1934) 71 F.2d 65, 67.)

The mere existence of a conversation between men, some of whom may have participated in a crime that had ended at the time of the conversation, during which something was said about a murder, was not admissible under any exception to the statutory prohibition on hearsay evidence. The trial court erred in allowing the jurors to consider

Onkhamdy's allegedly statement for the truth of the matter purportedly asserted: that appellant admitted killing Hagan and Pham.

D. The Onkhamdy Hearsay Statements Were Prejudicial

In the context of the lengthy trial and penalty phase proceedings, it is tempting to regard one piece of prejudicial evidence, such as this hearsay statement, as ultimately inconsequential and thus harmless. But the prosecutor fought hard to introduce Onkhamdy's interview statement, and the trial court spent a significant amount of time considering the issue. "There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it." (*People v. Powell* (1967) 67 Cal.2d 32, 56-57, citing *People v. Cruz* (1964) 61 Cal.2d 861, 868.)

As appellant argued at trial, introduction of Onkhamdy's interview statement impermissibly bolstered the prosecution's argument that sufficient evidence proved beyond a reasonable doubt that appellant committed the Spokane murders. (47 RT 6071-6074.) Other circumstantial evidence connected appellant to the murders – his fingerprints were found at the scene; he was connected to some jewelry taken from the house; and four-and-one-half-year-old Joe Hagan Jr. selected appellant's photograph out of a photographic lineup. (40 RT 4063, 4177, 47 RT 6071-6075.) But without Onkhamdy's statement serving as an admission by appellant that he actively committed the murders, the defense could have plausibly argued that any role played by appellant in the Spokane murders was passive, an argument that would have dovetailed with the defense theory that appellant did not personally kill anyone at Elm Avenue. The trial court's error in allowing irrelevant and prejudicial evidence to bolster the prosecution's case fits a pattern of prejudicial over-inclusiveness pervasive throughout

both the guilt and penalty phases.

The trial court's failure to keep out Onkhamdy's prejudicial hearsay statements violated appellant's right to confront the witnesses against him, guaranteed by the Sixth and Fourteenth Amendments, and the California Constitution, article I, section 15; his right not to be deprived of his life or liberty without due process of law, guaranteed by the Fourteenth Amendment, and the California Constitution, article I, sections 7 and 15; and his right to "reliability in the determination that death is the appropriate punishment in a specific case" (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plurality opn.)), and reliability in the determination of guilt in a capital case (*Beck v. Alabama, supra,* 447 U.S. 625) guaranteed by the Eighth and Fourteenth Amendments, and the California Constitution, article I, section 17. The death judgment must be reversed.

VIII.

THE TRIAL COURT ERRED IN EXCLUDING VINH TRAN'S STATEMENT INCULPATING HIMSELF FOR THE MURDER OF TRINH TRAN AND HER THREE CHILDREN AS INSUFFICIENTLY TRUSTWORTHY TO QUALIFY AS A STATEMENT AGAINST VINH TRAN'S INTEREST

A. Factual and Procedural Background

1. Vinh Tran Initially Agreed to Testify in Accordance With His Inculpatory Statement, But Faced With the Potential of Incriminating Himself With an Uncharged Murder, Refused to Testify

On May 21, 1999, defense investigator Frank Pancucci visited Vinh Tran at Folsom State Prison in Sacramento. (45 RT 5791-5792.) Vinh agreed to allow Pancucci to tape record their conversation, but when Pancucci steered the conversation to the night of the Elm Avenue crimes, Vinh told Pancucci to turn off the recorder. (45 RT 5794.) He did not want to talk about the murders on the record, because he did not want to jeopardize the possibility of getting a new lawyer to help him withdraw his plea and obtain a new trial. (45 RT 5794-5795.) Pancucci complied, and then asked about the murders. Vinh revealed that he had gone to Elm Avenue with the others, after first stopping at someone else's house to get a second gun; he was brought along to speak Vietnamese to the targeted victims. (45 RT 5797-5798.) Vinh said that after Henry Nguyen was shot Vinh "lost it or went crazy." He shot Trinh Tran, then ran through the house shooting the children. (45 RT 5796-5797.)

On July 2, 1999, during the penalty phase of appellant's trial, defense mitigation specialist David Sandberg interviewed Vinh Tran, who again explained what happened that night at Elm Avenue, but, again, refused to allow the interview to be tape recorded. (45 RT 5825-5826.)

Vinh said he got in the car with appellant, Karol Tran and Evans, and that the four of them went to Pan's place to pick up a gun before proceeding to Elm Avenue. (45 RT 5827.) Vinh and Karol approached the door and gained entry. Vinh told the family to get on the floor, and appellant and Evans came inside. They collected jewelry and were in the house 15-20 minutes. (45 RT 5827.) At one point Henry Nguyen became "stubborn" and began arguing with appellant. (45 RT 5827.) Appellant started acting "weird" and shot Henry Nguyen. When Vinh saw appellant standing over Henry's body, Vinh "went crazy," and started shooting the mother and children. (45 RT 5827.) Pressed to explain, Vinh, whom Sandberg observed was obviously depressed, said he "went crazy," and that "it was all a fog." (45 RT 5827-5828.) Sandberg took notes during the interview and memorialized those notes on a computer file he used to aid his memory during testimony. (45 RT 5828-5829.)

In his May 21, 1999, interview with Pancucci, Vinh said that he felt badly. He felt responsible for the murders, and he had become a Christian since that event. (45 RT 5798.) Still, he was concerned about testifying in court. He requested that media be barred and the courtroom be closed because he was afraid of how his role as the killer of children would be portrayed. (45 RT 5800.) Vinh also believed he would be in danger in prison as a person who killed children, which also might jeopardize his chances of obtaining a new trial. (45 RT 5800.) Robert Alvarenga, an attorney appointed to represent Vinh Tran, spoke with Vinh's former attorney and revealed that attorney had advised Vinh not to testify in any proceeding regarding the Elm Avenue murders because it would jeopardize Vinh's chance at parole. (42 RT 5419-5421.)

Still, Vinh Tran was willing to testify at the penalty phase of appellant's trial. (45 RT 5803.) When appellant's defense team announced their intent to have Vinh testify for the limited purpose of explaining his role at Elm Avenue, however, the prosecutor countered that no matter how limited in scope the proposed testimony, he would find a way to impeach Vinh with the uncharged murder of Trang Vu. "I honestly, I sincerely believe that if he testifies there will be doors opened. . . . And I have, I say that with my plan of cross examination. And if you want to test it, let's have a 402 hearing where he actually testifies." (42 RT 5439.) For Vinh and his lawyer, the prosecutor's promise to expose Vinh to the uncharged murder of Vu changed the calculus of Vinh's decision of whether or not to testify. (42 RT 5421.) Alvarenga explained that "the possibility is if the State is angered by [Vinh]'s quotes, cooperating with defense, you know we could face the very real fact of a charging murder." (42 RT 5423.) The prosecutor confirmed Alvarenga's assessment, promising as an "officer of the court" he would find a way to bring in the Vu murder, and noted that he had emailed all the parties asking them, "are you sure you want to go there?" (42 RT 5432-5433.)

The trial court repeatedly questioned the prosecutor's assertion that no matter how limited the scope of Vihn Tran's testimony, the Vu killing was so intertwined with Vinh's description of the events of Elm Avenue that the prosecutor would be able to impeach Vinh with the Vu killing:

> If he doesn't refer to it, he doesn't go into the state of mind of Mr. Chhoun, he doesn't relay to us anything other than what happened on Elm Street, how he could then be impeached by what happened at some other killing and his involvement or Mr. Chhoun's involvement is at this point escaping me.

(42 RT 5434-5435.)

The trial court, however, did not order that Vinh Tran testify at an Evidence Code section 402 hearing or that Vinh's testimony be limited so as to exclude the Vu killing. Rather, it cautioned Vinh's attorney that perhaps the court was wrong and the prosecutor was right:

> Mr. Alvarenga, I've made a statement what my position is. You apparently have greater knowledge of the intimacy of these facts than I do. Now if you feel based upon this preliminary statement that still exposes your client in some way to the Vu killing, then it's your decision "I'm not going to have him testify, Judge."
> . . .¶ So ultimately the decision is yours based upon what I have said I would do under the very simplistic hypothetical. If you can see something beyond that, you can see something in merit to [the prosecutor's] position, he could go beyond that, then you are ultimately going to have to make that decision yourself.

(42 RT 5435-5436.) Vinh Tran's attorney still seemed satisfied, stating that his understanding of the trial court's ruling was that unless his client "screws up and says something stupid," the inquiry would be limited to the events at Elm Avenue. (42 RT 5438.) The prosecutor persisted, however, insisted that he would find some way to tie the Vu killing to Vinh's testimony. Ultimately, the trial court told Vinh's attorney that he should defer to the prosecutor: "maybe [the prosecutor] can explain to you a little more his position on this and can convince you." (42 RT 5440.) Thus, when called by appellant, Vinh Tran refused to testify, asserting his Fifth Amendment rights. (44 RT 5650.)

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2. After Vinh Tran Exercised His Fifth Amendment Rights, Appellant Attempted to Introduce Vinh's Statements as a Declaration Against Interest, But the Trial Court Ruled the Statements Inadmissable

Upon Vinh Tran's assertion of his right not to testify, appellant moved to call Pancucci and Sandberg to testify to the statements Vinh made to them about the events at Elm Avenue. (44 RT 5653.) Appellant's theory of admission was that the declarant was unavailable and the statements were against his penal interest. (44 RT 5654.) The parties agreed that Vinh Tran was unavailable, but the prosecutor argued that although Vinh's statements, "on the face of it" appeared to run counter to his penal interests, they were not sufficiently trustworthy to meet the hearsay exception. (44 RT 5654-5656.) The trial court granted the prosecutor time to research and present his argument. (44 RT 5657-5658.)

The trial court heard further argument during the afternoon session. (44 RT 5765-5785.) The following day, August 26, 1999, the trial court held a hearing to determine the admissibility of Vinh Tran's statements pursuant to Evidence Code section 1230. After Pancucci and Sandberg testified, the trial court ruled that Vinh's statements were inadmissible. (45 RT 5789, 5832-5839.)

The trial court emphasized that it was a close call; even though the statute was plain and the law clear, applying the law to this case was "very difficult," and the court found itself "confronted with a situation in which the Supreme Court says the trial judge must exercise his discretion," but here that discretion would "certainly" be reviewed by this Court, if appellant raised the issue. (45 RT 5832.)

The trial court ultimately ruled that it was "questionable" whether Vinh Tran's statements were even against a penal interest, as Vinh would

suffer "no consequences" for stating that appellant killed Henry Nguyen and Vinh killed Trinh Tran and the children. (45 RT 5836.) The court assumed Vinh's right to appeal had been exhausted and, in any event, found that a reasonable time had passed such that Vinh could not expect to be able to set aside his plea. Also, by implicating himself in the murders of four of the five victims, Vinh was "exonerating" appellant and thus possibly gaining favor with his former gang members. (45 RT 5836-5837.)

The trial court acknowledged it was required to exercise its discretion "based on deep acquaintance with the way human beings actually conduct themselves," but admitted, "I don't have the deep acquaintance with the way human beings actually conduct themselves" to determine Vinh Tran's motive for giving the statements. (45 RT 5834-5835, 5837.) On the one hand, Vinh said he had become a Christian, found God, and wanted to clear his conscience and make sure appellant did not receive the death penalty for something he did not do. (45 RT 5836.) On the other hand, Vinh, by testifying for appellant, "had the opportunity to not only avoid" being labeled an informant, but also gain favor with the gang. (45 RT 5837.)

The court concluded Vinh Tran was inherently untrustworthy. Prior to making the statements at issue here, Vinh Tran made contrary statements as to his involvement and the involvement of others at Elm Avenue. (45 RT 5835.) That made Vinh a "proven liar," whose "track record of credibility is nil." (45 RT 5835.) The trial court looked for indicia of reliability, but believed that where the statements were not against Vinh's penal interest, such indicia could not be found. (45 RT 5834.)

The trial court observed that because Vinh Tran was not comfortable having his statements about the Elm Avenue murders tape recorded, his

statements were not sufficiently preserved. (45 RT 5837-5838.) The absence of such preservation hampered the court in evaluating the statements. (45 RT 5838.)

The court concluded its ruling the same way it began: the decision was a close call; "maybe some other judge would have called it differently." (45 RT 5839.)

B. Vinh Tran's Statements Were Admissible as Statements Against Interest

Evidence Code section 1230 provides that out of court statements that normally would be prohibited as hearsay may be admitted if:

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

1. Vinh Tran Was Unavailable to Testify

That Vinh Tran was unavailable to testify once he invoked his Fifth Amendment rights was not disputed; the trial court correctly ruled that Vinh Tran was unavailable within the meaning of Evidence Code section 240, subdivision (a)(1). (44 RT 5654; see *People v. Duarte* (2000) 24 Cal.4th 603, 609-610.)

2. Vinh Tran's Admission that he Killed Four People, Including Three Children, Constituted Statements Against Interest

Vinh Tran's statements that he shot four of the five victims at Elm Avenue after appellant shot Henry Nguyen constituted statements against Vinh's interests under two separate though interrelated theories. First, Vinh

realized his statements regarding his role at Elm Avenue would make him "an object of hatred, ridicule, or social disgrace" in the eyes of a segment of society. (Evid. Code, § 1230; see also *People v. Wheeler* (2003) 105 Cal.App.4th 1423, 1426-1427.) Pancucci testified that Vinh Tran's statements, claiming credit for the murder of three children, were dangerous to make. Vinh was concerned with self-preservation and said he would only testify about Elm Avenue in a closed courtroom with no media present. (45 RT 5800-5801.) Indeed, prisoners known to have killed children face potential violence from other inmates. (See, e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 283 [defendant admitted crime to informant on the condition informant would protect him from rough treatment he was receiving from inmates due to rumor he had killed child]; Michael Higgins, *Tough Luck for the Innocent Man: As Scientific Breakthroughs Help Overturn More Convictions of Wrongly Imprisoned People, the New Crime Is How Little Their Lost Lives Are Worth*, ABA J., March 1999, at p. 46 ["As a convicted child killer, Green was marked for special abuse"].)

Whether in prison or in society at large, an admitted child-killer would be "an object of hatred, ridicule, or social disgrace," within the meaning of Evidence Code section 1230. The fact that Vinh's statements ran against his "social" interests in prison should not be considered a trivial addendum to the broader examination of whether the statements ran against his interests.

> Declarations against social interests, such as acknowledgments of facts which would subject the declarant to ridicule or disgrace, or facts calculated to arouse in the declarant a sense of shame or remorse, seem adequately buttressed in trustworthiness and should be received [as statements against interest].

(2 McCormick on Evid. (4th ed. 1992) § 318, p. 340.) Social interests are often in the forefront of "the minds and hearts of men." (*Ibid.*) Vinh expressed remorse for the killings to Pancucci, he was reluctant to record statements regarding the events at Elm Avenue and he became depressed talking about them with Sandberg; he clearly understood the impact of his statements. (45 RT 5796, 5798, 5828.)

Second, contrary to the trial court's observation that Vinh Tran faced absolutely no penal consequences as a result of his statements (45 RT 5836), Vinh's trial attorney believed it would "doom" Vinh's chance of obtaining parole. (42 RT 5419-5420.)

For Vinh Tran, a juvenile at the time of the murders and thus ineligible for the death penalty, a chance of parole was the difference between the plea deal of 50 years to life he accepted and the harshest possible sentence, life imprisonment without possibility of parole. Vinh's decision not to testify for fear of the penal repercussions threatened by the prosecutor belies the trial court's finding that "The likelihood of [Vinh] being subjected to any further penal punishment is not there. There was nothing to be done to him." (45 RT 5836.)

C. Vinh Tran's Statement's Were Sufficiently Reliable To Be Admitted Pursuant to Evidence Code Section 1230

The totality of the circumstances surrounding Vinh Tran's statements about the Elm Avenue murders reveals they were sufficiently reliable to meet the standard set forth in Evidence Code section 1230. There is no "litmus test" for whether a statement is trustworthy enough to fall within the declaration against interest exception; a court looks to the totality of circumstances, including whether the declarant spoke from personal knowledge, actual statements, motivation, and anything else relevant to the

inquiry. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334 .) "Assessing trustworthiness requires the court to apply to the particular facts . . . a broad and deep acquaintance with the ways human beings actually conduct themselves," in the circumstances surrounding the making of the statements. (*People v. Duarte*, *supra,* 24 Cal.4th at p. 614, citing *People v. Frierson* (1991) 53 Cal.3d 730, 745.)

Normally, when reviewing a ruling admitting or excluding evidence, the question is whether the ruling is an abuse of discretion. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 362.) When examining a hearsay statement's inherent trustworthiness, however, a reviewing court does not defer "to lower courts' determinations regarding whether a hearsay statement has particularized guarantees of trustworthiness." (*Lilly v. Virginia* (1999) 527 U.S. 116, 136.) Thus, in determining whether a statement was sufficiently trustworthy, "it is appropriate to conduct a de novo review of the totality of circumstances that surround the making of the statement." (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 174-175; citing *Lilly v. Virginia, supra,* 527 U.S. at pp. 136-137; but see *People v. Cudjo* (1993) 6 Cal.4th 585, 607 [on appeal, trial court's determination on whether statement is against interest is reviewed for abuse of discretion].)

1. Vinh Tran's Demeanor, Reluctance to Talk about the Events of Elm Avenue, and Disclosure of a Fact That Could Only Be Known by an Eyewitness to the Killings Demonstrate that His Statements Were Sufficiently Reliable

Sufficient indicia of trustworthiness may be found when an accomplice admits culpability and does not attempt to shift blame to another. (*People v. Brown* (2003) 31 Cal.4th 518, 536-537.) "To determine whether the declaration passes the required threshold of trustworthiness, a

trial court may take into account not just the words but the circumstances under which they were uttered." (*People v. Brown, supra*, 31 Cal. 4th at p. 536.)

Here, Vinh Tran pointedly admitted culpability of four of the five murders. At the same time, he was reluctant to reveal too much. Vinh uttered his statements of culpability to Pancucci only when "off-record." Furthermore, although Vinh agreed to testify in accordance with his statements, he set forth conditions for testifying. He wanted to testify in a closed courtroom with no media. (45 RT 5800.) "[A] big concern was admitting to killing children and having to do another 4 life sentences in prison with people knowing he had killed a woman and children." Vinh was "afraid how the media would portray it." (45 RT 5800.)

Vinh also told Sandberg that he did not want the interview tape-recorded. (45 RT 5826.) Sandberg testified that Vinh became depressed when talking about the events of Elm Avenue, at one point shaking his head and putting his head down. (45 RT 5828.) The demeanor of an out-of-court declarant when making a statement at issue is a relevant factor in determining the statement's truthfulness. (*Idaho v. Wright* (1990) 497 U.S. 805, 807 [change in demeanor of declarant may suggest declarant telling the truth].)

In *People v. Frierson, supra,* 53 Cal.3d at p. 745, this Court examined a situation where a declarant knew there had already been an adjudication that the defendant committed a murder. This Court found that the declarant's statement that he, not the defendant, committed the murder stood to benefit the defendant with little risk to the declarant, and thus the statement was insufficiently trustworthy to be admitted under the declaration against interest exception to the hearsay rule. (*Ibid.*) Here,

however, the trial court's theory, that by "only" inculpating appellant for the shooting death of Henry Nguyen he was in fact exonerating appellant, and potentially gaining good will with fellow gang members, overlooked the possibility that by testifying at all Vinh Tran risked being tagged with the "snitch" label he dreaded. (44 RT 5769-5770.) Vinh could have avoided that label by refusing to give *any* statements regarding Elm Avenue; that would have been the safe course given that Vinh's statement removed all doubt that appellant personally shot and killed at least one of the Elm Avenue victims. In fact, in Vinh's account, appellant was the instigator of the murders: appellant shot and killed first.

Far from being beneficial, Vinh Tran's statements were potentially dangerous. If his motive were truly to exonerate appellant and curry favor with TRG members, he could have taken the fall for all of the murders, rather than pinning one of them squarely on appellant. Instead, Vinh's statement would have undermined the defense theory that appellant was taken by surprise by Vinh Tran's violence and did not personally do any of the shooting, while also putting Vinh in danger as a self-admitted child-killer. That appellant personally shot all of the victims was the prosecutor's theory: "We believe the evidence is going to show [appellant] did all the shooting and committed the murders." (14 RT 1897.)

The trial court did not point to any evidence to support its "curry favor with the gang" theory for Vinh Tran's motivation to give the statements at issue. In contrast, Pancucci testified that Vinh expressed a motive for making the statements, that he had become a Christian in prison and it was necessary to tell the truth. (45 RT 5798.) The trial court discounted that motive and did not appear to consider it in making its decision. (45 RT 5836-5837.) Earlier in the trial, however, when Jonathan

Ibarra, an informer who was afraid to go to prison and thus testified for the prosecution pursuant to a deal, cited as a motive for his testimony that he had found God and become a Christian, the trial court, after first sustaining an objection that Ibarra's motivation for testifying was irrelevant, allowed the prosecutor to explore at length Ibarra's devotion to God, and how his belief in God and the bible induced him to take his oath to testify truthfully very seriously. (20 RT 2873-2875; 2881-2883; 2885-2886.) If such a motive was relevant during the guilt phase, it should have been similarly relevant at the penalty phase.

The trial court noted that when reviewing a possible statement against interest a court is not allowed to consider the evidence presented to determine whether that evidence corroborates the statement, as such corroboration has been held to constitute improper "bootstrapping." (45 RT 5837; *People v. Greenberger, supra*, 58 Cal.App.4th at p. 336.) This Court has looked to corroborating evidence more broadly, however, as part of the circumstances surrounding a statement a court must analyze in determining the reliability of that statement. (*People v. Cudjo, supra,* 6 Cal.4th at p. 607.) Here, the trial court was presented with a unique situation in which the state of the evidence at the time Vinh Tran made his statements detailing the events of the Elm Avenue crime was such that no one, not the prosecution nor counsel for appellant or Pan, knew that an unanalyzed piece of evidence actually showed that there were two guns used at Elm Avenue. (24 RT 3359-3365; 26 RT 3548-3550; 33 RT 4528-4529.)

Vinh Tran's account of the murders, that Chhoun used one gun to shoot and kill Henry Nguyen and Tran used another gun to shoot and kill the other victims, was only corroborated by evidence discovered after his account. The state of the evidence prior to the penalty phase of appellant's

trial, which is to say the state of the evidence that existed at the time Vinh Tran talked to Pancucci at Folsom State Prison, was that all the shell casings from the Elm Avenue scene came from the same gun, likely a Glock nine-millimeter, indicating one shooter or, less plausibly, multiple shooters handing off the same gun. (24 RT 3354-3355.) At the penalty phase, however, it was revealed that the evidence from the Elm Avenue crime scene included a cartridge that had not been analyzed, and that cartridge showed that two guns had been used. (33 RT 4528-4529.) Two guns suggests two shooters; something Vinh Tran alleged before the penalty phase began.

Again, a court must look to whether the declarant spoke from personal knowledge. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 175.) In this case, Vinh's admission went against the then prevailing theory of one shooter using one gun, and presaged the discovery of evidence of a second shooter. This revelation lends credence to Vinh's account of events.

Although the trial court was justifiably concerned that Vinh Tran's earlier accounts of the events at Elm Avenue contradicted his proffered testimony, the prosecutor could have easily recalled Dillon to testify about the earlier contradictory accounts Vinh gave in his three previous interviews (42 RT 5430, 5437-5438), which would have allowed the jurors to compare the contradictory statements, as they did with witnesses Evans, Karol Tran and others.

2. Vinh Tran's Statements Did Not Bear the Hallmarks of Unreliability Traditionally Used to Exclude Putative Statements Against Interest

"Clearly the least reliable circumstance is one in which the declarant . . . attempts to improve his situation with the police by deflecting criminal responsibility onto others." (*People v. Greenberger, supra,* 58 Cal.App.4th

at p. 335.) Significantly, this was "not a case in which [the declarant] admitted to some culpability in order to shift the bulk of the blame to another." (*People v. Brown, supra,* 31 Cal.4th at p. 537.) In fact, Vinh Tran's statement presents this Court with the opposite situation. He admitted culpability for four murders, including the killing of three children. Moreover, Vinh did not accept an early plea offer from the prosecutor in exchange for testifying.

The trial court's reliance on irrelevant factors in finding Vinh Tran's statements untrustworthy should not influence this Court's review of the reliability of those statements. The trial court apparently placed some weight on the fact Vinh Tran's statements to Pancucci were not preserved on tape and that Vinh's statements were only preserved in Sandberg's notes. (45 RT 5837-5838.) But "whether the declaration was as represented is governed by the substantial evidence rule." (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 608.) "As with other facts, the direct testimony of a single witness is sufficient to support a finding." (*Ibid.*) This Court should ignore the trial court's reliance on such non-factors in evaluating reliability.

D. The Exclusion of the Proffered Evidence Infringed on Appellant's Constitutional Rights, Resulting in a Fundamentally Unfair Process and Result

In addition to constituting evidentiary error, the trial court's exclusion of Vinh Tran's admissions violated appellant's constitutional rights to present relevant mitigating evidence and a penalty phase defense, a fair trial and a fair and reliable capital-sentencing determination, and rebut aggravating evidence, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, and 17 of the California Constitution. The trial court's exclusion of Vinh Tran's admissions infringed on appellant's right to present relevant

mitigating evidence. Evidence tending to prove a fact or circumstance that a factfinder could reasonably find mitigating is relevant mitigating evidence. (*Tennard v. Dretke* (2004) 542 U.S. 274, 284-285.)

The exclusion of Vinh Tran's confession that he killed four of the Elm Avenue victims violated appellant's right to present a complete defense that the Sixth and Fourteenth Amendments guarantee. (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 324; *Green v. Georgia* (1979) 442 U.S. 95, 97.) Both the compulsory process clause and the due process clause imbued appellant with the right to present a complete defense. (See *Holmes v. South Carolina, supra*, 547 U.S. at p. 324.) Fundamental fairness demands "that criminal defendants be afforded a meaningful opportunity to present a complete defense." (*California v. Trombetta* (1984) 467 U.S. 479, 485.)

The prosecutor apparently offered Vinh Tran a plea deal in exchange for testifying in this case, just as he did for several other codefendants. (14 RT 1922.) Unlike those codefendants, however, Vinh Tran did not take the deal. By allowing the prosecutor to build his case on the backs of proven flagrant liars such as Evans, Karol Tran and Marshall Ibarra while barring a statement from Vinh Tran that, as to appellant, was both mitigating (in that Vinh claimed credit for the actual shooting of four of the victims) and aggravating (in that Vinh implicated appellant for the actual shooting of Henry Nguyen) on the basis of the statement's "unreliability," the trial court violated fundamental fairness principles. "[D]ue process is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Rather, the phrase expresses the requirement of fundamental fairness." (*Lassiter v. Department of Social Services of Durham County, N.C.* (1981) 452 U.S. 18, 24.)

It cannot be said that appellant received a fair trial when the prosecutor built his case by offering carrots in the form of plea deals, to favorably testifying codefendants, while wielding sticks in the form of threats to prosecute Vinh Tran for the unrelated murder of Trang Vu, to prevent an unfavorable codefendant from testifying, and then arguing for the exclusion of that codefendant's statements. Evans, one of the prosecutor's main witnesses, told so many contradictory stories that at one point the prosecutor sought and obtained a ruling that would have allowed him to show that one of Evans's many prior stories was actually consistent with his live testimony. (21 RT 3001-3002.) After being questioned about his various changing stores on cross-examination, Evans admitted that he would lie to get himself out of trouble. (17 RT 2496-2501.) The Ibarra brothers both gave so many different accounts of the crimes that the prosecutor was forced to admit during opening statements that the jury would hear "some statements made by both Jonathan and Marshall Ibarra, which quite frankly, I have a lot of problems with." (14 RT 1919.)

The prosecutor's argument to the trial court that Vinh Tran's statements about the events that occurred at Elm Avenue should be excluded for their unreliability was audacious; the trial court's acceptance of that argument violated appellant's due process rights. "Fair play and common sense dictate that what is sauce for the goose is sauce for the gander." (*Sharp v. State* (Fla.Dist.Ct.App. 1969) 221 So.2d 217, 219.) The trial court permitted the prosecutor to build his entire case on the testimony of self-serving codefendants whose various stories changed continuously; it seems a cruel turn-around that the trial court then forbade appellant from offering the statements of codefendant Vinh Tran on the basis of unreliability. "As applied to a criminal trial, denial of due process is a

failure to observe that fundamental fairness essential to the very concept of justice." (*Lisenba v. People of the State of California* (1941) 314 U.S. 219, 236.)

The exclusion of defense evidence violates "an accused's right to present a defense [if it is] 'arbitrary' or '*disproportionate* to the purposes they are designed to serve.'" (*United States v. Scheffer* (1998) 523 U.S. 303, 308, quoting *Rock v. Arkansas* (1987) 483 U.S. 44, 55, italics added.) The centrality of evidence to the defense is the key variable for determining whether the right to present a defense requires the admission of exculpatory defense evidence. (See *Rock v. Arkansas, supra*, 483 U.S. at p. 57; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Green v. Georgia, supra,* 442 U.S. at p. 97; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Davis v. Alaska* (1974) 415 U.S. 308, 317-318.) Nothing could have been more central to the defense case at the penalty phase than the admission from appellant's codefendant that he, not appellant, personally killed four of the five victims for whose deaths the prosecutor beseeched the jury to kill appellant. The United States Supreme Court has explicitly held that when faced with a defendant's fundamental right to present witnesses in his defense, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Chambers v. Mississippi, supra*, 410 U.S. at p. 302; *Green v. Georgia, supra*, 442 U.S. at p. 97.) In finding Vinh Tran's statements unreliable without considering the circumstances of the case and the prosecution's similarly unreliable gang witnesses presented, that is exactly what happened here.

The prejudice that resulted from the trial court's error in excluding Vinh Tran's statements is patent. Vinh was the only codefendant involved in the Elm Avenue crimes who was present during the shooting, and his

admission to killing four of the five victims, including all three child victims would have dramatically altered the jury's consideration of the aggravating and mitigating factors and their ultimate decision as to the proper punishment for appellant's five murder convictions. And while at the close of the guilt phase the jurors found the gun enhancements as to the five murder counts untrue (28 RT 3789-3790), by the time of the penalty phase deliberations, the jurors were aware that a second gun had been used (33 RT 4528-4529), which may have influenced their assessment of appellant's involvement.

The trial court took pains to emphasize the decision not to allow Vinh's statements was a close call. It would not have been had the court considered the possible penal consequences Vinh actually faced (in contrast to the trial court's characterization that there were absolutely no penal consequences); the social consequences he faced; and the incongruity of allowing testimony and statements of similarly situated codefendants presented by the prosecution.

Exclusion of Vinh Tran's statements also deprived appellant of his right to due process and a fundamentally fair jury trial under the Fifth Amendment as well as his right to present witnesses in his defense under the Sixth Amendment. In addition, exclusion of the testimony deprived appellant of his right to reliable determinations of guilt, death-eligibility and penalty as provided by the Eighth Amendment. (See *Holmes v. South Carolina, supra,* 547 U.S. at pp. 329-331; *Pennsylvania v. Richie* (1987) 480 U.S. 39, 60; *Chambers v. Mississippi, supra*, 410 U.S. at pp. 298-302; *Washington v. Texas* (1967) 388 U.S. 14, 19; *Chia v. Cambra* (9th Cir.

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2004) 360 F.3d 997, 1003-1004; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357; *Beck v. Alabama, supra,* 447 U.S. at p. 638; *Woodson v. North Carolina, supra,* 428 U.S. at pp. 304-305.) The death judgment must be reversed.

IX.

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S LEGALLY SUPPORTED MODIFICATIONS TO CALJIC NO. 8.85

A. Introduction

"What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." (*Zant v. Stephens* (1983) 462 U.S. 862, 879.) CALJIC No. 8.85 informs the jurors of factors they can consider in determining the penalty to be imposed. Appellant proposed that CALJIC No. 8.85 be modified to accurately and constitutionally guide the jurors in making their penalty determination by clarifying how the penalty phase evidence could be considered under the relevant provisions of Penal Code section 190.3, rather than simply providing a boiler-plate recitation of the general categories of mitigating and aggravating factors prepared to cover all factual scenarios leading to the consideration of death as a penalty. The trial court denied appellant's proposed modifications.

Appellant's proposed modifications accurately explained and clarified how the jurors should consider evidence on the appropriate punishment in this case. When the trial court refused the modifications, it ensured that the jury would reach the penalty determination without being apprized of the overarching philosophies that come into play when making such a decision. Because the trial court tilted the balance in the prosecution's favor by rejecting appellant's offers to more properly define the factors at play in his specific case in favor of generic categories that did not properly reflect his case, the instructions given to appellant's capital sentencing jury were constitutionally flawed and violated his rights to due process, to a fair and reliable capital trial by a properly instructed jury, and

to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and analogous provisions of the California Constitution. (*Beck v. Alabama, supra,* 447 U.S. at p. 638; *Estelle v. Williams* (1976) 425 U.S. 501; *Carter v. Kentucky* (1981) 450 U.S. 288, 302; *Duncan v. Louisiana* (1968) 391 U.S. 145.) The trial court's errors further violated federal due process by arbitrarily depriving him of his state right to the delivery of requested instructions supported by the evidence. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300.) These errors require that appellant's death sentence be vacated.

B. Appellant's Proposed Modifications

Appellant submitted the following modifications to factors (a), (i), (j), and (k) of CALJIC No. 8.85 (appellant's proposed modifications and additions appear in brackets, with a citation to the modification as set forth in the Clerk's Transcript):

> In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may be hereafter instructed or herein instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true;
>
> [A juror who voted for conviction at the guilt phase may still have a lingering or residual doubt as to whether the defendant __ [insert appropriate element, e.g., was the actual shooter, intended to kill, premeditated and deliberated, etc.] Such a lingering doubt, although not sufficient to raise a reasonable doubt at the guilt phase, may still be considered as a

mitigating factor at the penalty phase. Each individual juror may determine whether any lingering or residual doubt is a mitigating factor and may assign it whatever weight the juror feels is appropriate. (3 CT 1140.)];

* * *

(i) The age of the defendant at the time of the crime;

[Under the factor of age, you may consider the defendant's psychological immaturity as a factor in mitigation. (3 CT 1134.)];

[#1 In weighing the defendant's age you should consider that no person is eligible for the death penalty or life without parole unless he or she was at least 18 years old at the time of the killing.

(OR)

#2 Defendant was __ years when he committed the crimes of which you have found him guilty. If defendant had been under 18 years old when the crimes were committed, he would be subject to neither life imprisonment without the possibility of parole nor the death penalty. You must consider the defendant's age only as a mitigating factor, to be accorded whatever weight you believe it deserves; you may not under any circumstances consider defendant's age as an aggravating factor. (3 CT 1137.)];

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

[You may consider the fact that defendant's accomplice[s] received a more lenient sentence as a mitigating factor. (3 CT 1136.)]

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a

sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

[The fact that the defendant was [an accomplice] [a coconspirator] who did not personally commit [the killing] [all of the charged acts] may be considered by you as mitigation. [The fact that the defendant was not the actual killer may be considered as a mitigating factor.] (3 CT 1139.)]

[In considering, taking into account and being guided by the aggravating and mitigating circumstances, you must not decide the evidence of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by the relative number but by their relative convincing force on the ultimate question of punishment. (3 CT 1138).]

(3 CT 1134-1140.)

The court rejected all of these proposed modifications off the record, so the rationale behind the rejections remains unclear. (41 RT 5384-5385.)

C. The Trial Court Erred in Refusing to Give the Requested Modifications Reflecting Appellant's Case And Simply Instructing the Jury with a Generic Version of CALJIC No. 8.85 That Addressed All Conceivable Death Penalty Cases

CALJIC No. 8.85 is typical of a pattern jury instruction in that it is designed to cover all of the statutory factors set forth in Penal Code section 190.3 that may apply to any conceivable capital case. Defense counsel's proposed modifications further explained certain factors relevant to the actual case at hand, and thus were appropriate addenda. As section 190.3 and CALJIC No. 8.85 instruct, whether or not the penalty is appropriate is ultimately a case by case decision. The United States Supreme Court has

emphasized the necessity for particularized consideration of defendants and their crimes before imposing death.

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

(*Woodson v. North Carolina, supra,* 428 U.S. at p. 304.) If penalty phase instructions were infallible, no modifications would ever be permitted, but that is clearly not the case. Appellant's proposed modifications dealt with appellant's specific case, rather than abstractions. It was error to refuse any of them.

1. Appellant's Lingering Doubt Modification to the Standard Factor (a) Instruction Was Improperly Rejected

In *People v. Cox, supra,* 53 Cal.3d at p. 678, fn 20, this Court stated that, pursuant to section 109.3, subdivision (f), the trial court may be required to give a "properly formulated" lingering doubt instruction as to the extent of the defendant's guilt. (See also *People v. Thompson* (1988) 45 Cal.3d 86, 134-135.) The lingering doubt instruction in *Cox* was properly refused because the instruction – which stated the jury "must" consider residual doubt as mitigation – invaded the jury's responsibility to determine whether or not a factor is mitigating. (*People v. Cox, supra,* 53 Cal.3d at pp. 678-679, fn. 21.) Appellant's carefully formulated lingering doubt addition to factor (a) satisfies this Court's concern in *Cox* by allowing the jury, and in fact each individual juror, to determine whether any residual

doubt is mitigating, and what weight to place on that possible mitigation. (3 CT 1140.)

"Certainly, jurors are entitled to consider any lingering doubt they may have about the defendant's guilt as one of the many factors to be weighed at the penalty phase." (*People v. Cowan* (2010) 50 Cal.4th 401, 444.) When a lingering doubt instruction focuses upon a theory of the defense that seeks to negate an element of the offense, then the instruction properly directs the jury in pinpointing the crux of the defense. (See *People v. Howard* (1988) 44 Cal.3d 375, 442; *People v. Wright* (1985) 45 Cal.3d 1126, 1136-1137; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.)

It is true that courts are not required as a matter of state law to instruct on lingering doubt, and thus the "[*People v.*] *Cox* dictum that a lingering doubt instruction *may* be required as a matter of statutory law . . . has been put to rest." (*People v. Hartsch* (2010) 49 Cal.4th 472, 512-513.) Although a lingering doubt instruction may not be required, but when, as in this case and *Cox*, it is supported by the evidence in a specific case, such an instruction can help a juror evaluate such doubts in proper context. Here, the jury's guilt phase verdict, finding appellant guilty for the five charged murders but finding untrue the allegation that appellant personally shot any of the victims, indicated the possibility of lingering doubt; appellant's proposed instruction was carefully crafted to inform each individual juror that they *could* find that lingering doubt was a mitigating factor, and if they did, each juror could "assign it whatever weight the juror feels is appropriate." (3 CT 1140.)

The trial court's error in rejecting appellant's properly formulated mitigation instruction violated the federal Constitution in multiple ways. First, under state law, appellant had a statutory right to have the jury

exercise its discretion and "fix his punishment in the first instance" at either life in prison without parole or death (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 347) and to do so based on both statutory and judicially-recognized mitigating factors. *Hicks* held that a defendant, entitled by state statute to have jury decide his punishment, was deprived of federal due process by incorrect instructions that failed to state the jury's authority to impose any sentence of not less than ten years. Although the jury here, unlike the jury in *Hicks*, was instructed on all the punishment options provided by state law, its sentencing discretion was unfairly cabined by the trial court's rejection of a mitigation instruction that informed the jurors that under state law lingering doubt was a mitigating factor and a basis for choosing life without parole over a death sentence. In this way, appellant's jury, much like the jury in *Hicks*, was hindered from exercising its sentencing authority to the full extent allowed under state law.

Second, the due process clause of the Fourteenth Amendment was violated by the trial court's failure to heed the "the statutory mandate" (*People v. Cox, supra,* 53 Cal.3d at p. 678, fn. 20), embedded in section 1093 and a similar admonition about instructional duties in section 1127. (See *Sandin v. Conner* (1995) 515 U.S. 472, 484 [setting forth the test for evaluating whether a state prison regulation creates a liberty interest protected by the due process clause].) Although *Sandin* involved prison regulations, its ruling applies to state statutes as well. (See *Marsh v. County of San Diego* (9th Cir. 2012) 680 F.3d 1148, 1155-1156 [applying *Sandin* to Code Civ. Proc., § 129 and noting that "once a state creates a liberty interest, it can't take it away without due process"].) In the context of a capital sentencing proceeding, sections 1093 and 1127 secure for the capital defendant his substantive right to a reliable sentencing by a jury with

knowledge of the full range of its discretion, and guide the trial court in evaluating the circumstances under which requested instructions must be provided to the jury. The statutes also prescribe for the trial court what it must do if the requested instructions are proper. In this way, the statutes both protect a "substantive end" and are sufficiently mandatory in nature to create a liberty interest protected by the due process clause. (*Ibid.*)

Third, a jury charge may be impermissibly vague in violation of the Eighth and Fourteenth Amendments by failing "adequately to inform" the jury what it "must find to impose the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) In such a situation, the jury receives inadequate guidance about the meaning of the applicable state sentencing factors, and the vice of such an omission is that the resulting death sentence is impermissibly arbitrary and capricious. (*Id.* at p. 362.) Although sentence-selection factors are subject to a more deferential scrutiny than death-eligibility factors (*Tuilaepa v. California* (1994) 512 U.S. 967, 973), sentencing factors must have some "'common-sense core of meaning . . . that criminal juries should be capable of understanding'" (*ibid.*, citation omitted). At a minimum, the instructions must tell "the jury to consider a relevant subject matter and [do] so in understandable terms." (*Id.* at p. 976.) In the present case, the intentional instructional omission left to chance and caprice whether appellant's jury understood and applied the concept of residual doubt, a mitigating factor embedded in the state's jurisprudence and which appellant was entitled to have them consider. The lack of definition and guidance in the instructions here violated the precepts described in *Maynard* and *Tuilaepa*.

Fourth, although appellant may not have been entitled to have a jury consider lingering doubt as a matter of federal constitutional law, he was so

entitled under state decisional law. It was, simply put, a mitigating factor that he was entitled to have his jury consider under state law. A residual doubt over whether appellant committed a capital murder is by definition something that might serve as the basis for a life verdict. "The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment." (*People v. Terry* (1964) 61 Cal.2d 137, 146, overruled on other grounds in *People v. Laino* (2004) 32 Cal.4th 878, 893; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5 [excluding evidence of petitioner's good behavior in jail awaiting trial violated his right to place before the sentencer relevant evidence in mitigation of punishment].) Consequently, he was entitled to instructions that allowed the jury to give meaningful consideration and full effect to his evidence, theory, and argument explaining and applying that factor. (See *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [confirming that the sentencer must be permitted to consider "any relevant mitigating factor"].)

In sum, the failure to deliver appellant's requested proper instruction violated long-standing federal constitutional principles; this Court should so find and reverse the death judgment.

2. Appellant's Proposed Expansions to Factor (i) Were Improperly Rejected

Appellant was 22 years old at the time of the offense, and the conditions of his childhood in Cambodia during the Khmer Rouge genocide were suboptimal for normal cognitive and emotional maturation. The standard factor (i) portion of CALJIC No. 8.85 simply admonishes the jury that, "the age of the defendant at the time of the crime," should be

considered and taken into account by the jurors when considering whether to sentence appellant to death or to life imprisonment without parole. The instruction offers no guidance as to how the age of the defendant should be taken into account, leaving the individual jurors to determine whether a defendant's age tends to favor a judgment of death or of life imprisonment without parole.

Since 2010, the United States Supreme Court has recognized that "[a]s compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." (*Graham v. Florida* (2010) 560 U.S. 48, 68, citing *Roper v. Simmons* (2005) 543 US 551, 573, internal quotation marks omitted.) Accordingly, the federal Constitution's ban on cruel and unusual punishment forbids sentencing a defendant who was under 18 years of age at the time of his crime to death. (*Roper v. Simmons*, *supra*, 543 U.S. at p. 578.) Appellant's proposed modifications to factor (i) incorporate this recognition. (3 CT 1137.)

Appellant's first proposed modification to the factor (i) instruction would have informed the jury that, "[u]nder the factor of age, you may consider the defendant's psychological immaturity as a factor in mitigation." (3 CT 1134.) This Court has acknowledged that "psychological immaturity" is a valid age-related factor to consider pursuant to factor (i) in determining the appropriate penalty. (*People v. Cox, supra,* 53 Cal.3d at p. 675.) Proposed defense instructions that merely recite facts favorable to the defendant are inappropriate. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1159.) Thus, an instruction calling attention to evidence presented of appellant's traumatic childhood and life

story would not have been appropriate. However, "instructions pinpointing the *theory* of the defense," can be appropriate. (*People v. Gutierrez, supra,* 28 Cal.4th at pp. 1142, 1159.)

Here, the defense theory at penalty phase hinged on appellant's incredibly traumatic childhood, beginning with the holocaust years of the Khmer Rouge in Cambodia, and continuing through his experiences as an uneducated refugee thrust into an Alabama ghetto, and then moved to California by parents who were absentee at best, abusive at worst, before finally finding community, acceptance and protection with Asian gangs in Long Beach. Appellant's proposed modification, rather than presenting argumentation with certain facts, merely informed the jury that psychological immaturity was a factor that could be considered. In other words, the jurors should not have been forbidden from considering psychological immaturity as part of their age calculus pursuant to factor (i).

Appellant's second proposed modification provided valid death penalty law to a jury tasked with determining whether appellant deserved the death penalty. It is true that appellant's second proposed modification featured two possible versions of an under-18 instruction, and the second alternative would have admonished the jury that age can only be a mitigating factor, a view this Court has previously rejected. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 789; *People v. Lucky* (1988) 45 Cal.3d 259, 302.) Appellant's first alternative of the proposed modification, however, did not impermissibly restrict the jury's ability to use appellant's age as an aggravating factor. It simply restated settled death penalty law: "In weighing the defendant's age you should consider that no person is eligible for the death penalty or life without parole unless he or she was at least 18 years old at the time of the killing." (3 CT 1137.) The jurors were

thus free to assess whether appellant, at age 22, was either close enough to the constitutional age cut-off that his young age should be considered mitigating, or that appellant was four years past that cut-off and thus of an age that society deems fully adult such that his crime "lacks certain elements the state deems relevant to leniency in the choice of penalty," making appellant "less deserving of leniency (as opposed to more deserving of death) than a younger, perhaps less sophisticated offender." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 789.)

A jury with full knowledge of the death penalty scheme, rather than the limited and thus skewed knowledge the trial court's instructions provided, would be better able to take appellant's age into account and use it to help guide their decision on whether to sentence appellant to death or life imprisonment without parole, pursuant to penal code section 190.3 and CALJIC No. 8.85.

It was arbitrary and capricious to have jury members, unaware of the constitutional ban on sentencing people under 18 years of age to death, or of the propriety in considering appellant's psychological immaturity as a mitigating factor, blithely consider appellant's age in the abstract in determining whether to kill him or sentence him to life imprisonment. In addition, the trial court's rejection of legally and factually supported modifications violated federal due process by arbitrarily depriving appellant of his state right to the delivery of requested instructions supported by the evidence. (*Hicks v. Oklahoma, supra,* 447 U.S. at p.346; *Fetterly v. Paskett, supra,* 997 F.2d at p. 1300.)

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3. Appellant's Proposed Supplements to Factor (j), Regarding Appellant's Culpability in Relation to That of His Accomplices to the Crime, Were Improperly Rejected

CALJIC No. 8.85, factor (j) asks the jury to consider, "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." Appellant proposed to add: "You may consider the fact that defendant's accomplice[s] received a more lenient sentence as a mitigating factor." (3 CT 1136.) In addition, appellant proposed that the court add that "[t]he fact that the defendant was [an accomplice] [a coconspirator] who did not personally commit [the killing] [all of the charged acts] may be considered by you as mitigation. [The fact that the defendant was not the actual killer may be considered as a mitigating factor.]" (3 CT 1139.)

The United States Supreme Court has approved the practice of a sentencing authority considering the more lenient sentences received by a defendant's accomplice as mitigating evidence. (*Parker v. Dugger* (1991) 498 US 308, 314-318.) This Court, however, has rejected permitting jurors to consider the sentences received by accomplices on the ground that those sentences do not shed light on the defendant's character and record. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1249.)

Here, appellant was convicted of five counts of first degree murder, but as to each count the jury also found allegations that appellant used a handgun to commit the murder untrue. (28 RT 3787-3790.) The verdict reveals that the jurors concluded that either or both Vinh Tran and Evans were the actual shooters of the five victims. Nonetheless, appellant's codefendants received far more lenient sentences than appellant. For the murders of the Nguyen family, Karol Tran received a sentence of 15 years

to life, Vinh Tran received a sentence of 50 years to life, and Evans received a sentence of 25 years to life. (17 RT 2412-2414, 2489-2493, 2509; 25 RT 3447.)

It may be true that the sentences received by appellant's accomplices shed no light on appellant's character or previous record, but they certainly shed light on how the State (the prosecuting authority), the perpetrators and the trial courts (which accept or reject plea deals), viewed the gravity of the crime (section 190.3, factor (k)), and the culpability of the perpetrators (section 190.3, factor (j)). This Court has held that the purpose of presenting the jury with the list of section 190.3 factors is to "help put the particular crime in perspective," for jurors who otherwise are not familiar with how "culpability is appropriately assessed in such cases." (*People v. Bean* (1988) 46 Cal.3d 919, 953.)

In denying appellant's proposed modification, the trial court improperly precluded the jury from considering a valid aspect of section 190.3, factor (j). Accordingly, the error violated the state (Article I, sections 7, 15 and 17) and federal (6th, 8th and 14th Amendments) Constitutions because it precluded the jurors from fully considering important mitigating evidence that reduced the fairness and reliability of the death sentence and abridged appellant's constitutional rights to due process, fair trial by jury, and his right to be free from cruel and unusual punishment. (See *Penry v. Johnson* (2001) 532 U.S. 782, 797; *Lockett v. Ohio, supra,* 438 U.S. at pp. 604-605; *People v. Panah* (2005) 35 Cal.4th 395, 498.)

The error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal Constitution (8th and 14th Amendments), which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of

both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362; *Beck v. Alabama, supra,* 447 U.S. at pp. 637-640; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 427-429; *White v. Illinois* (1992) 502 U.S. 346, 363-364 [reliability required by due process])

4. Appellant's Proposed *Cummings* Instruction Admonishing the Jury Not Simply to Count the Aggravating and Mitigating Circumstances Was Improperly Rejected

Appellant proposed to supplement CALJIC No. 8.85 with an instruction reviewed favorably by this Court in *People v. Cummings* (1993) 4 Cal.4th 1233, 1327:

> In considering, taking into account and being guided by the aggravating and mitigating circumstances, you must not decide the evidence of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by the relative number but by their relative convincing force on the ultimate question of punishment.

(3 CT 1138.)

The trial court did eventually instruct the jurors with CALJIC No. 8.88, which includes the admonition: "the weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (47 RT 6197.) Appellant's proposed modification would have included the admonition not simply to weigh aggravating factors against mitigating factors with the instruction

detailing what those factors are. The trial court's admonition in CALJIC No. 8.88 was not given to the jurors until after all the other penalty instructions were given, and after lengthy closing argument, and that attenuation ensured the instruction was not effective in ensuring the protection of appellant's rights.

D. The Trial Court's Failure to Tailor the Instructions to the Case Prejudiced Appellant

"What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." (*Zant v. Stephens, supra,* 462 U.S. at p. 879.) The trial court's failure to tailor CALJIC No. 8.85 to this specific defendant and crime prevented individualized determination by the jury of appellant and the circumstances of the crime at issue. By refusing to accept any of appellant's case-specific proposed modifications the trial court deprived appellant of his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5, 8; *Lockett v. Ohio, supra,* 438 U.S. at pp. 604-605.)

X.

THE TRIAL COURT ERRED WHEN IT REFUSED TO MODIFY CALJIC NO. 8.88

Appellant requested to modify CALJIC No. 8.88 by adding the following language:

> In weighing the aggravating and mitigating factors, you are not merely to count numbers on either side. You are instructed, rather, to weigh and consider the factors. You may return a verdict of life imprisonment without possibility of parole even though you should find the presence of one or more aggravating circumstances which you feel does not outweigh the mitigating factors.

(4 CT 1141.)

The trial court initially approved of appellant's modification, and inserted similar language into the standard version of CALJIC No. 8.88 to be read to the jury. (47 RT 6094-6095.) It appears from the discussions between the trial court and the parties that the modified language would be inserted after the standard paragraph that concludes, "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (See 47 RT 6094-6095, 6197.)

The trial court's modification read: "You may return a verdict of life even though you should find the presence of one or more aggravating circumstances which you feel does not substantially outweigh the mitigating factors." (47 RT 6095.) The trial court added the word "substantially" in order to mirror the language in the previous paragraph of the instruction. Appellant had no objection to that change. (47 RT 6095.)

The trial court then expressed discomfort with departing from the standard CALJIC instruction and invited the parties to weigh in. The trial court commented that this Court had found it was not error to refuse similar proposed modifications but noted that it was "unfortunate" that this Court had not discussed whether it would be error to allow such a modified instruction. (47 RT 6095.) The trial court expressed concern that the modified instruction might undermine the admonishment that jurors base their decision on a weighing process involving the enumerated factors, and would permit them "to abandon all standards and simply go off into what they want to do without following the law in the weighing process of aggravating versus mitigating." (47 RT 6097.) The court stressed that it did not, in fact, believe that the modification undermined the weighing process, but instead accurately informed the jurors that "even though there are aggravating circumstances, unless those circumstances are so substantial in the weighing process, that they may still return life in the face of those aggravating circumstances, having weighed also the mitigating circumstances." (47 RT 6097.)

The prosecutor argued that while he agreed with the trial court's logic, he was worried about inadvertent consequences and thus he too was nervous about a special instruction. (47 RT 6097-6098.) The trial court was concerned that the jurors would interpret the modification as "well, we can find life, no matter what we think. And in essence they can, but they can't be so instructed." (47 RT 6098.) After additional back and forth with the attorneys the trial court concluded that it was "on safer ground" to decline the modification. It allowed the attorneys to cover the area in argument, but struck the modified paragraph from the instruction. (47 RT 6099.) The court erred.

The trial court's initial modified CALJIC No. 8.88 instruction was an accurate statement of the law. Indeed, without modification, CALJIC No. 8.88 is an *inaccurate* statement of section 190.3, which states that death shall be imposed only if the trier of fact concludes that "the aggravating circumstances outweigh the mitigating circumstances." In implicit recognition of this, the current CALCRIM instructions have modified CALJIC No. 8.88 consistent with the language defense counsel requested. The pertinent paragraph of CALCRIM No. 766 provides:

> To return a judgment of death, each of you must be persuaded that the *aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.*

(CALJIC No. 766, italics added.)

The trial court here was clearly not concerned that appellant's proposed modification was improper or unlawful; rather, it was concerned about departing from what, at the time, was considered the tried and true CALJIC standard. CALJIC instructions may be recommended, but reviewing courts have consistently admonished against giving them undue deference. As this Court explained:

> Though we cite CALJIC No. 12.00 for reference purposes, we caution that jury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent. They should not be cited as authority for legal principles in appellate opinions. At most, when they are accurate, as the quoted portion was here, they restate the law.

(*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 217 ["CALJIC 1.00 is not itself the law. Like other pattern instructions, it is merely an attempt at a statement

thereof"]; *People v. Mata* (1995) 133 Cal.App.2d 18, 21 [CALJIC instructions not "sacrosanct"].)

The Ninth Circuit has expressed similar sentiments:

> Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words in terms comprehensible to the lay person. The texts of standard jury instructions are not debated and hammered out by legislators, but by ad hoc committees of lawyers and judges. Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they belong.

(*McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 840 (en banc).)

When a party seeks an instruction revising or replacing a CALJIC cautionary, limiting or explanatory instruction, the inquiry should focus on whether the requested instruction *better* accomplishes the instructional objective, not simply whether the CALJIC instruction accurately states the law. (See e.g., *People v. Danks* (2004) 32 Cal.4th 269, 306, fn. 11 [even though telling jury not to speak with anyone accurately stated the law, the California Supreme Court recommends more specific instructions on the matter]; *People v. Bolton* (1979) 23 Cal.3d 208, 215-16 [California Supreme Court recommends instruction to fully "counteract" prosecutorial misconduct]; *People v. Duran* (1976) 16 Cal.3d 282, 292 [shackling instruction must not imply defendant is a security risk].)

Here, the requested modification better accomplished the instructional objective precisely *because* it more accurately stated the law. The trial court's initial modification would have made it clear to the jurors that even if they found several aggravating factors present, and perhaps in greater numbers then the mitigating factors, they could return a verdict of

life imprisonment without parole if they found those aggravating circumstances did not substantially outweigh the, perhaps fewer in number, mitigating circumstances. The boilerplate version of CALJIC No. 8.88 instructs jurors to determine which penalty "is justified and appropriate." The requested modification added more concrete guidance to that broad principle by pairing the existing language of CALJIC No. 8.88, stating that the aggravating circumstances must be "so substantial" in comparison to the mitigating circumstances that execution is warranted, with additional clarification that the mere presence of aggravating circumstances does not automatically tip the scales toward death. As the trial court remarked, the modification would have told the jurors that even if they found the presence of aggravating circumstances, "they may still return life in the face of those aggravating circumstances, having weighed also the mitigating circumstances." (47 RT 6097.)

In addition, the instruction given failed to inform the jurors that the central determination was whether the death penalty was the *appropriate* – not simply an authorized – penalty for appellant. The central 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; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) This Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.)

The standard CALJIC No. 8.88 given by the trial court did not make clear that the central determination the jurors were being asked to make was whether the death penalty or life imprisonment was the appropriate punishment for appellant. 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; in other words, it must be appropriate. (See *Zant v. Stephens, supra,* 462 U.S. at p. 879.)

The court's failure to give CALJIC No. 8.88 as modified violated the Eighth and Fourteenth Amendments by allowing the jurors to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.), denies due process (U.S. Const., 14th Amend.; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346), and must be reversed.

XI.

THE TRIAL COURT PREJUDICED APPELLANT WHEN IT ADMONISHED THE JURY WITH THE PROSECUTION'S PINPOINT INSTRUCTION TO SPECIFICALLY FOCUS ON THE IMPACT OF THE CRIME ON DENNIS NGUYEN

The prosecutor requested that the following special victim impact evidence instruction be given to the jury:

> You may consider the impact the defendant's crime on the surviving victim, Dennis Nguyen, named in Count 6, as part of the circumstances of the crime of which defendant was convicted in the present proceeding in Factor A of the jury instruction which I have just read to you [modified CALJIC No. 8.85].

(47 RT 6092, 6113.)

This special instruction is improper and argumentative. The erroneous victim impact instruction denied appellant his Eighth and Fourteenth Amendment rights to due process and a fair, non-arbitrary and reliable sentencing determination.

This Court held in *People v. Edwards* (1991) 54 Cal.3d 787, 833-835, that the statutory language of section 190.3 encompasses victim impact evidence as a circumstance of the offense under factor (a). It logically follows then that the standard instruction on factor (a) contained in CALJIC No. 8.85, which was read to the jury, encompassed the victim impact evidence. Because the standard instruction was sufficient to encompass victim impact evidence, no special instruction was required. (*People v. Cook* (2007) 40 Cal.4th 1334, 1364 [upholding refusal to give special defense instruction on specific nonstatutory mitigating circumstances].) The standard instructions the court gave here, including CALJIC No. 8.85, factor (a), adequately conveyed the full range of the circumstances of the

crime to be considered by the jury. There was no need to improperly highlight a particular item of evidence. (See *People v. Cook, supra,* 40 Cal.4th at p. 1364.

The prosecutor's special instruction improperly singled out the victim impact evidence for specific mention, alerting the jury that the impact of the murder of Dennis Nguyen's family in his presence was a singularly important factor in determining the appropriate penalty for appellant. (See 47 RT 6111-6113.) The prosecutor's special instruction was "flawed in that it was argumentative, i.e., it merely highlighted certain aspects of the evidence without further illuminating the legal standards at issue." (*People v. Fauber* (1992) 2 Cal.4th 792, 865 [upholding refusal to give special instruction on mitigating circumstances]; accord, *People v. Musslewhite* (1998) 17 Cal.4th 1216, 1269; *People v. Noguera* (1992) 4 Cal.4th 59, 648.) An instruction that highlights specific evidence should not be given because it "invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence," which is argumentative. (*People v. Earp* (1999) 20 Cal. 4th 826, 886.)

Pinpointing specific victim impact evidence is especially pernicious given the highly charged emotional nature of that evidence. "Studies have shown that emotionally arousing evidence can lead to higher levels of conviction, even when the evidence has no probative value for the issue at hand. [footnote omitted] As a result, litigants' fates are adversely affected by the emotional baggage [of such] evidence." (Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making* (2004) 71 U. Chi. L. Rev. 511, 569.) That danger was especially acute here where the dramatic rescue of little Dennis, first by neighbors, then Detective Dillon, from the charnel house where his family was killed resulted in victim

impact evidence that was much more raw and immediate than simply a consideration of how Dennis would fare without his family. Instead, it constituted a second opportunity to focus the jurors' attention on the horrible specifics of the crime, an improper re-emphasis of section 190.3 factor (a) evidence.

In other words, the prosecutor's pinpoint victim impact instruction asked the jury to consider the facts of the crime one more time, this time through the lens of Dennis Nguyen, when tallying aggravating factors. When the prosecutor discussed the various section 190.3 aggravating and mitigating factors he began with factor (a) and told the jury it was a "very important aggravating factor." (47 RT 6121.) The prosecutor explained, "[w]hat is not on this original instruction and what the judge read to you moments ago, there's an additional instruction which immediately followed this and it has to do with what we call victim impact evidence." (47 RT 6120.) The victim impact evidence the jury was to consider was Dennis, "the little child who was wounded but lived through the Elm Street murders. This is a little child who, as he grows up, is likely to remember what happened as he walked around the dead bodies of his family all night long and spreading their blood all over the walls." (47 RT 6120-6121.) The prosecutor said that pursuant to the instruction, "it's appropriate under the law for you to think about well, what has the defendant's crime done to that little child? How is that going to affect him as he grows up? . . . So under Factor A, you can consider the nature of the crimes." (47 RT 6121.)

The trial court should have refused the instruction outright as an improper pinpoint instruction. Instead, the court gave a stamp of judicial approval to an instruction that elevated one aspect of the crimes committed to a separate additional aggravating factor. The error thus permitted the

injection of improper considerations into the jury's penalty determination in violation of state law. (*People v. Fauber, supra*, 2 Cal.4th at p. 865; *People v. Earp, supra*, 20 Cal.4th at p. 901.) And where a State has set forth a jury's discretionary power, "it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law." (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) The Fourteenth Amendment also protects a criminal defendant's rights to the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Id.* at p. 346.) In a death penalty case, the state-created liberty interest described in *Hicks* means the right to due process in accordance with state law. And in a capital case, the principle of *Hicks* also implicates the Eighth Amendment. Just as *Hicks* guards against arbitrary deprivations of liberty or life, so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (*Parker v. Dugger* (1991) 498 U.S. 308, 321.) This Court should vacate appellant's death sentence because the State cannot prove beyond a reasonable doubt that this error did not contribute to the verdict obtained. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

XII.

APPELLANT IS ENTITLED TO REMAND FOR RECONSIDERATION OF THE $10,000 RESTITUTION FINE BY A JURY IN LIGHT OF HIS INABILITY TO PAY, OR IN THE ALTERNATIVE FOR A STAY AND REFUND OF SUMS PAID

A. Introduction

On January 4, 2000, the trial court pronounced judgment in this case, sentencing appellant to death for the special circumstances murders that occurred in 1995. Included in the judgment was the imposition of the mandatory restitution fine to be paid by appellant in the maximum amount of $10,000 pursuant to section 1202.4, subdivision (b). (48 RT 6319.) Imposition of the maximum restitution fine was an abuse of discretion because appellant is subject to a death sentence and has no reasonably discernable means of paying a fine of this magnitude. Imposition of the maximum fine also violated appellant's federal and state constitutional rights to due process and a jury trial because it was based on a factual determination made by the trial judge, did not meet the required standard of proof, and appellant did not waive his right to have a jury determine the existence of those facts beyond a reasonable doubt. Finally, because the restitution fine is part of the judgment, which is stayed pending appellant's automatic appeal to this court, enforcement of the fine should have been stayed, and now should be stayed, pending final disposition of the appeal.

B. The Trial Court Erred In Imposing The Maximum Restitution Fine

In California, it is mandatory that persons convicted of crime pay a restitution fine unless there are compelling and extraordinary reasons to the contrary. (§1202.4, subds. (b) and (c).) The amount of the restitution fine is subject to the court's discretion, and the statute in effect at the time of the

offenses for which appellant was convicted (August 9, 1995), as well as at the time of judgment and sentencing (January 4, 2000), set forth the amount for a felony to be within the range of $200 minimum and $10,000 maximum. (Former §1202.4, subd. (b) (1995); former §1202.4, subd. (b)(1) (2000).)[60]

Section 1202.4, subdivision (d) provides:

> In setting the amount of the fine . . . in excess of the minimum fine . . . the court shall consider any relevant factors, including, but not limited to, *the defendant's inability to pay*, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime.

(*Ibid.*, italics added.)[61]

In assessing the defendant's "inability to pay," the trial court may consider his future earning capacity. (§ 1202.4, subd. (d).)

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[60]Section 1202.4, subdivision (b)(1) was amended effective January 1, 2013 to provide, in relevant part, that: "[t]he restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than two hundred forty dollars ($240) starting on January 1, 2012, two hundred eighty dollars ($280) starting on January 1, 2013, and three hundred dollars ($300) starting on January 1, 2014, and not more than ten thousand dollars ($10,000)." (Stats. 2012, ch. 868, §3.)

[61]The versions of the statute in effect at the time of the crime as well as at the time of judgment and sentence also included the defendant's "ability to pay" (former §1204.4, subd.(d) (1995)) or "inability to pay" as a factor for the court to consider in setting the restitution fine amount (former §1202.4, subd. (d) (2000)).

Appellant objected to the imposition of the maximum $10,000 restitution fine because appellant was sentenced to death and would have no means to pay it. (48 RT 6308.) Although appellant noted that he might later receive funds in his inmate trust account, he asserted that the source of any funds would be from his family and the funds, which would be seized as part of a restitution order, would not "make whole any particular person or persons who have had harm, but . . . would simply serve to further impoverish [his] already impoverished family." (*Ibid.*) Appellant pointed out that the restitution order would have the collateral impact of indirectly imposing the fine on his family. (*Ibid.*)[62] Without any indication on the record that appellant had any independent source of income or assets which would afford him the ability to pay the $10,000 fine, the court imposed the maximum allowable amount. In so doing, the court only stated that the "question is do I have any mercy to allow [appellant] to get whatever benefits he might receive from his income at the prison during his stay there? Or do I take that away from him?" (48 RT 6309.)

It was an abuse of discretion for the trial court to impose the maximum restitution fine based on the fiction that appellant would be receiving an "income at the prison during his stay there" and in spite of his inability to pay a $10,000 restitution fine. The record of the trial court proceedings in appellant's case included no evidence that, once sentenced, appellant would be able to pay a fine of any amount, let alone one of $10,000. The trial court appointed counsel for appellant, indicating appellant was indigent at the onset of the criminal proceedings. (1 CT 13; 2

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[62] At the present time, 55% is taken for restitution fines and administration fees from any funds put on a prisoner's books. (Cal. Code Regs., tit. 15, §3097, subds. (c) & (f).)

CT 517.) As a condemned prisoner, appellant has no post-conviction earning potential because he is not allowed to work at the prison in which he is housed. (See § 2933.2 ["any person convicted of murder, as defined in section 187, shall not accrue any [worktime] credit."]; *In re Barnes* (1985) 176 Cal.App.3d 235, 239 [discussing California Department of Corrections' prioritization, with condemned prisoners and prisoners in security units at the lowest priority for work assignments]; see also §2933.05, subd. (b) [a prisoner's "reasonable opportunity to participate" in work programs must be "consistent with institutional security and available resources"]. Even assuming that appellant had received, or would receive, gifts from his family or friends in the form of small deposits to his prison trust account, there is nothing to suggest that small gifts of that nature create in appellant an ability to pay the maximum fine imposed. Accordingly, this Court should remand this case for reconsideration of the question of a restitution fine in light of appellant's inability to pay.

C. A Restitution Fine May Only Be Imposed By A Jury Based On Relevant Evidence

In *Apprendi v. New Jersey*, *supra*, 530 U.S. 227, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely v. Washington, supra,* 542 U.S. at p. 303, emphasis omitted.) *Apprendi* applies to the factfinding needed to impose criminal fines.

(*Southern Union Co. v. United States* (2012) 567 U.S. ___, 132 S. Ct. at 2344, 2357.)

The version of section 1202.4 effective at the time of the crime as well as at judgment and sentencing in this case provides that the court shall impose a "separate and additional" restitution fine of at least $200 but not more than $10,000, "unless it finds compelling and extraordinary reasons for not doing so. . . . " (§1202.4, subds. (b)(1) & (c) (2000)[63].) As such, a restitution fine increases the penalty for capital murder beyond death or life imprisonment without possibility of parole, and is not mandatory. Whether or not "extraordinary and compelling circumstances" exist is a fact question that potentially increases the penalty a capital defendant faces, and so, under *Apprendi*, it is for the jury to decide, and must be decided, under the beyond-a-reasonable-doubt standard. Because the statute instead vests the determination whether a capital defendant shall suffer a restitution fine, in any amount, with the trial judge, it violates *Apprendi* and appellant's concomitant state and federal constitutional rights to due process and a jury trial (U.S. Const., 6th and 14th Amends; Cal. Const., art. I, §16).

Appellant acknowledges that two courts of appeal have concluded that *Apprendi* is not applicable to restitution fines. (*People v. Kramis* (2012) 209 Cal.App.4th 346, 348-352; *People v. Urbano* (2005) 128 Cal.App.4th 396, 405-406.) Neither decision addresses the argument,

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[63]Former section 1202.4, subd. (c) (1995), specifically states that "if the court finds that there are compelling and extraordinary reasons, the court may waive imposition of the fine. When the waiver is granted, the court shall state on the record all reasons supporting the waiver. Except as provided in this subdivision and subdivision (f), under no circumstances shall the court fail to impose the separate and additional restitution fine required by this section."

raised here, that the language of section 1202.4 permitting the sentencing court to refrain from imposing any restitution fine "if it finds extraordinary and compelling reasons" renders the fine discretionary.[64] Moreover, the Supreme Court's recent opinion in *Southern Union Co. v. United States, supra*, 132 S.Ct. 2344, sustains appellant's assertion that *Apprendi* applies to restitution fines.

In *Southern Union*, a gas company was charged with violating the Resource Conservation and Recovery Act (RCRA), which provides for a maximum criminal fine of $50,000 per day of violation. (*Southern Union Co. v. United States*, *supra*, 132 S.Ct. at p. 2349.) The indictment alleged the company had violated RCRA for a period of 762 days, but the jury was instructed that it could convict if it found even a single day's violation. (*Ibid.*) The jury convicted, and at sentencing the court calculated a "maximum potential fine of $38.1 million"—$50,000 x 762 days—"from which it imposed a fine of $6 million and a 'community service obligatio[n]' of $12 million." (*Ibid.*) Defendant objected that it had been convicted of just one day's violation, so any fact resulting in a fine over the daily maximum had to be found by a jury. The Supreme Court agreed, applying *Apprendi* to criminal fines. (*Id.* at pp. 2349, 2357.)

As a recent Ninth Circuit opinion states, "*Southern Union* provides reason to believe *Apprendi* might apply to restitution." (*United States v. Green* (9th Cir. 2013) 722 F.3d 1146, 1150.) The court relied on the

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[64]See *People v. Giordano* (2007) 42 Cal.4th 644, 662, fn. 6, where this Court left open the possibility that the ordering of direct restitution is vulnerable to constitutional challenge pursuant to the United States Supreme Court's Sixth Amendment jurisprudence in cases such as *Cunningham v. California* (2007) 549 U.S. 270.

Supreme Court's ruling that "[i]n stating *Apprendi*'s rule, we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]' – terms that each undeniably embrace fines." (*Ibid.*, quoting *Southern Union Co.*, *supra*, 132 S.Ct. at p. 2351, internal quotation marks omitted.)[65]

By applying *Apprendi* to criminal fines, *Southern Union* strongly signals that *Apprendi* applies to criminal restitution as well.

For the foregoing reasons, the restitution fine should be stricken.

D. At the Minimum, The Restitution Fine Should Be Stayed Pending The Finality of Appellant's Automatic Appeal

The trial court erred in ordering that appellant shall pay the maximum restitution fine amount. (48 RT 6319.) As a condemned prisoner, appellant's conviction and sentence automatically were appealed and are not final. (Cal. Const., art. VI, §11, subd. (a); Pen. Code §1239, subd.(b).) Moreover, under section 1243, an appeal to this Court in a capital case stays the execution of the judgment until the determination of the appeal. (*People v. Sloper* (1926) 198 Cal. 601, 605.) It is, therefore, premature to transfer funds in payment of appellant's restitution fine pending finality. Doing so interferes with appellant's right to automatic appeal.

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[65]The panel ruled that *Apprendi* did not apply to the facts before it based on Ninth Circuit precedent, which, it stated, "doesn't mean our caselaw's well-harmonized with *Southern Union*." (*United States v. Green*, *supra*, 722 F.3d at p. 1151.) Whether the law should be changed was the "sole province of the court sitting en banc." (*Ibid.*)

E. Conclusion

This Court should stay further implementation of the restitution fine and order any sums exceeding $200 previously deducted from appellant's inmate trust account pursuant to section 2085.5, to be restored to the account. (Cf. *United States v. Rich* (9th Circ. 2010) 603 F.3d 722, 730-731.)

XIII.

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

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

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

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens, supra,* 462 U.S. at p. 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, section 190.2 contained 19 special circumstances.

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 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 Penal Code Section 190.3, Subdivision (a) Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 4 CT 1167-1168; 47 RT 6111-6113.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner 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*, *supra*, 486 U.S. at p. 363; but see *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 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; *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. (4 CT 1178-1179; 47 RT 6196-6198.)

Blakely v. Washington, supra, 542 U.S. at pp. 303-305, *Ring v. Arizona, supra,* 536 U.S. at p. 604, and *Apprendi v. New Jersey, supra,* 530 U.S. at p. 478 require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury first had to 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; 3 CT 692-693; 15 RT 4117-4119.) 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* (2001) 25 Cal.4th 543, 589, fn.

14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Blakely*, *Ring* and *Apprendi* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto, supra,* 30 Cal.4th at p. 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 *Blakely*, *Ring* and *Apprendi*.

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 rejected the claim that either the due process clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma, supra,* 447 U.S. at p. 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 (4 CT 1167-1168, 1178-1179; 47 RT 6111-6113, 6117-6119), 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 is unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court 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.

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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, supra,* 428 U.S. at p. 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,* 536 U.S. 584. (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., § 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; 4 CT 1170; 47 RT 6113-6114.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in 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 rejected this

claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented substantial evidence regarding unadjudicated criminal activity allegedly committed by appellant. (See, e.g., 31 RT 4074, et seq. [Thi Hong Nga Pham and Johnny Hagan, Jr. murders]; 34 RT 4605, et seq. [Nghiep Thich Le and Hung Dieu Le murders]; 33 RT 4349 [Bunlort Bun murder]; 33 RT 4409, et seq. [Miguel Avina Vargas murder].)

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." (4 CT 1179; 47 RT 6198.) 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*, *supra*, 486 U.S. at p. 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[66]

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs that they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. 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.

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[66]Appellant requested an instruction that would have remedied this problem. (See Arg. X, *supra*.) The court refused to give the requested modification to the standard CALJIC instruction.

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

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* (1996) 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 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. Kelley* (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, supra,* 438 U.S. at p. 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 a Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 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.

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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; § 190.3, factors (d) and (g) (4 CT 1167-1168; 47 RT 6111-6113) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 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, factor (e) [whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act]; factor (f) [whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct]; and factor (h) [whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or the effects of intoxication].) The trial court failed to omit those factors from the jury instructions (4 CT 1167-1168; 47 RT 6111-6113), likely confusing the jurors and preventing them 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. (4 CT 1167-1168; 47 RT 6111-6113.) 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.[67] 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,

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[67]The trial court did instruct the jurors that the absence of any felony conviction, factor (c), could only be considered as a mitigating factor. (47 RT 6114.) And it did instruct that the permissible aggravating factors were limited to those upon which the jurors had been instructed. (*Ibid.*) It did not, however, otherwise label the factors as either mitigating or aggravating.

230-236.) As such, appellant asks the court to reconsider its holding that the Court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase 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 intercase 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 noncapital crimes in violation of the equal protection clause. To the extent that there may be differences between capital defendants and noncapital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a noncapital 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 them.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short of International Norms

This Court has repeatedly rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, 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 United States 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.

XIV.

CUMULATIVE GUILT AND PENALTY PHASE ERRORS REQUIRE REVERSAL OF THE GUILT JUDGMENT AND PENALTY DETERMINATION

In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. (See *In re Avena* (1996) 12 Cal.4th 694, 772, fn.32 (dis. opn. of Mosk, J.) ["Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial"]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

Appellant has argued that a number of serious constitutional errors occurred during the guilt phase of trial and that each of these errors, alone, was sufficiently prejudicial to warrant reversal of appellant's guilt judgment. It is in consideration of the cumulative effect of the errors, however, that the true measure of harm to appellant can be found. Introduction of the Sacramento crimes, introduction of the gang evidence, denial of severance, and the presence of witness advocates were each,

individually, serious error. The combination of these errors, however, was greater than the sum of its parts and resulted in egregious error mandating reversal – especially when considered in light of incomplete and inaccurate jury instructions.[68]

The death judgment rendered in this case must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) This Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact during penalty trial. (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [state law error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) Error of a federal constitutional nature requires an even stricter standard of

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[68]Furthermore, a cumulative analysis must also include an inquiry into errors that prompted a curative admonition or other limiting instruction from the court. The curative effect of any instruction is uncertain and lingering prejudice can remain even after the most detailed and forceful admonition. Thus, this Court should also,

> consider errors and instances of misconduct which we earlier held were adequately cured by the court's instruction. We recognize that a trace of prejudice may remain even after a proper instruction is given. If we find a residue of prejudice, we will take it into account.

(*United States* v. *Berry* (9th Cir. 1980) 627 F.2d 193, 200-201; see also *United States* v. *Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282.)

review. (*Yates v. Evatt* (1991) 500 U.S. 391, 402-405; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Moreover, when errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

In this case, appellant has shown several errors in the guilt and penalty phases. Even if this Court were to determine that no single penalty error, by itself, was prejudicial, the cumulative effect of these errors sufficiently undermines the confidence in the integrity of the penalty phase proceedings so that reversal is required. There can be no doubt that appellant was denied the fair trial and due process of law to which he is entitled before the State can claim the right to take his life. Reversal is mandated because respondent cannot demonstrate that the errors individually or collectively had no effect on the penalty verdict. (*Skipper v. South Carolina*, *supra*, 476 U.S. at p. 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

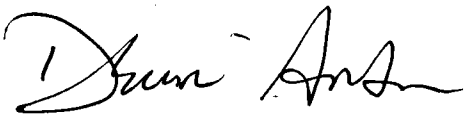
CONCLUSION

For the reasons set forth above, the judgment of conviction entered against appellant Run Peter Chhoun for the crimes of five first degree murders, three residential robberies, and one residential burglary, the true finding of the special circumstances, and the judgment of death entered in this case, should be reversed.

DATED: January 21, 2014

Respectfully submitted,

MICHAEL J. HERSEK
California State Public Defender



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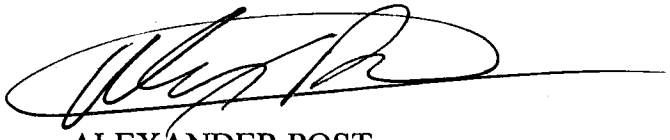

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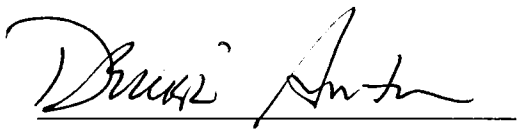
I, Denise Anton, am the Senior Deputy State Public Defender assigned to represent appellant RUN PETER CHHOUN in this Appellant's Opening Brief. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 85,521 words in length.

DATED: January 21, 2014



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DECLARATION OF SERVICE

Re: *People v. Run Chhoun*

Supreme Court No. S084996
Superior Court No. FSB858658

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California 94607; that I served a copy of the attached:

APPELLANT'S OPENING BRIEF

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

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Each said envelope was then, on January 22, 2014, sealed and deposited in the United States mail at Oakland, Alameda County, 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 January 22, 2014, at Oakland, California.

Glenice Fuller
DECLARANT